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129 CALIFORNIA APPELLATE REPORTS, 2d SERIES

Cal.App.	P.2d	
Page	Vol.	Page
1	277	45
12	276	6
15	276	174
19	276	139
21	276	108
23	276	144
26	276	146
29	276	193
40	276	182
47	276	177
54	276	605
60	276	112
67	276	703
81	276	1
89	276	102
97	276	19
100	276	679
115	276	611
120	276	124
124	276	118
132	276	116
137	276	126
144	276	614
150	276	655
160	276	186
165	276	649
174	276	689
179	276	8
184	276	645
191	276	618
197	276	188
204	276	697
214	276	637
216	276	876
222	276	880
232	276	671
236	276	829
244	277	36
249	276	636
251	276	668
255	276	886
264	277	104
268	277	57
272	276	858
278	276	822
287	276	839
290	276	841
294	276	844
296	276	836
300	276	834
302	276	820
305	276	846
309	276	818
313	276	848
320	276	895
324	276	814
327	277	73
330	276	853
339	277	43
342	277	106
356	276	871
364	276	809
371	276	869
375	277	80
389	277	56
391	276	816
395	277	89
403	276	862
413	277	30
421	277	60
427	277	53
429	277	39
432	277	41
436	277	94
448	277	67
453	277	76
459	277	423
463	277	463
464	277	407
466	277	418
471	277	436
476	277	70
482	277	444
498	277	416
500	277	455
509	277	428
515	277	411
519	277	477
525	277	408
528	277	510
536	277	473
542	277	461
546	277	421
550	277	873
558	277	464
565	277	931
570	277	866
573	277	519
575	277	484
579	277	495
593	277	869
601	277	469
608	277	897
660	277	400
667	277	859
671	277	439
676	277	481
682	278	22
688	278	39
693	277	834
700	277	842
711	277	861
715	278	32
721	278	42
732	277	943
743	277	941
747	277	890
758	278	114
775	277	936
778	277	938
783	277	886
791	277	855
793	277	841
795	277	854
797	277	828
803	277	850
810	278	91
823	277	832
827	278	29
832	278	85
841	277	857
844	278	63
844	282	991
853	278	68
867	277	520

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Cal.Rep. 283–284 P.2d
3—1970

TABLE OF CONTENTS

	Page
Judges and Officers	V
Table of Cases Reported	XI

*

JUDGES AND OFFICERS

SUPREME COURT

CHIEF JUSTICE

PHIL S. GIBSON	San Francisco

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APPELLATE DEPARTMENT, SUPERIOR COURT —Continued

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APPELLATE DEPARTMENT, SUPERIOR COURT —Continued

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[1] Appointed, took office July 8, 1955.

CASES REPORTED

Vols. 283–284 P.2d

	P.2d Vol.	Page
Abbott; Caruso v., App.	284	113
Abbot v. Stevens, App.	284	159
Acosta; People v., App.	283	73
Alvarez; Estrada v., App.	283	312
Alvarez's Estate, In re, App.	283	312
American Can Co.; Rodin v., App.	284	530
American Nat. Food; Bracker v., App.	284	163
American Nat. Food; Bracker Vegetables Sales Co. v., App.	284	163
American Trust Co. v. Durkin, App.	284	185
American Trust Co.; State v., App.	284	185
Andersen-Carlson Mfg. Co. v. Franchise Tax Bd., App.	283	278
Anderson v. No-Doz, App.	284	883
Andrew; Caron v., App.	284	544
Andrew; Caron v., App.	284	550
Andrew; Caron & Oliver Equipment Center v., App.	284	544
Andrew; Caron & Oliver Equipment Center v., App.	284	550
Andrew Bros.; Caron v., App.	284	544
Andrew Bros.; Caron v., App.	284	550
Anticouni; Zeidman v., App.	284	517
Antoine; Green v., App.	284	76
Appling; O'Brien v., App.	283	289
Arana; Mayr v., App.	284	21
Arnold's Estate, In re, App.	284	864
Atwood v. Elwood, App.	283	43
Aviles v. Hickerson, App.	284	176
Aviles' Guardianship, In re, App.	284	176
Badolato; Rangel v., App.	284	138
Bagley; People v., App.	284	36
Balance v. Parlato, App.	283	288
Baley v. J. F. Hink & Son, App.	283	349
Bankers Life Co.; Blos v., App.	283	744
Barker v. Barker, App.	284	900
Barrett's Estate, In re, App.	284	864
Bauer v. Otis, App.	284	133
Beamer, In re, App.	283	356
Bergmann, In re, App.	283	1063
Berg's Estate, In re, App.	284	881
Bessette v. City and County of San Francisco, Sup.	283	1
Best v. Burch, App.	283	262
Biagi v. State Dept. of Social Welfare, App.	284	889
Biell's Estate, In re, App.	284	864
Bisser's Estate, In re, App.	284	881
Blos v. Bankers Life Co., App.	283	744
Board of Sup'rs of Alameda County; Borghi v., App.	284	537
Bonham v. McConnell, App.	283	318
Borghi v. Board of Sup'rs of Alameda County, App.	284	537
Bossi's Estate, In re, App.	284	881

	P.2d Vol.	Page
Bowles v. Superior Court of City and County of San Francisco, Sup.	283	704
Bracker v. American Nat. Food, App.	284	163
Bracker Vegetables Sales Co. v. American Nat. Food, App.	284	163
Brandon's Estate, In re, App.	284	864
Brandwein v. Keystone Auto Court, App.	284	130
Brandwein v. Rodriguez, App.	284	130
Brannan; Wilson v., App.	284	821
Braziel's Estate, In re, App.	284	881
Bright v. Gineste, App.	284	839
Brookins; People v., App.	284	959
Brooks; People v., App.	283	748
Brown; Pizer v., App.	283	1055
Bryan; Eason v., App.	284	862
Budget Finance Plan v. Sav-On Food Club, Sup.	283	694
Buettner's Estate, In re, App.	284	864
Bullock's Estate, In re, App.	284	960
Burch v. Best, App.	283	262
Burchell v. Rohnert, App.	283	333
Burgess' Estate, In re, App.	284	881
Burke; Phillips v., App.	284	809
Burton Bros., Inc.; Wm. H. Hoegee Inv. Co. v., App.	283	314
Bycel; People v., App.	284	927
Calaveras County; Oakdale Irr. Dist. v., App.	283	732
Calaveras County; Rock Creek Water Dist. v., App.	283	740
California Motor Exp. v. State Bd. of Equalization, App.	283	1063
Cal-Ore Lumber Sales v. Russell, App.	284	179
Cal-Ore Lumber Sales v. United Box & Lumber Co., App.	284	179
Campbell v. State, App.	284	185
Cannon v. Goble, Super.	283	390
Caron v. Andrew, App.	284	544
Caron v. Andrew, App.	284	550
Caron v. Andrew Bros., App.	284	544
Caron v. Andrew Bros., App.	284	550
Caron & Oliver Equipment Center v. Andrew, App.	284	544
Caron & Oliver Equipment Center v. Andrew, App.	284	550
Carpenters Local Union No. 1040 of United Broth. of Carpenters and Joiners of America; Wallace v., App.	284	102
Carpenters Local Union No. 1040 of United Broth. of Carpenters and Joiners of America; Wallace Roofing Co. v., App.	284	102
Carroll v. Tomasello, App.	284	932
Carruthers v. Cunha, App.	283	384
Carruthers v. Cunha Transp. Co., App.	283	384
Caruso v. Abbott, App.	284	113
Chambers v. Spada, App.	283	1067
Chambers v. Spada and Stephens, App.	283	1067
Charters' Estate, In re, App.	284	68
Cheminol Corp. v. Ohlsson, App.	283	773
Ching Lo's Estate, In re, App.	284	864
Christof's Estate, In re, App.	284	881
Church v. Goldston, App.	284	508
City and County of San Francisco; Bessette v., Sup.	283	1
City and County of San Francisco; Doran v., Sup.	283	1
City of Long Beach; Farrell v., App.	283	296
City of Long Beach v. Pacific Elec. Ry. Co., Sup.	283	1036
City of Los Angeles; Hicks v., App.	283	1046
City of Richmond; City of San Pablo v., App.	283	57

	P.2d Vol.	Page
City of San Pablo v. City of Richmond, two cases, App.	283	57
City of San Pablo; Johnson v., App.	283	57
Civil Service Bd. of City of Oakland; Waters v., App.	284	919
Clutter; People v., App.	284	918
Combs & Hoose v. Security-First Nat. Bank of Los Angeles, App.	283	293
Continental Cas. Co. v. Phoenix Const. Co., App.	284	554
Cook v. Goldsmith, Super.	284	542
Cookingham; Ormsby v., App.	284	51
Cookingham's Estate and Guardianship, In re, App.	284	51
Covina Manor, Inc. v. Hatch, Super.	284	580
Crofoot v. Crofoot, App.	283	283
Crowe v. Sacks, Sup.	283	689
Cruz' Estate, In re, App.	284	864
Cunha; Carruthers v., App.	283	384
Cunha; People v., App.	284	885
Cunha Transp. Co.; Carruthers v., App.	283	384
Curtis; King v., Super.	284	983
Darcy v. H. E. Murray Co., Super.	284	583
Davis; People v., App.	284	496
Deleaney; People v., App.	283	287
De Long v. Miller, App.	283	762
Department of Public Works, People Acting By and Through, v. Union Mach. Co., App.	284	72
De Soto v. De Soto, App.	283	1052
Dick's Estate, In re, App.	284	881
Di Genova v. State Bd. of Ed., App.	283	366
Doran v. City and County of San Francisco, Sup.	283	1
Duerksen v. Klassen, App.	284	25
Duff v. Schaefer Ambulance Service, App.	283	91
Duin v. Security-First Nat. Bank of Los Angeles, Super.	283	790
Dunnavant; People v., App.	283	274
Durkin; American Trust Co. v., App.	284	185
Durkin v. Durkin, App.	284	185
Durkin; Gregory v., App.	284	185
Eason v. Bryan, App.	284	862
Effland's Estate, In re, App.	284	864
Elwood; Atwood v., App.	283	43
Emery v. Emery, App.	284	150
Eshelman v. Eshelman, App.	284	103
Estrada v. Alvarez, App.	283	312
Fallon; Wolff v., Sup.	284	802
Farrell v. City of Long Beach, App.	283	296
Farrell; People v., App.	284	29
Fassett; Johnson v., App.	283	281
Felske's Estate, In re, App.	284	881
Ferdinand's Estate, In re, App.	284	881
Firestone v. Wahl, App.	284	499
Flickinger v. Swedlow Engineering Co., App.	284	521
Flintridge Oil Co.; Walston v., App.	284	895
Fontaine's Estate, In re, App.	284	881
Ford; People v., App.	284	836
Foroi's Estate, In re, App.	284	881
Forrest, In re, App.	283	1066
Franchise Tax Bd.; Andersen-Carlson Mfg. Co. v., App.	283	278
Frank v. J. C. Penney Co., App.	283	291
Freedman's Estate, In re, App.	284	864

	P.2d Vol.	Page
Freitas; Gault v., App.	284	512
Garcia-Ruby; Hillman v., Sup.	283	1033
Gault v. Freitas, App.	284	512
Gault v. Stockton Livestock Transp., App.	284	512
Geller's Estate, In re, App.	284	881
Gibson; San Diego County v., App.	284	501
Gibson; Winstanley v., App.	284	202
Gilreath; Young v., App.	284	960
Gineste; Bright v., App.	284	839
Goble; Cannon v., Super.	283	390
Gold v. Velkov, App.	284	890
Goldsmith; Cook v., Super.	284	512
Goldston; Church v., App.	284	508
Good's Estate, In re, App.	284	881
Grady's Estate, In re, App.	284	881
Green v. Antoine, App.	284	76
Green's Estate, In re, App.	284	202
Gregory v. Durkin, App.	284	185
Grey's Estate, In re, App.	284	864
Grimes' Estate, In re, App.	284	864
Habernicht; Odian v., App.	283	756
Halada v. Venice Lake Park, App.	283	42
Hall; Layne v., App.	284	33
Hall v. Lyons, App.	283	66
Halsell's Estate, In re, App.	284	821
Harden v. Superior Court In and For Alameda County, Sup.	284	9
Harper; Stuart v., App.	284	505
Hatch; Covina Manor, Inc. v., Super.	284	580
Haupt v. La Brea Heating & Air Conditioning Co., Super.	284	985
Havey's Estate, In re, App.	284	864
Hayduk's Estate, In re, App.	284	864
Heffernan's Estate, In re, App.	284	864
H. E. Murray Co.; Darcy v., Super.	284	583
Hendricks; Lewis v., App.	284	518
Hickerson; Aviles v., App.	284	176
Hicks v. City of Los Angeles, App.	283	1046
Hill v. Kraft, App.	284	832
Hillman v. Garcia-Ruby, Sup.	283	1033
Hischemoeller v. National Ice & Cold Storage Co. of Cal., App.	284	81
Hismoco American Co. v. National Ice & Cold Storage Co. of Cal., App.	284	81
Hoegee Inv. Co. v. Burton Bros., Inc., App.	283	314
Hogan's Estate, In re, App.	284	881
Holcomb v. Nunes, App.	283	301
Hopalong Cassidy, Inc.; Karp v., App.	284	62
Howard v. Howard, two cases, App.	284	966
Howard's Estate, In re, App.	284	966
Howarth's Estate, In re, App.	284	881
Hudson v. West, App.	283	53
Hughes v. MacDonald, App.	283	360
I. E. S. Corp. v. Superior Court of Los Angeles County, Sup.	283	700
Iman's Estate, In re, App.	284	881
Independent Growers; Raymond v., App.	284	57
Industrial Acc. Commission; Scott v., App.	283	323
Industrial Acc. Commission; Subsequent Injuries Fund of State of Cal. v., Sup.	283	1039
Industrial Acc. Commission of Cal.; Madin v., App.	284	956

CASES REPORTED

	P.2d	
	Vol.	Page
James; People v., App.	284	527
Jamieson's Estate, In re, App.	284	881
J. C. Penney Co.; Frank v., App.	283	291
Jenkins' Estate, In re, App.	284	881
J. F. Hink & Son; Baley v., App.	283	349
Johnson v. City of San Pablo, two cases, App.	283	57
Johnson v. Fassett, App.	283	281
Jones; Powell v., App.	284	856
Jones' Estate, In re, App.	284	881
Kalmus; Pierce v., App.	284	149
Karp v. Hopalong Cassidy, Inc., App.	284	62
Karp v. Sherman, App.	284	62
Karr v. Sherer, App.	283	376
Kasdorf's Estate, In re, App.	284	881
Kennedy; People v., App.	284	898
Keystone Auto Court; Brandwein v., App.	284	130
Kilcrease v. Kilcrease, App.	283	300
King v. Curtis, Super.	284	983
King; Pauly v., Sup.	284	487
Kingsburg Cotton Oil Co.; Kornoff v., App.	283	1060
Klassen; Duerksen v., App.	284	25
Klinker v. Klinker, App.	283	83
Kornoff v. Kingsburg Cotton Oil Co., App.	283	1060
Kraft; Hill v., App.	284	832
Kumagai's Estate, In re, App.	284	881
Kuntz' Estate, In re, App.	284	881
La Brea Heating & Air Conditioning Co.; Haupt v., Super.	284	985
Lail v. Lail, App.	284	907
Lamb; People v., App.	283	727
Landry's Estate, In re, two cases, App.	284	881
Langley v. Schumacker, App.	283	343
Larsen, In re, Sup.	283	1043
Lawrence; People v., App.	284	949
Layne v. Hall, App.	284	33
Lerch's Estate, In re, App.	284	881
Lewis v. Hendricks, App.	284	518
Lewis v. Williams, App.	284	510
Linch; Solot v., App.	284	941
Linville v. Linville, App.	283	34
Loescher v. Loescher, App.	284	902
Loescher's Estate, In re, App.	284	902
Long Beach, City of, v. Pacific Elec. Ry. Co., Sup.	283	1036
Long's Estate, In re, App.	284	881
Loomis' Estate, In re, App.	284	881
Los Altos School Dist. of Santa Clara County v. Watson, App.	284	513
Los Angeles Bookbinders Union No. 63; Smith v., App.	284	194
Los Angeles Bookbinders Union No. 63; S. & G. Bindery v., App.	284	194
Los Angeles Transit Lines; Moreno v., App.	283	76
Los Angeles Transit Lines; Rogers v., App.	283	265
Los Angeles Trona Stages; Wilson v., App.	284	951
Lo's Estate, In re, App.	284	864
Loveland's Estate, In re, App.	284	881
Low v. Woodward Oil Co., App.	283	720
Lyons; Hall v., App.	283	66
Lyons' Estate, In re, App.	283	66
McCartin's Estate, In re, App.	284	864

	P.2d Vol.	Page
McClure; People v., App.	284	887
McConnell; Bonham v., App.	283	318
McCrae's Estate, In re, App.	284	914
MacDonald; Hughes v., App.	283	360
MacDonald's Estate, In re, App.	283	271
McGee's Estate, In re, App.	284	33
McHugh's Estate, In re, App.	284	881
McKee's Estate, In re, App.	284	881
McMillin's Estate, In re, App.	284	864
Madin v. Industrial Acc. Commission of Cal., App.	284	956
Malone, Ex parte, Sup.	284	805
Mancha; People v., App.	284	931
Mann's Estate, In re, App.	284	864
Marcus; People v., App.	284	848
Mata; People v., App.	283	372
Mathys v. Turner, App.	283	31
Matsubara's Estate, In re, App.	284	881
Mawhiney v. Signal Trucking Co., App.	283	27
Mayr v. Arana, App.	284	21
Mead; Mosier v., App.	283	378
Medeiros v. Silva, App.	283	50
Melikian v. Truck Ins. Exchange, App.	283	269
Mendoza's Estate, In re, two cases, App.	284	864
Miller; De Long v., App.	283	762
Miller's Estate, In re, App.	284	864
Mitchell; Shyvers v., App.	284	826
Moffatt's Estate, In re, App.	284	881
Mohr's Estate, In re, App.	284	864
Moore v. Moore, App.	283	338
Moore's Estate, In re, App.	284	864
Moore's Estate, In re, App.	284	881
Moreno v. Los Angeles Transit Lines, App.	283	76
Morgan, Ex parte, App.	284	898
Morrison's Estate, In re, App.	284	864
Mosier v. Mead, App.	283	378
Murray v. Superior Court In and For City and County of San Francisco, Sup.	284	1
Musumeci; People v., App.	284	168
Nathanson; People v., App.	284	975
National Ice & Cold Storage Co. of Cal.; Hischemoeller v., App.	284	81
National Ice & Cold Storage Co. of Cal.; Hismoco American Co. v., App.	284	81
Navy Gas Co.; Rudolph v., App.	284	107
Neustadt v. Skernswell, App.	283	787
Nevarov v. Nevarov, App.	284	17
Nickel v. Superior Court of City and County of San Francisco, Sup.	283	704
No-Doz; Anderson v., App.	284	883
Nunes; Holcomb v., App.	283	301
Nunn; People v., App.	284	47
Oakdale Irr. Dist. v. Calaveras County, App.	283	732
O'Brien v. Appling, App.	283	289
Odian v. Habernicht, App.	283	756
O'Donnell; People v., App.	283	714
Ohlsson; Cheminol Corp. v., App.	283	773
Oil Tool Corp.; Stafford v., App.	284	937
One 1950 Cadillac 2-Door Club Coupe, Engine No. 506263120; People v., App.	284	118

	P.2d Vol.	Page
Oppenheimer v. Union Pac. R. Co., Super.	284	208
Orange County; Signal Oil & Gas Co. v., Sup.	283	257
Orange County; Southwest Exploration Co. v., Sup.	283	257
Orchard v. Pancoast, App.	283	309
Ormsby v. Cookingham, App.	284	51
Osborne; Rohar v., App.	284	125
Otis; Bauer v., App.	284	133
Pacific Elec. Ry. Co.; City of Long Beach v., Sup.	283	1036
Pacific Gas & Elec. Co.; Rosa v., App.	284	844
Pacific Tel. & Tel. Co.; Zanardi v., App.	284	851
Pageman Holding Corp.; Record Mach. & Tool Co. v., App.	283	724
Pancoast; Orchard v., App.	283	309
Parlato; Balance v., App.	283	288
Pauly v. King, Sup.	284	487
Pauly v. Travelodge Co., Sup.	284	487
People v. Acosta, App.	283	73
People v. Bagley, App.	284	36
People v. Brookins, App.	284	959
People v. Brooks, App.	283	748
People v. Bycel, App.	284	927
People v. Clutter, App.	284	918
People v. Cunha, App.	284	885
People v. Davis, App.	284	496
People v. Deleaney, App.	283	287
People v. Dunnavant, App.	283	274
People v. Farrell, App.	284	29
People v. Ford, App.	284	836
People v. James, App.	284	527
People v. Kennedy, App.	284	898
People v. Lamb, App.	283	727
People v. Lawrence, App.	284	949
People v. McClure, App.	284	887
People v. Mancha, App.	284	931
People v. Marcus, App.	284	848
People v. Mata, App.	283	372
People v. Musumeci, App.	284	168
People v. Nathanson, App.	284	975
People v. Nunn, App.	284	47
People v. O'Donnell, App.	283	714
People v. One 1950 Cadillac 2-Door Club Coupe, Engine No. 506263120, App.	284	118
People v. Pond, Sup.	284	793
People v. Rodriguez, App.	283	330
People v. Smith, App.	283	39
People v. Smith, Super.	284	203
People v. Thompson, App.	284	39
People v. Valdez, App.	283	36
People v. Van Eyk, App.	284	970
People v. Von Hecht, App.	283	764
People v. Wilkes, Sup.	284	481
People v. Williams, App.	283	760
People v. Woods, App.	283	778
People Acting By and Through Dept. of Public Works v. Union Mach. Co., App.	284	72
Perryman v. Tonkin, App.	283	298
Perryman's Estate, In re, App.	283	298

	P.2d Vol.	Page
Petlansky's Estate, In re, App.	284	881
Phelps' Estate, In re, App.	283	293
Phillips v. Burke, App.	284	809
Phillips' Estate, In re, App.	284	881
Phoenix Const. Co.; Continental Cas. Co. v., App.	284	554
Pierce v. Kalmus, App.	284	149
Pitt's Estate, In re, App.	284	864
Pizer v. Brown, App.	283	1055
Pond; People v., Sup.	284	793
Powell v. Jones, App.	284	856
Rangel v. Badolato, App.	284	138
Raymond v. Independent Growers, App.	284	57
Ray's Estate, In re, App.	284	881
Record Mach. & Tool Co. v. Pageman Holding Corp., App.	283	724
Rhodes & Jamieson, Limited; Simmons v., App.	284	813
Richards' Adoption, In re, App.	284	889
Richardson's Estate, In re, App.	284	864
Riess' Estate, In re, App.	284	864
Robinson v. Tanovitz, App.	284	148
Robinson v. 20th Century Market, App.	284	148
Robinson; Winstanley v., App.	284	864
Robinson; Winstanley v., App.	284	881
Robinson Elec. v. Tanovitz, App.	284	148
Rock Creek Water Dist. v. Calaveras County, two cases, App.	283	740
Rodin v. American Can Co., App.	284	530
Rodriguez; Brandwein v., App.	284	130
Rodriguez; People v., App.	283	330
Rogers v. Los Angeles Transit Lines, App.	283	265
Rohar v. Osborne, App.	284	125
Rohar v. Shank's Economy Store, App.	284	125
Rohnert; Burchell v., App.	283	333
Rosa v. Pacific Gas & Elec. Co., App.	284	844
Rosenberg's Estate, In re, App.	284	864
Rosinsky Motor Co.; Williams v., Super.	284	979
Rowe's Estate, In re, App.	284	881
Royal Indem. Co.; Skroopka v., Super.	283	111
Rudolph v. Navy Gas Co., App.	284	107
Rudolph v. Tubbs, App.	284	107
Russell; Cal-Ore Lumber Sales v., App.	284	179
Ryall's Estate, In re, App.	284	864
Sacks; Crowe v., Sup.	283	689
San Diego County v. Gibson, App.	284	501
San Pablo, City of, v. City of Richmond, App.	283	57
Santa Cruz County; Wood v., App.	284	923
Sav-On Food Club; Budget Finance Plan v., Sup.	283	694
Schaefer Ambulance Service; Duff v., App.	283	91
Scheige's Estate, In re, App.	284	881
Schellinger's Estate, In re, App.	284	881
Schifano v. Security Bldg. Co., App.	283	306
Schumacker; Langley v., App.	283	343
Scott v. Industrial Acc. Commission, App.	283	323
Seabron v. Seabron, App.	284	117
Security Bldg. Co.; Schifano v., App.	283	306
Security-First Nat. Bank of Los Angeles; Combs & Hoose v., App.	283	293
Security-First Nat. Bank of Los Angeles; Duin v., Super.	283	790
Security-First Nat. Bank of Los Angeles v. Yeakel, App.	284	68

	P.2d Vol.	Page
Shank's Economy Store; Rohar v., App.	284	125
Shearer v. United California Theatres, App.	284	934
Sherer; Karr v., App.	283	376
Sherman; Karp v., App.	284	62
Sherman's Estate, In re, two cases, App.	284	62
Shih Ching Lo's Estate, In re, App.	284	864
Shyvers v. Mitchell, App.	284	826
Signal Oil & Gas Co. v. Orange County, Sup.	283	257
Signal Trucking Co.; Mawhiney v., App.	283	27
Silva; Medeiros v., App.	283	50
Simmons v. Rhodes & Jamieson, Limited, App.	284	813
Skernswell; Neustadt v., App.	283	787
Skroopka v. Royal Indem. Co., Super.	283	111
Smith v. Los Angeles Bookbinders Union No. 63, App.	284	194
Smith; People v., App.	283	39
Smith; People v., Super.	284	203
Smith v. Smith, App.	283	782
Smith v. Wattenburg, App.	283	751
Smith's Estate, In re, App.	284	881
Snowden's Estate, In re, App.	284	881
Solot v. Linch, App.	284	941
Southwest Exploration Co. v. Orange County, Sup.	283	257
Spada; Chambers v., App.	283	1067
Spada and Stephens; Chambers v., App.	283	1067
Spear's Estate, In re, App.	284	881
Stafford v. Oil Tool Corp., App.	284	937
State v. American Trust Co., App.	284	185
State; Campbell v., App.	284	185
State Bd. of Ed.; Di Genova v., App.	283	366
State Bd. of Equalization; California Motor Exp. v., App.	283	1063
State Dept. of Social Welfare; Biagi v., App.	284	889
Steno's Estate, In re, App.	284	864
Stevens; Abbot v., App.	284	159
Stockton Livestock Transp.; Gault v., App.	284	512
Stuart v. Harper, App.	284	505
Subsequent Injuries Fund of State of Cal. v. Industrial Acc. Commission, Sup.	283	1039
Sullivan's Estate, In re, App.	284	881
Superior Court In and For Alameda County; Harden v., Sup.	284	9
Superior Court In and For City and County of San Francisco; Murray v., Sup.	284	1
Superior Court of City and County of San Francisco; Bowles v., Sup.	283	704
Superior Court of City and County of San Francisco; Nickel v., Sup.	283	704
Superior Court of Los Angeles County; I. E. S. Corp. v., Sup.	283	700
Swedlow Engineering Co.; Flickinger v., App.	284	521
Symington's Estate, In re, App.	284	881
S. & G. Bindery v. Los Angeles Bookbinders Union No. 63, App.	284	194
Tadoyoshi Matsubara's Estate, In re, App.	284	881
Tanovitz; Robinson v., App.	284	148
Tanovitz; Robinson Elec. v., App.	284	148
Thompson; People v., App.	284	39
Tomasello; Carroll v., App.	284	932
Tonkin; Perryman v., App.	283	298
Travelodge Co.; Pauly v., Sup.	284	487
Trites' Estate, In re, App.	284	881
Truck Ins. Exchange; Melikian v., App.	283	269

	P.2d Vol.	Page
Tubbs; Rudolph v., App.	284	107
Turner; Mathys v., App.	283	31
20th Century Market; Robinson v., App.	284	148
Union Mach. Co.; People Acting By and Through Dept. of Public Works v., App.	284	72
Union Pac. R. Co.; Oppenheimer v., Super.	284	208
United Box & Lumber Co.; Cal-Ore Lumber Sales v., App.	284	179
United California Theatres; Shearer v., App.	284	934
Valdez; People v., App.	283	36
Van Eyk; People v., App.	284	970
Van Paemel's Estate, In re, App.	284	864
Velkov; Gold v., App.	284	890
Vellis; Wylie v., App.	283	327
Venice Lake Park; Halada v., App.	283	42
Verdier v. Verdier, App.	284	94
Von Hecht; People v., App.	283	764
Wahl; Firestone v., App.	284	499
Wallace v. Carpenters Local Union No. 1040 of United Broth. of Carpenters and Joiners of America, App.	284	102
Wallace Roofing Co. v. Carpenters Local Union No. 1040 of United Broth. of Carpenters and Joiners of America, App.	284	102
Walsh's Estate, In re, App.	284	864
Walston v. Flintridge Oil Co., App.	284	895
Waters v. Civil Service Bd. of City of Oakland, App.	284	919
Watson; Los Altos School Dist. of Santa Clara County v., App.	284	513
Wattenburg; Smith v., App.	283	751
Weaver's Estate, In re, App.	284	864
Wells' Estate, In re, App.	284	864
West; Hudson v., App.	283	53
White's Estate, In re, App.	284	864
Wilkes; People v., Sup.	284	481
Wm. H. Hoegee Inv. Co. v. Burton Bros., Inc., App.	283	314
Williams, In re, App.	284	510
Williams; Lewis v., App.	284	510
Williams; People v., App.	283	760
Williams v. Rosinsky Motor Co., Super.	284	979
Wilson v. Brannan, App.	284	821
Wilson v. Los Angeles Trona Stages, App.	284	951
Winstanley v. Gibson, App.	284	202
Winstanley v. Robinson, App.	284	864
Winstanley v. Robinson, App.	284	881
Wolff v. Fallon, Sup.	284	802
Wood v. Santa Cruz County, App.	284	923
Woods; People v., App.	283	778
Woodward Oil Co.; Low v., App.	283	720
Worthley v. Worthley, Sup.	283	19
Wright's Estate, In re, App.	284	864
Wylie v. Vellis, App.	283	327
Yeakel; Security-First Nat. Bank of Los Angeles v., App.	284	68
Young v. Gilreath, App.	284	960
Young's Estate, In re, App.	284	881
Zanardi v. Pacific Tel. & Tel. Co., App.	284	851
Zeidman v. Anticouni, App.	284	517
Zimmermann's Estate, In re, App.	283	68
Zimmerman's Estate, In re, App.	284	881

CALIFORNIA REPORTER

283 PACIFIC REPORTER
SECOND SERIES

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SECOND SERIES

44 Cal.2d 477

Jeanne DORAN and Adolf Doran, Plaintiffs and Appellants,

v.

CITY AND COUNTY OF SAN FRANCISCO., a Municipal Corporation, Defendant and Respondent.

Jules BESSETTE, Plaintiff and Appellant,

v.

CITY AND COUNTY OF SAN FRANCISCO., a Municipal Corporation, Defendant and Respondent.

S. F. 19190, 19191.

Supreme Court of California.
In Bank.
April 28, 1955.
Rehearing Denied May 25, 1955.

Personal injury action by pedestrians against city and county. The Superior Court, City and County of San Francisco, Robert L. McWilliams and Melvyn I. Cronin, JJ., made determinations adverse to pedestrians, and pedestrians appealed. The Supreme Court, Spence, J., held that, where state of helplessness of pedestrians, who were struck by electric overhead trolley bus, was created by pedestrians' act of leaving their position of safety near center of street and stepping directly into path of bus, and pedestrians could not have taken more than two or three steps after leaving place of safety and before accident occurred, pedestrians' negligence occurred almost simultaneously with happening of accident and could not be deemed "remote in causation", and, therefore, doctrine of last clear chance was not applicable.

Order and judgment affirmed.

Gibson, C. J., Carter and Traynor, JJ., dissented.

Opinions, 274 P.2d 464; 275 P.2d 840, vacated.

1. Negligence 🔑83.1

Question of whether doctrine of last clear chance applies in a particular case depends wholly upon existence of elements necessary to bring it into play.

2. Negligence 🔑83.4

Doctrine of last clear chance presupposes that plaintiff has been negligent and, as result thereof, is in position of danger from which he cannot escape by exercise of ordinary care because escape is physically impossible or he is totally unaware of his danger, and that defendant knows or should know that plaintiff cannot escape and has last clear chance to avoid accident by exercise of ordinary care but fails to do so and plaintiff is injured as proximate result of such failure.

3. Negligence 🔑83.1

If any one of elements of doctrine of last clear chance is absent, doctrine does not apply, and ordinary rules of negligence and contributory negligence are applicable.

4. Street Railroads 🔑103(1)

Total unawareness of danger, as contemplated by doctrine of last clear chance, does not exist where injured party is fully aware of approach of an oncoming vehicle up to instant before collision and then shifts his attention to look in some other direction while proceeding directly into path of vehicle.

5. Negligence 🔑1, 65, 80

Ordinary case presenting issues of negligence and contributory negligence is governed by traditional rules which cover such issues and which make contributory negligence a bar to recovery by injured party

6. Negligence ⚿83.5, 135(6)

Last clear chance doctrine relieves injured party of results of his own contributory negligence and permits him to recover despite such negligence, but doctrine is applicable only in exceptional case in which there is substantial evidence to support a favorable finding on each of the several required elements of the doctrine.

7. Negligence ⚿83.10

Continuing negligence of injured party does not deprive him of benefit of last clear chance doctrine if all required elements for application of such doctrine are present.

8. Negligence ⚿136(32)
Trial ⚿252(7)

Question whether there is any substantial evidence, conflicting or otherwise, which could justify application of last clear chance doctrine in given case is question of law, and, in absence of such evidence, it is error for trial court to instruct jury concerning such doctrine.

9. Negligence ⚿136(32)

If there is substantial evidence, conflicting or otherwise, which could justify application of last clear chance doctrine in given case, question whether defendant should be held to have had last clear chance to avoid accident is one of fact for jury under appropriate instructions.

10. Negligence ⚿135(6)

Doctrine of last clear chance is to be applied only in the exceptional case, and mere fact that there is ample evidence to show that defendant is negligent, without substantial evidence of existence of other required elements of doctrine, will not warrant application of such doctrine.

11. Negligence ⚿83.8

Doctrine of last chance, which permits injured person to recover, despite his continuing and contributory negligence, is based on premise that defendant had been afforded last clear chance to avoid accident after defendant had discovered that plaintiff was in helpless situation and is based upon humanitarian concept that fault of injured party should not relieve erring defendant of his liability if defendant is afforded such last clear chance after it is too late for injured party to avail himself of any similar chance.

12. Negligence ⚿83.8

Under the last clear chance doctrine, chance, which is afforded to defendant, must be something more than a bare possible chance and must not only be a last chance but a clear chance which follows actual knowledge of plaintiff's helplessness to avoid accident by exercise of ordinary care.

13. Negligence ⚿83.8, 83.11

Doctrine of last clear chance excludes from its application any case in which plaintiff's state of helplessness, which results from his own negligence, is created so nearly simultaneously with happening of accident that neither party may be fairly said to have thereafter a last clear chance to avoid the accident.

14. Negligence ⚿83.7, 83.8

Where elements of doctrine of last clear chance are present, doctrine may be applied only if it may be fairly said that plaintiff's negligence was "remote in causation," and it is the existence of some appreciable interval, after time that plaintiff has reached state of helplessness, within which defendant is able to gain actual knowledge of plaintiff's state of helplessness and has last clear chance to avoid accident that makes plaintiff's negligence a remote, rather than proximate, cause of the accident.

15. Street Railroads ⚿103(1)

Where plaintiff is actually aware of approach of oncoming vehicle, and his negligent act, which removes him from position of safety into one of danger, occurs almost simultaneously with happening of accident, there cannot be an appreciable interval which enables defendant to gain knowledge of plaintiff's helplessness and to have last clear chance to avoid the accident, and, therefore, plaintiff's negligence cannot then be deemed to be "remote in causation" but is proximate cause of accident.

16. Negligence ⚷83.6

So long as plaintiff is only approaching and is not actually in a position of danger, he cannot invoke the doctrine of last clear chance.

17. Street Railroads ⚷103(2)

Where state of helplessness of pedestrians, who were struck by electric overhead trolley bus, was created by pedestrians' act of leaving their position of safety near center of street and stepping directly into path of bus, and pedestrians could not have taken more than two or three steps after leaving place of safety and before accident occurred, pedestrians' negligence occurred almost simultaneously with happening of accident and could not be deemed "remote in causation", and, therefore, doctrine of last clear chance was not applicable.

◆

Fitz-Gerald Ames, Sr., and Harold A. Galloway, San Francisco, for appellants.

Dion R. Holm, City Atty., and Jerome Cohen, Deputy City Atty., San Francisco, for respondent.

SPENCE, Justice.

This is a consolidated appeal by plaintiffs in two personal injury actions which were separately tried but which arose out of the same accident. It is submitted on two separate settled statements, which are substantially the same in their presentation of the evidence and are so treated by counsel for plaintiffs in discussing the legal points in the joint briefs presented on plaintiffs' behalf. Plaintiff Doran appeals from an order granting a new trial after judgment in her favor. Plaintiff Bessette appeals from a judgment in favor of defendants.

In the Doran case the trial court instructed the jury on the last clear chance doctrine, and then granted a new trial solely on the ground that it had erred in giving that instruction. In the Bessette case the trial court refused to instruct on that doctrine. Plaintiffs contend that the last clear chance instruction was properly given in the Doran case, and that therefore the order granting defendants' motion for a new trial in that case should be reversed. They further contend that the requested instruction on the last clear chance doctrine should have been given in the Bessette case, and that therefore the judgment in favor of defendants in that case should be reversed. While defendants make no objection to the form of plaintiffs' requested instructions, they maintain that the evidence was insufficient to justify the giving of the last clear chance instruction in either case, and that therefore the order and judgment should be affirmed. The evidence was substantially the same in both cases but viewing that evidence in the light most favorable to plaintiffs, Rodabaugh v. Tekus, 39 Cal.2d 290, 291, 246 P.2d 663; Daniels v. City and County of San Francisco, 40 Cal.2d 614, 617, 255 P.2d 785, we have nevertheless concluded that defendants' position must be sustained.

On March 17, 1950, about 7:30 p. m., plaintiffs were struck by defendants' electric overhead trolley bus as they were crossing Union Street at a point approximately 120 feet west of the intersection with Fillmore Street, in San Francisco. Plaintiff Jules Bessette, accompanied by plaintiff Jeanne Doran, had parked his automobile on the south side of Union Street, about 100 feet west of Fillmore. Union Street is relatively narrow, being 44 feet 9 inches from curb to curb, and there were cars parked at the curbs on both sides. After leaving their car and proceeding west on the sidewalk about a car's length, plaintiffs stepped into Union Street intending to cross the street to a theatre on the opposite (north) side. Defendants' trolley bus, traveling west on Union Street, had crossed Fillmore and stopped in front of a drugstore on the northwest corner of the intersection. There were two sets of streetcar tracks on Union Street, and the bus was stopped parallel to the curb with its right wheels just to the right of the most northerly rail of the car tracks. Plaintiffs testified that after they had stepped into Union Street and were a few feet from the curb, they stopped, "looked around," observed the bus stopped to their right at the corner but saw no moving traffic, and then proceeded straight, not diagonally, across the street. When they reached the center of the street and were between the two sets of tracks, they looked again to the right and saw the bus moving in their direction. When plaintiff Bessette saw the bus for the second time, he "could not tell if it moved any distance from the point where he first saw it when it was stopped." Plaintiff Doran testified: "When I was in the middle of the street, I don't know how far the bus was from me. I know the bus was going in my direction. * * * I cannot tell you if it had gone half way. I don't know if it was as close as 10 feet to me when I saw it the second time. As I was crossing the street, I know the bus was coming in my direction but I don't know whether the bus was going to stop or would continue to go along." Neither plaintiff looked again in the direction of the bus, but they continued to walk into its path. Their memory of events ends there.

The bus driver testified that he was traveling between 15 to 20 miles per hour when he first saw plaintiffs running diagonally across the street. At that time they were 15 to 20 feet ahead of the bus, 3 feet to its left and in the center of the street, looking straight ahead in the direction in which they were going. The bus headlights were on low beam. The street lights and the theatre marquee and sign lights were burning. Looking ahead from his stopped position at the corner in front of the drugstore, the bus driver could see parked cars the full length of the block on both sides of the street; and there was nothing in the street to obstruct his view. After starting the bus, he traveled some 2 or 3 coach lengths (a coach length is 35 feet) before he saw plaintiffs. He then immediately applied his brakes and swerved to the left, but the right front half of the bus struck plaintiffs. The bus traveled 4 to 6 feet between the point of impact and the stop. Traveling at the speed of 15 to 20 miles per hour when he first saw plaintiffs, he stated that he could stop the bus within 23 to 26 feet, including reaction time. He did not sound his horn but used both hands to turn the steering wheel in an effort to avoid striking plaintiffs. He could not state why he did not see plaintiffs sooner in the street, except for these prevailing circumstances: plaintiffs were wearing semi-dark clothing—plaintiff Doran in a dark brown coat, white blouse and beige skirt, and plaintiff Bessette in a gray suit and "sort of brown" overcoat; the stores on both sides of the street, excepting the corner drugstore and the theatre, both on the north side, were dark; and the southerly part of Union Street was a dark background at approximately the spot where he first saw plaintiffs.

It thus appears that the only real conflict in the evidence was on the question of whether plaintiffs walked straight, or ran diagonally, across the street and into the path of the bus. Accepting plaintiffs' testimony, it will be assumed that they walked straight across. But plaintiffs' own testimony further showed that they did not stop at any time in making such crossing, and that they saw the approaching bus when they were at the center of the street. Their own exhibits (plaintiff Doran's Exhibits 1, 4, 5, and 7 and plaintiff Bessette's Exhibit 1) left no doubt as to the place where the accident occurred. The point of impact was shown to have been at a point near the center of the street, and no further north than the center of the west-bound tracks, which was approximately 6 feet from the center of the street. Hence plaintiffs' own testimony affirmatively showed that there could not possibly have been any appreciable interval between the time that they left a place of safety and the time that the accident occurred. In this situation it is understandable that plaintiffs should have admitted that they did not know how far the bus was from them when they were at the center of the street or how many steps they took after passing the center of the street; and in the light of these admissions and the above-mentioned admitted facts, any testimony of plaintiffs to the effect that the bus was still at the corner (about 120 feet away) and was just starting to move at the time that plaintiffs crossed the center of the street is inherently improbable as it cannot be reconciled with the happening of the accident. Such testimony therefore cannot be deemed to be substantial evidence on that subject.

[1-3] Whether or not the doctrine of last clear chance applies in a particular case depends wholly upon the existence or non-existence of the elements necessary to bring it into play. The doctrine presupposes: "'(1) That plaintiff has been negligent and, as a result thereof, is in a position of danger from which he cannot escape by the exercise of ordinary care; and this includes not only where it is physically impossible for him to escape, but also in cases where he is totally unaware of his danger and for that reason unable to escape; (2) that defendant has knowledge that the plaintiff is in such a situation, and knows, or in the exercise of ordinary care should know, that plaintiff cannot escape from such situation, and (3) has the last clear chance to avoid the accident by exercising ordinary care, and fails to exercise the same, and the accident results thereby, and plaintiff is injured as the proximate result of such failure.'" Daniels v. City and County of San Francisco, supra, 40 Cal.2d 614, 619, 255 P.2d 785, 788. If any one of these elements is absent, the doctrine does not apply and the case is governed by the ordinary rules of negligence and contributory negligence. Palmer v. Tschudy, 191 Cal. 696, 700, 218 P. 36.

Defendants contend that the doctrine is not applicable here because plaintiffs were aware of their dangerous position and could have saved themselves by the exercise of ordinary care. Concededly, plaintiffs were guilty of negligence in crossing the street in the middle of the block directly in the path of the oncoming bus. They saw the bus shortly after leaving the curb. They again looked to their right and saw the bus approaching when they were in the center of the street, but nevertheless they continued on their way without again glancing in that direction. Defendants therefore maintain that it cannot be said that plaintiffs, after seeing the approaching bus and then stepping into its path, were "totally unaware" of their dangerous position within the purview of the last clear chance doctrine.

[4] In their effort to answer defendants' contention relating to the first required element, plaintiffs apparently realize that they cannot claim that they were in a position of danger from which it was "physically impossible" for them to escape until after they had passed the center of the street and had stepped directly into the path of the oncoming bus. They therefore rely mainly upon their claim that they were "totally unaware" of their danger. This latter claim finds no support in the evidence. Plaintiffs concededly knew of the presence of the bus as they started to cross the street, and also knew that it was moving toward them when they again looked to the right while near the center of the relatively narrow street. With this knowledge, they proceeded to step directly into the path of the oncoming bus; and in the light of this admitted knowledge, it cannot be said that plaintiffs were "totally unaware" of their danger. Total unawareness of danger, as contemplated by the doctrine, does not exist where the injured party is fully aware of the approach of an oncoming vehicle up to the instant before the collision and then shifts his attention to look in some other direction while proceeding directly into its path.

Plaintiffs have cited no case in which the last clear chance doctrine has been held applicable to any comparable factual situation. On the contrary, in a case which is closely parallel on its facts, it was held that the doctrine was not applicable. Palmer v. Tschudy, supra, 191 Cal. 696, 218 P. 36. There the plaintiff, a pedestrian, upon reaching the curb, glanced to her right and saw defendant's automobile approaching at a distance of approximately 200 feet. She started to cross the street and when she had taken 2 or 3 steps from the curb, she again glanced to her right and saw defendant's automobile still approaching and, of course, nearer. Without again looking at the approaching automobile, she proceeded to cross the street and was struck and injured. The trial court there instructed on the last clear chance doctrine, and the judgment in favor of plaintiff was reversed because of the error in giving such an instruction. This court recognized that the last clear chance doctrine may be applied when the injured party is totally unaware of the danger but held that "plaintiff was aware of it from the beginning". 191 Cal. at page 701, 218 P. at page 38.

Plaintiffs cite numerous cases where the last clear chance doctrine has been held applicable but all are distinguishable on their facts. Some of these cases involved situations where there was evidence to show that the injured person was in fact "totally unaware" of the danger. In Girdner v. Union Oil Co., 216 Cal. 197, 13 P.2d 915, the trial court found upon sufficient evidence that "up to the time of the collision, he [plaintiff] did not see and was totally oblivious of the approach of the truck, and the danger that confronted him". 216 Cal. at page 200, 13 P.2d at page 917. In Center v. Yellow Cab Co., 216 Cal. 205, 13 P.2d 918, the evidence showed that the plaintiff "did not see the approach of the automobile that struck him." 216 Cal. at page 206, 13 P.2d at page 919. And in the more recent decision of Peterson v. Burkhalter, 38 Cal.2d 107, 237 P.2d 977, there was evidence to show that the injured boy did not see the defendant's oncoming automobile. The boy in approaching the intersection on his motor scooter and while 75 feet therefrom was "looking over his right shoulder in the opposite direction," and as he neared the intersection he "was still looking over his right shoulder." 38 Cal.2d at page 109, 237 P.2d at page 978. Other cases cited by plaintiffs involved situations where there was evidence to show that the vehicle in which the injured person was traveling was either stalled or stopped practically directly in the path in which defendant was traveling. Selinsky v. Olsen, 38 Cal.2d 102, 237 P.2d 645; Daniels v. City and County of San Francisco, supra, 40 Cal.2d 614, 255 P.2d 785; Sills v. Los Angeles Transit Lines, 40 Cal.2d 630, 255 P.2d 795. It thus appears that in each of the cited cases there was evidence from which the trier of the facts could find that plaintiff's negligence had placed him in a position of danger from which he could not escape by the exercise of ordinary care either (1) because it was "physically impossible for him to escape" or (2) because he was "totally unaware of his danger and for that reason unable to escape". Under such circumstances, there was no lack of evidence to support a finding of the presence of the first required element for the application of the last clear chance doctrine. Of course, in each of said cases, it was also held that there was sufficient evidence to support a finding that defendant had actual knowledge that plaintiff was in such a situation, and that defendant thereafter had a "last clear chance to avoid the accident by exercising ordinary care" but failed to do so.

It would serve no useful purpose to review all of the authorities dealing with the applicability of the last clear chance doctrine. Many of them have been reviewed in the recent decisions of this court, and it has been recognized that some cases have "presented close questions concerning the sufficiency of the evidence to warrant the application of the doctrine". Rodabaugh v. Tekus, supra, 39 Cal.2d 290, 297, 246 P.2d 663, 667. It was further stated in the earlier case of Girdner v. Union Oil Co., supra, 216 Cal. 197, 202–203, 13 P.2d 915, 917, that any "apparent confusion which exists in some of the decisions upon the subject arises in the application of the law to the facts, but as to the rule itself there is little or no confusion." A summary of the rules established by the recent cases may serve to dispel any apparent confusion that may be said to exist by reason of certain earlier decisions.

[5–7] The ordinary case presenting the issues of negligence and contributory negligence is governed by the traditional rules which cover those issues, and which make contributory negligence a bar to recovery by the injured party. The last clear chance doctrine, which relieves an injured party of the results of his own contributory negligence and permits him to recover despite such negligence, is applicable only in the exceptional case in which there is substantial evidence to support a favorable finding on each of the several required elements above enumerated. And as above indicated, if any one of these elements is absent, the doctrine does not apply and the case is governed by the ordinary rules of negligence and contributory negligence. Palmer v. Tschudy, supra, 191 Cal. 696, 700, 218 P. 36; Rodabaugh v. Tekus, supra, 39 Cal.2d 290, 293, 246 P.2d 663; see, also, Girdner v.

Union Oil Co., supra, 216 Cal. 197, 202, 13 P.2d 915; Daniels v. City and County of San Francisco, supra, 40 Cal.2d 614, 619, 255 P.2d 785; Sills v. Los Angeles Transit Lines, supra, 40 Cal.2d 630, 635, 255 P.2d 795. In this connection, it should be emphasized that the "continuing negligence" of the injured party does not deprive him of the benefit of the last clear chance doctrine if all the required elements for the application of that doctrine are present, for such "continuing negligence" ordinarily exists in all last clear chance cases. Girdner v. Union Oil Co., supra, 216 Cal. 197, 203, 13 P.2d 915; Center v. Yellow Cab Co., supra, 216 Cal. 205, 207–208, 13 P.2d 918; Selinsky v. Olsen, supra, 38 Cal.2d 102, 104–105, 237 P.2d 645; Peterson v. Burkhalter, supra, 38 Cal.2d 107, 111, 237 P.2d 977

[8, 9] The question of whether there is any substantial evidence, conflicting or otherwise, which could justify the application of the last clear chance doctrine in a given case, is a question of law; and in the absence of such evidence, it is error for the trial court to instruct the jury concerning that doctrine. Wallis v. Southern Pacific Co., 184 Cal. 662, 672, 195 P. 408, 15 A.L.R. 117; Rodabaugh v. Tekus, supra, 39 Cal.2d 290, 297, 246 P.2d 663; Johnson v. Sacramento Northern Ry., 54 Cal.App.2d 528, 543, 129 P.2d 503; Dalley v. Williams, 73 Cal. App.2d 427, 431–432, 166 P.2d 595. On the other hand, if there is such substantial evidence, conflicting or otherwise, the question of whether the defendant should be held to have had a last clear chance to avoid the accident is a question of fact to be determined by the jury under appropriate instructions. Girdner v. Union Oil Co., supra, 216 Cal. 197, 204, 13 P.2d 915; Center v. Yellow Cab Co., supra, 216 Cal. 205, 208, 13 P.2d 918; Selinsky v. Olsen, supra, 38 Cal.2d 102, 106, 237 P.2d 645; Peterson v. Burkhalter, supra, 38 Cal.2d 107, 113, 237 P.2d 977; Daniels v. City and County of San Francisco, supra, 40 Cal.2d 614, 619, 622–623, 255 P.2d 785; Sills v. Los Angeles Transit Lines, supra, 40 Cal.2d 630, 635–636, 638, 255 P.2d 795.

[10] While the determination of the question of law above mentioned is not free from difficulty in certain border-line cases, the cited authorities show that the courts have not hesitated to hold that the doctrine could be applied whenever it may be fairly said that there is substantial evidence, conflicting or otherwise, upon which to base a finding of the presence of each of the required elements. These authorities recognize, however, that it is only the exceptional case to which the doctrine may be applied, and that the mere fact that there is ample evidence to show that a defendant is negligent, without substantial evidence of the existence of the other required elements, will not warrant the application of the last clear chance doctrine. Rodabaugh v. Tekus, supra, 39 Cal.2d 290, 293, 246 P.2d 663.

[11–13] The underlying basis for the application of this doctrine, which permits an injured person to recover despite his continuing and contributory negligence, is that defendant was afforded a *last* chance and a *clear* chance to avoid the accident *after* defendant had discovered that plaintiff was in a helpless situation. It is based upon the humanitarian concept that the fault of the injured party should not relieve the erring defendant of his liability if defendant is afforded such last clear chance to avoid the accident after actually discovering that it is too late for the injured party to avail himself of any similar chance. But the chance which is afforded to defendant must be something more than a bare possible chance. It must be not only a *last* chance but a *clear* chance, following actual knowledge of plaintiff's helplessness, to avoid the accident by the exercise of ordinary care; and, by its very terms, the doctrine excludes from its application any case in which plaintiff's state of helplessness, resulting from his own negligence, is created so nearly simultaneously with the happening of the accident that neither party may be fairly said to have thereafter a last clear chance to avoid the accident. Rodabaugh v. Tekus, supra, 39 Cal.2d 290, 294–296, 246 P.2d 663; Poncino v. Reid-Murdock & Co., 136 Cal.App. 223, 229–232, 28 P.2d 932; Johnson v. Sacramento Northern Ry., supra, 54 Cal.App.2d 528, 532, 542, 129 P.2d 503.

[14, 15] In applying the foregoing principles, it is helpful to bear in mind the decisions which rationalize the last clear chance doctrine in terms of proximate cause. Girdner v. Union Oil Co., supra, 216 Cal. 197, 204, 13 P.2d 915; Center v. Yellow Cab Co., supra, 216 Cal. 205, 207–208, 13 P.2d 918; Sparks v. Redinger, 44 Cal.2d 121, 279 P.2d 971. As was said in the Center case at pages 207–208 of 216 Cal., at page 920 of 13 P.2d: "The doctrine of [plaintiff's] continuing negligence has no application unless the negligence is the proximate cause of the injury. *If all the elements of the doctrine of the last clear chance are present and plaintiff's negligence becomes remote in causation, then the doctrine applies.* If, on the other hand, any of the elements of the doctrine are lacking, courts have declared, and rightfully so, that plaintiff's negligence being continuous and contributory with that of defendant bars a recovery." (Emphasis added.)

Thus, the doctrine may be applied only if it may fairly be said that plaintiff's negligence was "remote in causation." What then is the main factor which may make plaintiff's negligence, in the eyes of the law, a remote cause rather than a proximate cause of the accident? It is obviously the existence of some such appreciable interval after the time that plaintiff has reached a state of helplessness as to enable defendant to gain actual knowledge of plaintiff's state of helplessness, and to have a last clear chance to avoid the accident. And as above indicated, such state of helplessness is reached only when plaintiff's negligence has placed him "in a position of danger from which he cannot escape by the exercise of ordinary care" either (1) because it is "physically impossible for him to escape" or (2) because he is "totally unaware of his danger and for that reason unable to escape." Accordingly, when a plaintiff is actually aware of the approach of an oncoming vehicle and when his negligent act, which removes him from a position of safety and into a position of danger, occurs almost simultaneously with the happening of the accident, there can be no such appreciable interval thereafter as to enable defendant to gain knowledge of plaintiff's helplessness and to have a *last clear chance* to avoid the accident. In such case, the negligence of plaintiff cannot be deemed to be "remote in causation." On the contrary, such negligence is, in the eyes of the law, a proximate cause of the accident, and the last clear chance doctrine has no application.

[16] In the light of the above discussion, it appears clear that the cases involved on this appeal presented no substantial evidence upon which to predicate the application of the last clear chance doctrine. We have heretofore indicated that there was no evidence to show that plaintiffs were totally unaware of the danger, for they testified that they saw the approaching bus twice after leaving the south curb—first immediately after leaving the south curb and again when in the center of the street. It is also clear that plaintiffs cannot successfully claim that defendants had a last clear chance to avoid the accident *after* plaintiffs had left their position of safety near the center of the street and stepped into a position of danger. Plaintiffs were not in a position of danger nor in a state of helplessness, within the meaning of the doctrine, until they had reached a point where they could no longer escape by the exercise of ordinary care. As was said in Dalley v. Williams, supra, 73 Cal.App.2d 427, at page 435, 166 P.2d 595, at page 599, "the term 'place of safety' ordinarily includes the position of the plaintiff while he is merely *approaching* the place of danger, and so long as he is only *approaching* but is not actually *in* a position of danger, the plaintiff cannot invoke the doctrine."

[17] The distance from the center of the street to the north curb was but 22 feet 4½ inches. There were automobiles parked along the curb, thus leaving only the intervening space for the bus to operate along the northerly half of the street, where the accident occurred at a point within a few feet from the center line of the street. Plaintiffs' state of helplessness was created only by their act of leaving their position of safety near the center of the street and stepping directly into the path of danger. Under any view of the evidence, plaintiffs

could not have taken more than two or three steps after leaving a place of safety and before the accident happened. Therefore plaintiffs' act of negligence in leaving a place of safety and stepping directly into the path of the oncoming bus necessarily occurred almost simultaneously with the happening of the accident. Under these circumstances, such negligence cannot be deemed "remote in causation," and it cannot be said that defendants thereafter had a last clear chance to avoid the accident. We therefore conclude that in each of these cases the trial court correctly determined by the challenged ruling that as a matter of law the record presented no substantial evidence to justify the application of the last clear chance doctrine.

In Doran v. City and County of San Francisco, S.F. 19190, the order granting a new trial is affirmed. In Bessette v. City and County of San Francisco, S.F. 19191, the judgment is affirmed.

SHENK, EDMONDS and SCHAUER, JJ., concur.

CARTER, Justice.

I dissent.

I cannot agree with the majority opinion for several reasons. The first of these reasons is that the facts have not been fairly stated. In determining the propriety of the order granting a new trial and of the refusal to give a requested jury instruction in these cases, the evidence is to be viewed in the light most favorable to plaintiffs. Rodabaugh v. Tekus, 39 Cal.2d 290, 246 P.2d 663; Daniels v. City and County of San Francisco, 40 Cal.2d 614, 255 P.2d 785. The appeal in these cases is presented on settled statements of facts submitted by plaintiffs with amendments proposed by defendant. The excerpts from the settled statements, quoted in the majority opinion, appear to be the excerpts least favorable to the plaintiffs and most favorable to defendant. In some instances the excerpts attributed to plaintiff Doran have been taken from the statement submitted by plaintiff Bessette. They do not appear in the settled statement of facts submitted by plaintiff Doran.

Testimony of Bessette

From the testimony of plaintiff Bessette as it appears in the settled statement of facts, the majority opinion quotes: When he "* * * saw the bus for the second time, he 'could not tell if it moved any distance from the point where he first saw it when it was stopped.'" Read in the context of the majority opinion, these words seem to imply that plaintiff Bessette simply did not know where the bus was located when he saw it the second time. That inference seems to be the basis for the later statement of the majority that plaintiffs were not totally unaware of the danger because they knew that the bus was moving toward them when they reached the center of the street. Read in the context in which it was submitted to this court in the settled statements of facts, this excerpt conveys a far different meaning. Compare the words quoted in the majority opinion with these statements, which appear in the same settled statements of facts as the testimony of plaintiff Bessette, which the majority opinion apparently ignores:

> "We walked about 6 or 7 feet into the street, going north, and then stopped to look for traffic. We saw no moving traffic in either direction, but saw the bus stopped at the corner near the drugstore, with the back wheel of the bus extending into the intersection. The visibility was good and when I looked to my left (west) I was able to see beyond Steiner Street, and was able to see the houses up there."
>
> "We proceeded across the street and when I reached near the center of the street I noticed that the bus was just beginning to move from the stopped position. It 'don'' go hardly at all, it just beginning to move.' (sic) I continued right across, going straight, not diagonally, and I don't remember what happened after that."
>
> "When I was in the middle of the street I looked to my right to see the bus, what the bus was doing there at the corner. As far as I could see, the bus was just beginning to move."
>
> "The last time I saw the bus it was northwest of Fillmore near the front of the drugstore. When the bus was just

starting to move, it was right there in the same place that I was looking the first time. I never saw the bus after that. I know I was walking to the middle of street but after that I don't know what happened to me. When I was at the center of the street I didn't stop but continued to walk. I know I was past the middle of the street when the accident occurred but I don't know how far past."

"When he was looking at the bus again to see what the bus was doing when he reached the center of the street and saw the bus just starting up, it seemed to him that he had plenty of time to cross."

"Portions of the witness's testimony given in his deposition was read into the record in which he said: 'I did not see the bus just before it hit me.' He can't say how far he had walked from his position in the center of the street up to the time he was knocked out, because he doesn't really know."

"He did not recall hearing the sound of a horn, bell or gong or any other sound coming from the bus at any time prior to the accident."

"That he was wearing some sort of light colored overcoat at the time of the accident. 'Yes, maybe it was a sort of greenish-gray.' "

"When he first saw the bus, when it was stopped at the corner, it was about 120 or 125 feet away from where he stopped to look for traffic when he was standing about 6 or 7 feet out from the south curb."

"When he got to the middle of the street he looked to the right and saw the bus again; he could not tell if it moved any distance from the point where he first saw it when it was stopped."

"When he looked at the bus a second time it was about 120 to 125 feet from him. From the time he left the sidewalk until the time he got to the center of the street the bus hadn't moved any distance at all, it was still in the same place, right there at the corner."

"I knew the bus was moving in my direction but I did not alter the speed of my walk because I had plenty of time, the bus was so far I took my eyes off the bus and I never looked at it again to see what was happening to it."

"When he passed the center of the street and saw the bus start to move, he never looked in the direction from which the bus was coming, and never looked at the bus again."

I believe it is quite clear that the brief excerpt of plaintiff Bessette's testimony appearing in the majority opinion is not a fair statement of the general tenor of his testimony. Wrenched out of context, as it is in the majority opinion, it is perhaps as *favorable to defendant* as any excerpt which could have been found. It obviously does not represent a view of the evidence in the light most favorable to plaintiff.

The majority infers that plaintiff Bessette knew the bus was coming toward him, did not know (nor apparently care) how far away it was, and recklessly stepped into its path. The evidence viewed as a whole indicates to the contrary, that plaintiff Bessette saw the bus still at the corner, 120 feet away, just beginning to move, and so continued to walk across the street in the mistaken, but reasonable belief that he had plenty of time.

Testimony of Doran

From the testimony of plaintiff Doran, the majority opinion quotes the following excerpts: " 'When I was in the middle of the street, I don't know how far the bus was from me. I know the bus was going in my direction. * * * I cannot tell you if it had gone half way. I don't know if it was as close as 10 feet to me when I saw it the second time. As I was crossing the street, I know the bus was coming in my direction but I don't know whether the bus was going to stop or would continue to go along.' "

Let us analyze this excerpt one sentence at a time, and compare it with other excerpts from the same settled statements. The first sentence quoted by the majority opinion is " 'When I was in the middle of the street, I don't know how far the bus was from me.' " This sentence appeared originally in the settled statement of facts submitted by plaintiff Bessette. It did not appear in the settled statement of facts submitted by plaintiff Doran. Compare the quoted sentence with these statements, referring to the same subject matter, which the majority apparently ignores:

"When we reached the middle of the street between the two sets of tracks I again looked to the right (east) and saw the bus in about the same position, just beginning to move in my direction."

"I saw the bus a second time when I was about the middle of the street. The bus was in the same position mostly and Mr. Bessette was on my right."

"Before we got to the middle of the street I was looking and when I was in the middle of the street I was looking again watching the bus." "The bus started to move when I was about in the middle of the street. After I started across the street when I saw the bus down at the corner I next looked to see where the bus was when I was in the middle. After that I didn't look any more."

The inference which the majority draws from the *single sentence* quoted by it, is that plaintiff Doran did not know how far away the bus was. The inference logically to be drawn from the *whole testimony* is that plaintiff Doran did know about how far away the bus was—she knew that it was still at the corner, about 120 feet away.

The second sentence of plaintiff Doran's testimony quoted by the majority opinion is: "'I know the bus was going in my direction. * * *'" This sentence also does not appear in the settled statement of plaintiff Doran. Again, however, the majority has ignored these references which seem pertinent:

"When we reached the middle of the street between the two sets of tracks I again looked to the right (east) and saw the bus in about the same position, just beginning to move in my direction."

"When I looked the second time the bus was moving. I can't tell you how close it was to me. I don't know if it had left the position of the nearest corner."

The inference which the majority apparently draws from the sentence which it quotes is that plaintiff Doran saw the bus moving at full speed down the street toward her. The evidence viewed as a whole will not support that inference. A logical inference which may be drawn from the *whole testimony* is that plaintiff Doran saw the bus still at the corner, 120 feet away, just beginning to move.

The third and fourth sentences in the quoted paragraph of the majority opinion were "I cannot tell you if it had gone half way. I don't know if it was as close as 10 feet to me when I saw it the second time." Of the quoted paragraph, these are the first sentences which actually do appear in the settled statement submitted by plaintiff Doran. But compare them with these words, which also appear in plaintiff Doran's statement and which the majority ignored:

"When we reached the middle of the street between the two sets of tracks I again looked to the right (east) and saw the bus in about the same position [about 120 feet away], just beginning to move in my direction."

"The bus was in the same position mostly [about 120 feet away] and Mr. Bessette was on my right."

"The bus started to move [from its position at the corner about 120 feet away] when I was about in the middle of the street."

The majority picks out isolated sentences which imply that plaintiff Doran did not know how far away the bus was; but the majority ignores the many statements in the record that indicate that plaintiff Doran did know that the bus was about 120 feet away when she was at the middle of the street.

The last sentence in the quoted paragraph is "'As I was crossing the street, I know the bus was coming in my direction but I don't know whether the bus was going to stop or would continue to go along.'" Again, there is no such statement in the settled statement submitted by plaintiff Doran. There does not seem to be any direct reference in the statement submitted by plaintiff Doran as to plaintiff Doran's knowledge of "'whether the bus was going to stop or would continue to go along.'"

All of these purportedly representative excerpts of plaintiff Doran's testimony were culled by the majority from the statement of facts submitted by plaintiff Bessette. I cannot understand how, if the majority opinion was guided by the controlling principle that the evidence is to be viewed in the light most favorable to plaintiffs, it could have ignored such statements as I have quoted above. On the same page of the Bessette statement that the majority quotes plaintiff Doran as saying, " 'When I was in the middle of the street, I don't know how far away the bus was from me,' " appears the statement " 'When I was in the middle of the street I saw the bus just beginning to move.' " Can it possibly be said that the majority views the evidence in the light most favorable to plaintiffs? Can it be said that the facts have been fairly stated? I think not.

The majority paints a word picture of plaintiff Doran walking to the middle of the street, seeing a large bus bearing down on her, apparently quite close, and blandly stepping in front of it with no idea whether it would stop or not. This picture is but a sadly distorted remnant of the original portrayal which appeared in the evidence. A clearer view shows plaintiff Doran walking to the center of the street; seeing the bus about 120 to 125 feet away, just beginning to move; and continuing across the street with a feeling of apparent safety; only to be struck down by the bus which rapidly covered the intervening distance.

Testimony of the Bus Driver

The testimony of the bus driver is summarized in the majority opinion somewhat accurately. Minor discrepancies in the majority's summary include (1) "* * * he was traveling between 15 to 20 miles per hour when he first saw plaintiffs. * * *" The testimony was that he was traveling 20 miles per hour when he first saw them. (2) "Traveling at the speed of 15 to 20 miles per hour when he first saw plaintiffs, he stated that he could stop the bus within 23 to 26 feet, including reaction time." The testimony was, "Under the conditions present at that time and place, with the bus travelling at 20 miles per hour, I could stop that bus within 23 to 26 feet, including reaction time." (3) The bus driver did not, as the majority opinion intimates, specify the colors of the clothing worn by plaintiffs.

I believe that a fair statement of the evidence in the light most favorable to plaintiffs would have brought out, as the settled statements of fact did, (1) that the bus driver from his experience in driving along those streets, had found that the dim lights sufficiently lighted up the road for the purpose of operating the bus—that he could see whatever it was necessary to see in operating the bus. (2) That the bus headlights lit up the whole street from curb to curb. (3) That before starting up from the corner he could see right and left and in front. (4) That all of the time, up to the time of impact, he was looking straight ahead. (5) That cars were outlined quite clearly and he had no trouble in seeing them. (6) He had a perfect field of vision (peripheral vision) and 20-20 vision. These facts, coupled with the plaintiffs' testimony that when they were in the middle of the street, the bus was still at the corner, just starting to move, could quite clearly lead to the inference that the bus driver saw the plaintiffs when he was 120 feet away from them, Selinsky v. Olsen, 38 Cal.2d 102, 105, 237 P.2d 645; Hoy v. Tornich, 199 Cal. 545, 250 P. 565; Bailey v. Wilson, 16 Cal.App.2d 645, 61 P.2d 68; Hellman v. Bradley, 13 Cal. App.2d 159, 56 P.2d 607. If a jury should draw this inference, there would be little trouble in holding that the last clear chance doctrine is applicable. Clearly that inference could be drawn, and would be upheld on any appeal, since there is evidentiary support for it. A jury would not be bound by the direct testimony of the defendant bus driver. Even less bound by defendant's testimony are we, who are supposed to be viewing the evidence in the light most favorable to plaintiffs.

The majority opinion states that the only real conflict in the evidence was on the question of whether plaintiffs walked straight, or ran diagonally, across the street. Having set up this defenseless "straw man," the majority then strikes it down by magnanimously accepting plaintiffs' testimony that they walked straight across. In the entire majority opinion, this is apparently the only point on which the evidence has been viewed favorably to the plaintiffs, as required by law. Rodabaugh v. Tekus, supra; Daniels v. City and County of San Francisco, supra. Having complied with the law on this one minor point, the majority then apparently feels that it is free to ignore the more significant items of evidence. The majority opinion commences with the above mentioned correct statement, then continues with a distortion of the facts by which the majority seeks to prove that "there could not possibly have been any appreciable interval between the time that they [plaintiffs] left a place of safety and the time that the accident occurred." From the conflicting evidence in the record, the majority assumes that the accident occurred about 6 feet from the center of the street. From this one isolated fact (which itself was contradicted by the direct testimony of plaintiff Bessette, who testified that to the best of his recollection he took 6 or 7 steps after leaving the center of the street before he was hit) the majority attempts to prove a measure of *time* by use of a statement of *linear* measurement. To prove that no appreciable *time* passed while plaintiffs took the 6 or 7 steps, it would be necessary to know the *rate of speed* at which plaintiffs were walking. The only direct evidence of the rate of speed of plaintiffs' walk is the testimony that they were walking at an *ordinary* walk, and that they didn't hurry, speed up or slow down while crossing the street. The only facts from which their rate of speed could be inferred are the facts that plaintiff Bessette was 74 years old, and that there were street car tracks in the street. From these facts it could be inferred that an ordinary walk for plaintiff Bessette might be slower than an ordinary walk for a younger, more agile youth. There is no evidence in the record as to the agility or gait of the plaintiffs. Clearly, the majority was forced to make assumptions wholly unwarranted by the record in order to support the decision which it had dogmatically determined it was going to reach.

Continuing with the same paragraph, the majority opinion states "In this situation it is understandable that plaintiffs should have admitted that they did not know how far the bus was from them when they were at the center of the street or how many steps they took after passing the center of the street; and in the light of these admissions and the above-mentioned admitted facts, any testimony of plaintiffs to the effect that the bus was still at the corner (about 120 feet away) and was just starting to move at the time that plaintiffs crossed the center of the street is inherently improbable as it cannot be reconciled with the happening of the accident. Such testimony therefore cannot be deemed to be substantial evidence on that subject." This statement demonstrates the absolute unfairness of the position taken by the majority in order to prevail in this action. It cannot reconcile the conclusion it wants to reach with the factual situation disclosed by plaintiffs' testimony, so it blandly says such testimony is "inherently improbable." In the light of the record before us in this case such a holding is unworthy of a court of justice.

To arrive at its predetermined conclusion the majority is forced to ignore the repeated direct testimony of the plaintiffs that the bus was still at the corner, 120 feet away, when they were at the center of the street. The majority attempts to justify its action by holding that the testimony of the plaintiffs is "inherently improbable." The only support for the charge of inherent improbability is the assumed fact that the accident occurred approximately six feet from the center of the street. I submit that there is nothing inherently improbable in plaintiffs' testimony that the bus was still at the corner, 120 feet away, when they were at the center of the street. The evidence clearly indicates that the bus driver started the bus by pressing the accelerator all the way to the floor and that the bus reached the speed of 20 miles an hour before hitting plaintiffs. There is nothing in the evidence to indicate that the bus driver took his foot off of the accelerator until he was very close to plaintiffs. There is no indication in the evidence of the maximum rate of acceleration of the bus. Simple mathematical computation will show that a bus travelling 20 miles per hour will cover the distance of 120 to 125 feet in less than 5 seconds. I submit that, even allowing a reasonable time for acceleration, it would be quite possible for the bus to cover the distance from the corner to the point of impact in not more than 6 or 7 seconds, and that it would be equally possible for plaintiff Bessette, a 74 year old man, to take 6 or 7 seconds to walk 6 or 7 steps across the street car tracks. How, may I ask, can the majority find inherent improbability in such testimony? It can do so only by blindly and arbitrarily disregarding inferences and deductions to be drawn from the evidence which has been accepted as reasonable and probable by at least seven judges and twelve jurors who have passed on the record in the Doran case.

The rule has long been settled in this state that contradictions in the testimony of a witness, even if the witness is the plaintiff, create nothing more than a conflict in the evidence and an appellate court is required to treat such conflict the same as if it existed between two or more witnesses. Conflicting testimony of a plaintiff constitutes nothing more than a conflict in the evidence to be resolved by the trial court. Rice v. California Lutheran Hospital, 27 Cal.2d 296, 163 P.2d 860; O'Banion v. Borba, 32 Cal.2d 145, 195 P.2d 10; Bushey v. Union Oil Co., 13 Cal.App.2d 350, 56 P.2d 1272; Von Hasseln v. Von Hasseln, 122 Cal.App.2d 7, 264 P.2d 205. Where the jury accepts plaintiff's testimony notwithstanding its contradictions, the appellate court must do so unless it is *so inherently improbable as to be no evidence.* Miller v. Schimming, 129 Cal.App. 171, 18 P.2d 357. "Common experience and observation teach us that strange and astonishing things sometimes happen in the world of physical phenomena, and accidents sometimes appear to happen in manner unaccountable. For these reasons an appellate court must be careful not to give to dogmatic and undemonstrated conclusions respecting natural laws precedence over the testimony of apparently credible witnesses; and the mere fact that the admitted circumstances make the story of the witnesses seem improbable will not justify a reversal by an appellate tribunal upon the ground that the verdict is contrary to the evidence." Austin v. Newton, 46 Cal. App. 493, 498, 189 P. 471, 473; see, also, Postier v. Landau, 121 Cal.App.2d 98, 262 P.2d 565; Murphy v. Ablow, 123 Cal.App. 2d 853, 268 P.2d 80; Jones v. Re-Mine Oil Co., 47 Cal.App.2d 832, 119 P.2d 219; Bennett v. Chandler, 52 Cal.App.2d 255, 126 P.2d 173; Poe v. Lawrence, 60 Cal. App.2d 125, 140 P.2d 136.

Statement of Facts

As stated above, I do not believe that the facts are fairly stated in the majority opinion. The summary of the facts to which the majority opinion applies the law could conceivably be drawn from the submitted statements, but it is emphatically not a view of the evidence most favorable to plaintiffs. It is not even an impartial view of the evidence. It is a view of the evidence most favorable to defendant. Many different versions of the facts could be drawn from the settled statements of facts submitted by the plaintiffs. I propose that we adopt a version as favorable to the plaintiffs as the evidence will reasonably allow.

On March 17, 1950, about 7:30 p. m., plaintiffs were struck by defendant's electric overhead trolley bus as they were crossing Union Street at a point approximately 120 to 125 feet west of its intersection with Fillmore Street, in San Francisco. Plaintiff Jules Bessette, accompanied by plaintiff Jeanne Doran, had parked his automobile on the south side of Union Street, about 110 to 120 feet west of Fillmore. Union Street is relatively narrow, being 44 feet 9 inches from curb to curb, and there were cars parked at the curbs on both sides. After leaving their car and proceeding west on the sidewalk about a car's length, plaintiffs stepped into Union Street intending to cross the street to a theater on the opposite (north) side. They walked a few steps into the street, stopped and looked both ways for traffic. They saw no moving traffic in either direction, but on their right, they saw defendant's trolley bus, stopped at the corner of Union and Fillmore Streets, on the west side of Fillmore, about 120 to 125 feet away from where they stood. The sun had gone down and it was nighttime, but the visibility was good, the street well lighted. They resumed walking straight across the street. When they reached the middle of the street, both plaintiffs again looked to the right (east) to see what the bus was doing. It was still at or near the corner, about 120 feet away, but had just begun to move. Believing that they had plenty of time to cross, they took their eyes off the bus, looked straight ahead and continued straight across the street. They did not stop at the center of the street, but looked to the right while walking.

Meanwhile, the bus driver, who had 20-20 vision and perfect peripheral vision, had started the bus by pushing the accelerator all the way to the floor. He was looking straight ahead, in the direction of plaintiffs. There were no obstructions to his view. There was no glare from the inside lights to interfere with his view. The bus headlights were on low beam, but this was adequate to see all that was necessary to be seen for operation of the bus. The lights lit up the whole street from curb to curb. He drove straight ahead until he was within 15 or 20 feet of plaintiffs, at which time he pushed on the brake pedal and turned the wheels to the left. The right front side of the bus struck plaintiffs, and the bus continued for about 8 feet after the impact before it came to a stop. The point of impact was about 6 or 7 steps north of the center of the street, where plaintiffs last looked to see the bus at the corner. The bus driver admits that he did not sound his horn and that he did not apply his brakes when he first saw the plaintiffs, but he claims that he did not see them until he was 15 or 20 feet away from them.

Application of Last Clear Chance Doctrine

With this statement of the facts in mind, let us proceed to a discussion of the application of the last clear chance doctrine. The last clear chance doctrine is applicable in very few cases. The case now before this court is one of those few cases. Whether or not the doctrine applies in a particular case, as correctly pointed out by the majority, depends on the existence or non-existence of certain factual elements. The majority opinion has adequately set out the nature of those factual elements. What remains is to see whether or not those elements are present in this case.

Defendants contend that the doctrine is not applicable here because plaintiffs were aware of their dangerous position and could have saved themselves by the exercise of ordinary care. Plaintiffs may have been negligent in crossing the street in the middle of the block when there were marked crosswalks at the end of the block. But it does not follow that they were aware of any danger from the bus. They saw it stopped at the corner, walked to the middle of the narrow street, looked again and saw it still at the corner, just beginning to move. They did not look at it again, believing they had plenty of time to cross. They took 6 or 7 more steps and were hit. Awareness of the fact that a bus 120 feet away is beginning to move does not constitute awareness of the danger which actually was present. If it did, every pedestrian who crosses a city street would be in a constant state of awareness of imminent peril, since there is usually some traffic moving toward one when he crosses a street. The evidence in this case, viewed reasonably, clearly shows that plaintiffs were totally unaware of any danger.

The majority opinion erroneously assumes that plaintiffs were "fully aware of the approach of an oncoming vehicle up to the instant before the collision * * *." The majority seems to believe that the plaintiffs were bent on suicide. It intimates that the plaintiffs saw the bus right on top of them and blithely ignored it as they stepped into its path. No reasonable reading of the evidence could give that impression.

The case of Palmer v. Tschudy, 191 Cal. 696, 218 P. 36, which the majority opinion describes as "closely parallel on its facts," has no application to this case, because it is clearly distinguishable on its facts. I agree with the learned justices of the District Court of Appeal, who stated in their decision that the Palmer case was not applicable to this case, Cal.App., 274 P.2d 464, 470. They said: "Palmer v. Tschudy [citation], is not applicable here for the reason, first, that the facts are different. There the court held that the plaintiff was aware of the danger from the approaching automobile and by the exercise of ordinary care could have avoided the accident, and hence the first element above mentioned required to apply the doctrine was not present. Secondly, the court there relied on the narrow interpretation of the doctrine given in Young v. Southern Pac. Co., [citation], to the effect that one is not in a position of danger until he actually gets in the pathway of the oncoming vehicle. This interpretation, like that given in Rodabaugh v. Tekus, [citation], was held in Daniels v. City and County of San Francisco, [citation], not to apply where the driver is aware, as here, of the fact that the other person is coming directly into his path." There is the additional factual distinction in the Palmer case, that the plaintiff had audible warning of the approach of the automobile, the driver of which twice sounded his horn. No horn was sounded here.

Other cases which the majority opinion purportedly distinguishes, Girdner v. Union Oil Co., 216 Cal. 197, 13 P.2d 915; Center v. Yellow Cab Co., 216 Cal. 205, 13 P.2d 918; Peterson v. Burkhalter, 38 Cal.2d 107, 237 P.2d 977, are all applicable to the extent at least that they hold that one who is totally unaware of the approaching danger may be in a position of danger from which he cannot escape by the exercise of ordinary care; that it need not be physically impossible for him to escape in order to qualify under this requirement.

It is interesting to note that the majority opinion in its summary of the "facts" near the conclusion of the opinion, states that plaintiffs were in a position of safety near the center of the street, and not in a position of danger. I had thought that this question was settled by the case of Daniels v. City and County of San Francisco, supra, 40 Cal.2d 614, 621, 255 P.2d 785, where the same writer held that the plaintiff was in a position of danger even though not directly in the path of the oncoming bus, but only approaching its path. No reference to the Daniels case was made in the majority discussion on this point.

On the question of whether defendant had knowledge that the plaintiffs were in a position of danger and knew or should have known that plaintiffs could not escape, the evidence clearly would support an inference that the bus driver saw plaintiffs when he was 120 to 125 feet away from them. The bus driver himself states that he did not see them look in his direction, that they just crossed in front of him.

In light of the preceding discussion, no comment should be necessary as to the presence of the third factual element for the application of the last clear chance doctrine. By any reasonable view of the evidence, the defendant had the last clear chance to avoid the accident by the exercise of ordinary care, and he failed to exercise the same, thereby proximately causing the plaintiffs' injuries.

The Underlying Error in the Majority Opinion

The astonishing thing about the majority opinion is that even if one accepted as a starting point the erroneous and slanted view which it takes of the facts, and even though in most (but not all) particulars it correctly states the rules of law, still it reaches a result contrary to established principles of law and logic.

In reviewing the cases on the last clear chance doctrine, the majority opinion states, "The question of whether there is any substantial evidence, conflicting or otherwise, which could justify the application of the last clear chance doctrine in a given case, is a question of law; and in the absence of such evidence, it is error for the trial court to instruct the jury concerning that doctrine. [Citations.] On the other hand, if there is such substantial evidence, conflicting or otherwise, the question of whether the defendant should be held to have had a last clear chance to avoid the accident is a question of fact to be determined by the jury under appropriate instructions. [Citations.]"

I know of only one test for determining whether or not there is an issue of fact which should be submitted to a jury for its determination, and that is the so-called "reasonable minds" test. I have never heard another test suggested and I know of no other basis for determining this question. In applying this test it would seem that when a trial court has concluded that an issue of fact exists, and submits such issue to a jury, and the jury, on proper instructions, determines that issue of fact, I can see no basis whatever in reason or common sense for an appellate court to hold that no issue of fact exists.

This court has in numerous cases stated without equivocation that "Even where the facts are undisputed, if reasonable minds might draw different conclusions upon the question of negligence, the question is one of fact for the jury." Johnson v. Southern Pacific R. Co., 154 Cal. 285, 97 P. 520, 525; Seller v. Market-Street Ry. Co., 139 Cal. 268, 72 P. 1006; Herbert v. Southern Pacific Co., 121 Cal. 227, 53 P. 651; Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513; see dissenting opinion, Gray v. Brinkerhoff, 41 Cal.2d 180, 186, 192, 258 P.2d 834. Can it possibly be said in the case at bar that reasonable minds cannot draw different conclusions from the evidence contained in the record in this case on the question as to whether or not the necessary elements are present to give rise to the doctrine of last clear chance? The answer to this question is obvious. That reasonable minds have drawn different conclusions is demonstrated by the record before us. The trial judge in the Doran case gave a last clear chance instruction and the jury returned a verdict in favor of plaintiff. The three members of the District Court of Appeal concluded that the evidence was sufficient to support a last clear chance instruction, 274 P.2d 464, and three members of this court have arrived at the same conclusion. In view of this state of the record, it seems clear that the case is decided in accordance with the view of the majority because there are four members of this court who feel it should be so decided, and it must necessarily follow that all cases of this character will take the same course. The reasonable minds test which has been followed by this court and all other common law courts since time immemorial, is without force or effect so long as four members of this court see fit to arbitrarily conclude that the rule is not applicable to a case involving a particular factual situation to which they think the doctrine should not apply.

The majority opinion in this case is an outright usurpation of the fact finding function of the trial court in at least two particulars: (1) It is held that the elements necessary for application of the last clear chance doctrine were not present *as a matter of law;* (2) it is held as a matter of law that the defendant did not have a last chance or a clear chance to avoid the accident. The unsoundness of the majority opinion on these two points is clearly shown by tracing the steps in these cases. (The cases being joined in this appeal, and the evidence being substantially the same in each, the Doran case is outlined as the more graphic example.) (a) Evidence was presented on each of the two points stated above. (b) The trial judge, in the first instance, decided that these were questions of fact, therefore gave them to the jury for determination. (c) The jury found certain facts to be true. (It is not necessary to detail the findings—the logic is the same in any case.) (d) The trial judge granted a new trial. (e) The three able justices of the District Court of Appeal unanimously decided that reasonable minds could differ on the evidence presented, therefore reversed the order granting a new trial. See Doran v. City and County of San Francisco, Cal.App., 274 P.2d 464. (f) On appeal to this court, a majority of the court decides that reasonable minds could *not* differ on the evidence presented, therefore affirms the order granting a new trial. As I pointed out in my concurring opinion in Daniels v. City and County of San Francisco, supra, 40 Cal.2d 614, 628, 255 P.2d 785, by holding that reasonable minds could not differ, the majority of this court is saying that the trial judge, the trial jury, the members of the District

Court of Appeal, and their dissenting brethren on this court do not have reasonable minds. If the majority opinion says any less than this, then the problem is one of semantics. The law is clear; the logic is inescapable; the only possible reconciliation of the majority opinion and common sense must be found in divergence of opinion as to the meaning of the words used. The meaning which I attach to the words of the majority opinion shows to me that the majority opinion is illogical.

This is not the first case of this sort to come before this court. Nor is this the first time that the majority has followed this illogical course, see Rodabaugh v. Tekus, supra, 39 Cal.2d 290, 246 P.2d 663; Gore v. Market Street Ry. Co., 4 Cal.2d 154, 48 P.2d 2; Young v. Southern Pacific Co., 182 Cal. 369, 190 P. 36. Nor is this the first time that I have expressed my views on this subject (see Selinsky v. Olsen, supra, 38 Cal.2d 102, 237 P.2d 645; dissenting opinions, Rodabaugh v. Tekus, supra, 39 Cal.2d 290, 246 P.2d 663; Sparks v. Redinger, 44 Cal.2d 121, 279 P.2d 971; concurring opinion, Daniels v. City and County of San Francisco, supra, 40 Cal.2d 614, 255 P.2d 785; Recent Trends in Court Decisions in California, 5 Hast. L.J. 133. Unless we wish to repeal the portions of the Constitution of the United States and the Constitution of the State of California which guarantee the right to trial by jury, the result of this case must not be allowed to stand.

I would commend to the majority of this court a reading of the history of the development of the jury system, e. g., James B. Thayer, The Jury and Its Development, 5 Harv.L.Rev. 249 (1892). A cursory examination of that history will show that from its first establishment as a part of our system of law, the jury has had the function of determining facts. From the twelfth century to date the controlling maxim has been *"ad questionem facti non respondent judices, ad questionem legis non respondent juratores."* This may be loosely translated as "the judges do not answer questions of fact, the jurors do not answer questions of law." The trend of decisions in this court clearly shows that some of my colleagues on this bench do not feel the weight of the centuries of history which have produced this rule. Do they seek a return to the feudal system or some other pre-twelfth century form of judicial administration?

I would also recommend to the majority, a rereading and a reconsideration of the analysis of this problem which was made in my dissenting opinion in Rodabaugh v. Tekus, supra, 39 Cal.2d 290, 297, 303, 246 P.2d 663, 671. The closing statement which I made there perfectly fits the situation in this case. "I do not believe it can fairly and honestly be said that the record in this case presents a factual situation on which reasonable minds cannot differ. What has happened thus far demonstrates beyond question that reasonable minds have arrived at different conclusions on the record before us. Such being the case, under the well-settled doctrine, the issue is one of fact and not of law, and hence should be determined by the trier of fact—the jury in this case.

"While the majority opinion in this case will create great confusion because it is in clear conflict with numerous other decisions of this court and the District Court of Appeal which I have cited hereinabove, of graver and more far-reaching concern is the problem that it is in direct violation of the constitutional provision that 'the right of trial by jury shall be secured to all, and remain inviolate;' (Art. I, sec. 7, Constitution of California). It cannot be doubted that where a factual situation is presented in a case in which litigants are entitled to a jury trial as a matter of right, and the court takes the case from the jury and decides as a matter of law that there is no issue of fact to be determined, the litigants have been deprived of a jury trial, and the Constitution has been violated. Such is the situation in the case at bar. While this result may seem to be unimportant in this case, it has an insidious impact on our whole constitutional structure. If judges who have taken a solemn oath to support the Constitution can ruthlessly disregard its provisions, as the majority has done here, why demand loyalty oaths from those holding positions of lesser importance?"

As a trial lawyer I tried last clear chance cases over thirty years ago and I thought the rules applicable to these cases were quite well settled at that time, but the difficulty was then and still is in the application of these rules to a particular case under consideration. Frankly, I think the difficulty which the Supreme Court of California is now having with these cases is the result of the disposition of some members of the court to reweigh the evidence and pass upon issues of fact. I have called attention to this situation in some of my dissenting and concurring opinions, and I intend to continue to talk about this matter whenever the opportunity arises, as I feel that such a policy or practice is not only contrary to settled principles of law but is placing an undue burden upon the members of the Supreme Court. However, I am disposed to believe that so long as the personnel of the Supreme Court of California continues as it is presently constituted, this policy or practice will continue. I am hopeful, however, that the time may come when more consideration will be given to the factual determinations of the trial courts in cases of this character, as I believe that it was the intention of the framers of the Constitution to place the burden of determining issues of fact upon the trial courts and that such determinations should be accepted by appellate courts. I am unable to reconcile the reasoning of the majority in this case with this concept.

I believe in constitutional government. I believe in obeying constitutional mandates. I believe that the people of this state have the right to expect of the Justices of this court that they will obey their oath of office and support the Constitution of the United States and the Constitution of California, and I believe that when the Justices of this court decide that a party is not entitled to have a jury decide issues of fact in a case in which such party is entitled to a jury trial as a matter of right, they are not supporting the Constitution and are violating their oath of office.

If a majority of this court can deny a litigant the right to a jury trial in one case, it can do it in a hundred cases or it can do it in every case. It can thereby abrogate the right to a jury trial. That situation almost existed during one period in the history of this court in railroad crossing cases. It has almost reached that point at the present time in last clear chance cases and will contests. I am positively and unalterably opposed to this trend in the decisions of this court.

In these two cases, I would reverse the order and the judgment respectively.

GIBSON, Chief Justice, and TRAYNOR, Justice.

We dissent.

In our opinion the evidence was sufficient to justify the giving of instructions on the last clear chance doctrine.

Rehearing denied; GIBSON, C. J., and CARTER and TRAYNOR, JJ., dissenting.

44 Cal.2d 465

Ruth M. WORTHLEY, Plaintiff and Appellant,

v.

Edward J. WORTHLEY, Defendant and Respondent.

No. L. A. 22889.

Supreme Court of California.
In Bank.
April 28, 1955.

Action to enforce New Jersey decree for separate maintenance. The Superior Court, Los Angeles County, John Gee Clark, J., sustained a plea in bar, and plaintiff appealed. The Supreme Court, Traynor, J., held that foreign-created alimony and support obligations are enforceable; and in an action to enforce a modifiable support obligation, either party may tender and litigate any plea for modification that could be presented to the courts of the state where the alimony or support decree was originally rendered.

Reversed.

Spence, Shenk and Schauer, JJ., dissented.

Opinion, 267 P.2d 23, vacated.

1. Divorce ⚷353(3)

Nevada divorce decree, regular on its face, would have to be accorded full faith and credit in California.

2. Divorce ⚷399(1)

Full faith and credit clause compels recognition of sister state divorce decree only as an adjudication of marital status of parties and not of any property rights that may be incident to that status.

3. Divorce ⚷391

Effect of Nevada divorce decree on pre-existing obligations under New Jersey maintenance decree would have to be determined by law of New Jersey.

4. Divorce ⚷393(1)

Under New Jersey law, husband's obligations under New Jersey separate maintenance decree were not terminated by marriage dissolution effected by Nevada court in subsequent proceeding in which personal jurisdiction over wife was not obtained.

5. Judgment ⚷815

New Jersey separate maintenance decree being both prospectively and retroactively modifiable, California court was not constitutionally bound to enforce husband's obligations under it; but neither was it bound not to enforce them. N.J.S.A. 2A:-34-23.

6. Divorce ⚷398
Judgment ⚷946

In action to enforce prospectively and retroactively modifiable support or alimony obligations under divorce or separate maintenance decree of sister state, either party may tender and litigate any plea for modification that could be presented to court of state where alimony or support decree was originally rendered. N.J.S.A. 2A:4-30.1. to 30.22; West's Ann.Code Civ.Proc. § 1875.

7. Divorce ⚷397(1)
Judgment ⚷930

Action to enforce retroactively modifiable decrees for alimony or support should be tried in forum that has personal jurisdiction over both parties; and in trial of such action defendant must be afforded opportunity to set up any mitigating defenses that would be available to him if suit were brought in state where alimony or support decree was originally rendered.

8. Courts ⚷89

Cases are not authority for propositions not considered therein.

9. Courts ⚷89

Where report of case clearly indicated that it had been argued and decided solely on question of full faith and credit, its authority as precedent was limited to decision on that question.

10. Courts ⚷91(2)

Propositions of law laid down in opinions of District Courts of Appeal are not binding on Supreme Court.

11. Divorce ⚷394(3), 398
Judgment ⚷823

In proceedings commenced pursuant to provisions of Uniform Reciprocal Enforcement of Support Act, California court must recognize and enforce foreign alimony and support decrees, whether modifiable or not, and must afford defendant opportunity to litigate issue of modification. West's Ann Code Civ.Proc. § 1654.

12. Judgment ⚷815

If accrued installments under divorce or separate maintenance decree are modified retroactively, judgment for liquidated sum entered after such modification will be final and thus will be entitled to full faith and credit in all other states. West's Ann. Code Civ.Proc. §§ 1650-1690.

13. Judgment ⚷822(3)

If support or alimony installments under divorce or separate maintenance decree are modified prospectively, issues thus determined will be res judicata so long as circumstances of parties remain unchanged. West's Ann.Code Civ.Proc. § 1654.

Kenny & Morris and Robert W. Kenny, Los Angeles, for appellant.

Slane, Mantalica & Davis and Frank Barclay, Los Angeles, for respondent.

TRAYNOR, Justice.

Plaintiff appeals from a judgment barring further prosecution of this action. The judgment was entered after a trial of defendant's special defense, Code Civ.Proc. § 597, to plaintiff's complaint for prospective and retroactive enforcement of defendant's obligations under a separate maintenance decree entered in the New Jersey Court of Chancery on May 19, 1947. Plaintiff and defendant were married in New Jersey in March 1943, and separated in November 1946. In the action for separate maintenance defendant appeared personally and by counsel, and the decree ordered him to pay $9 a week for plaintiff's support. About ten months after the decree was entered, defendant left New Jersey for Nevada, and in March 1948 he commenced an action for divorce in that state. Although plaintiff was served in New Jersey with summons and a copy of the complaint in the Nevada action, she did not appear therein. On July 7, 1948, the Nevada Second Judicial District Court granted defendant a divorce.

Defendant had paid all of the sums due under the New Jersey decree at the time the divorce was granted by the Nevada court but made no further payments thereafter. The Nevada decree contained no provision for alimony. On November 16, 1951, plaintiff commenced this action in the Superior Court of Los Angeles County, the county of defendant's present residence. She alleged that the New Jersey decree "has become final and has never been vacated, modified, or set aside" and that defendant is delinquent in his payments thereunder in the amount of $1,089. She seeks a judgment for the accrued arrearages and asks that the New Jersey decree be established as a California decree and that defendant be ordered to pay her $9 a week until further order of the court. Defendant answered the complaint by a general denial and by alleging, as an affirmative defense, that the Nevada divorce decree had terminated his obligations under the earlier New Jersey separate maintenance decree. On defendant's motion, the affirmative defense was tried first under the procedure established by section 597 of the Code of Civil Procedure. The trial court concluded that the Nevada decree dissolved the marriage and was therefore a bar to the maintenance of an action to enforce defendant's obligations under the New Jersey decree.

[1] Since plaintiff does not question the validity of the divorce granted by the Nevada court, that decree, being regular on its face, must be accorded full faith and credit in this state. Williams v. North Carolina, 317 U.S. 287, 63 S.Ct. 207, 87 L.Ed. 279; Id., 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577. The controlling questions on this appeal are, therefore, (1) whether the dissolution of the marriage terminated defendant's obligations under the New Jersey decree and, if not, (2) whether and to what extent those obligations are enforceable in this state.

[2-4] Since the full faith and credit clause compels recognition of the Nevada decree only as an adjudication of the marital status of plaintiff and defendant and not of any property rights that may be incident to that status, Estin v. Estin, 334 U.S. 541, 548-549, 68 S.Ct. 1213, 92 L.Ed. 1561, the effect of the dissolution of the marriage on defendant's pre-existing obligations under the New Jersey maintenance decree must be determined by the law of New Jersey. Sutton v. Leib, 342 U.S. 402, 406, 409, 72 S.Ct. 398, 96 L.Ed. 448; Biewend v. Biewend, 17 Cal.2d 108, 111, 114, 109 P.2d 701, 132 A.L.R. 1264. The Supreme Court of that state has recently held that a New Jersey "decree for maintenance [is not] superseded by a judgment of the foreign state where jurisdiction has only been obtained by publication entered in an *ex parte* proceeding in which *in personam* jurisdiction over the wife to whom the maintenance decree runs was not obtained." Isserman v. Isserman, 11 N.J., 106, 93 A.2d 571, 575. We must therefore conclude that defendant's obligations under the New Jersey decree were not terminated by the dissolution of the marriage effected by the Nevada court in a proceeding in which personal jurisdiction over plaintiff was not obtained.

[5, 6] The second question is more difficult. Since the New Jersey decree is both prospectively and retroactively modifiable, N.J.S.A. § 2A:34–23, we are not constitutionally bound to enforce defendant's obligations under it. Sistare v. Sistare, 218 U.S. 1, 30 S.Ct. 682, 54 L.Ed. 905; Lynde v. Lynde, 181 U.S. 183, 21 S.Ct. 555, 45 L.Ed. 810; Barber v. Barber, 21 How. 582, 16 L.Ed. 226.[1] Nor are we bound *not* to enforce them. People of State of New York ex rel. Halvey v. Halvey, 330 U.S. 610, 615, 67 S.Ct. 903, 91 L.Ed. 1133; Cummings v. Cummings, 97 Cal.App. 144, 151, 275 P. 245. The United States Supreme Court has held, however, that if such obligations are enforced in this state, at least as to accrued arrearages, due process requires that the defendant be afforded an opportunity to litigate the question of modification. Griffin v. Griffin, 327 U.S. 220, 233–234, 66 S.Ct. 556, 90 L.Ed. 635; see also, Gough v. Gough, 101 Cal.App.2d 262, 267–268, 225 P.2d 668. It has also clearly indicated that as to either prospective or retroactive enforcement of such obligations, this state "has at least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the State where it was rendered." People of State of New York ex rel. Halvey v. Halvey, supra, 330 U.S. 610, 615, 67 S.Ct. 903, 906.

In Biewend v. Biewend, 17 Cal.2d 108, 113–114, 109 P.2d 701, 704, 132 A.L.R. 1264, it was held that the California courts will recognize and give prospective enforcement to a foreign alimony decree, even though it is subject to modification under the law of the state where it was originally rendered, by establishing it "as the decree of the California court with the same force and effect as if it had been entered in this state, including punishment for contempt if the defendant fails to comply. [Citations.]" Similar holdings in reference to both alimony and support decrees have repeatedly been made by the District Courts of Appeal, see the cases cited in Biewend v. Biewend, supra, 17 Cal.2d at page 113, 109 P.2d at pages 704, 705; see, also, Starr v. Starr, 121 Cal.App.2d 633, 263 P.2d 675, modifying prospectively a Nevada decree for child support; Toohey v. Toohey, 97 Cal.App.2d 84, 87, 217 P.2d 108; Tomkins v. Tomkins, 89 Cal.App.2d 243, 250, 200 P.2d 821, and by the courts of other states, Sackler v. Sackler, Fla., 47 So.2d 292, 294–295; Rule v. Rule, 313 Ill.App. 108, 39 N.E.2d 379; Matson v. Matson, 186 Iowa 607, 625, 173 N.W. 127; Fanchier v. Gammill, 148 Miss. 723, 737, 114 So. 813; Little v. Little, 146 Misc. 231, 233, 262 N.Y.S. 654, affirmed without opinion, 236 App.Div. 826, 259 N.Y.S. 973, reargument denied, 237 App.Div. 817, 260 N.Y.S. 981; Lockman v. Lockman, 220 N.C. 95, 98, 16 S.E.2d 670; Cousineau v. Cousineau, 155 Or. 184, 201–202, 63 P.2d 897, 109 A.L.R. 643; Johnson v. Johnson, 194 S.C. 115, 8 S.E.2d 351, 354; Sorensen v. Spence, 65 S.D. 134, 272 N.W. 179, 180–181; McKeel v. McKeel, 185 Va. 108, 113, 37 S.E. 2d 746; see also, Kruvand v. Kruvand, Fla., 59 So.2d 857; Ostrander v. Ostrander, 190 Minn. 547, 549–550, 252 N.W. 449; Shibley v. Shibley, 181 Wash. 166, 42 P.2d 446, 97 A.L.R. 1191. It was stated in the Biewend case, however, that the Missouri decree would be established as a decree of the California courts "until such time as the Missouri court modifies its decree." 17 Cal. 2d 108, 114, 109 P.2d 701, 705. On reconsideration we have concluded, for reasons that appear below, that this statement was erroneous insofar as it implied that the California courts will not try the issue of modification on its merits, and that the courts of this state should undertake to try such issues.[2]

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[1] In recent cases the United States Supreme Court has expressly reserved judgment on the question of full faith and credit to modifiable judgments and decrees, see, Barber v. Barber, 323 U.S. 77, 81, 65 S.Ct. 137, 89 L.Ed. 82; Griffin v. Griffin, 327 U.S. 220, 234, 66 S. Ct. 556, 90 L.Ed. 635; but see, People of State of New York ex rel. Halvey v. Halvey, 330 U.S. 610, 615, 67 S.Ct. 903, 91 L.Ed. 1133, and the late Mr. Justice Jackson, a foremost expounder of the law of full faith and credit in recent years, forcefully declared that modifiable alimony and support decrees are within the scope of that clause: "Neither the full faith and credit clause of the Constitution nor the Act of Congress implementing it says anything about final judgments or, for that matter, about any judgments. Both require that full faith and credit be given to 'judicial proceedings' without limitation as to finality. Upon recognition of the broad meaning of that term much may someday depend." Concurring opinion, Barber v. Barber, 323 U.S. 77, 87, 65 S.Ct. 137, 141, 89 L.Ed. 82.

The District Court of Appeal for the Third Appellate District in a recent case has prospectively modified a support obligation created in a Nevada decree. Starr v. Starr, supra, 121 Cal.App.2d 633, 263 P.2d 675. In that case the plaintiff-wife obtained a divorce in Nevada in 1949, at which time she was awarded custody of her minor child and the defendant-husband was ordered to contribute $25 per month toward the support of the child. Subsequently the wife and child became residents of California, and in 1951 she brought an action asking that the husband's support payments be increased to $75 per month. In affirming the trial court's order increasing the husband's obligation to $75 per month, the District Court of Appeal drew an analogy to Sampsell v. Superior Court, 32 Cal.2d 763, 197 P.2d 739, in which it was held that custody rights established in one state were modifiable in any other state that had jurisdiction over the subject matter. The court concluded that if the California courts could modify the custody rights created in the Nevada decree, there was no reason why the support obligation created in the same decree could not also be modified. Similarly, the courts of a number of other states have affirmed their willingness to undertake prospective modification of alimony and support obligations created in sister-state decrees. See, Blauvelt v. Blauvelt, 199 Ark. 710, 136 S.W.2d 201, 204; Sackler v. Sackler, supra, Fla., 47 So.2d 292, 294–295; Lopez v. Avery, Fla., 66 So.2d 689, 693; Durfee v. Durfee, 293 Mass. 472, 477–479, 200 N.E. 395; Turnage v. Tyler, 183 Miss. 318, 184 So. 52; Robison v. Robison, 9 N.J. 288, 88 A.2d 202, 204, certiorari denied 344 U.S. 829, 73 S.Ct. 33, 97 L.Ed. 645; Johnson v. Johnson, 196 S.C. 474, 13 S.E.2d 593, 595–596, 134 A.L.R. 318; Setzer v. Setzer, 251 Wis. 234, 236–237, 29 N.W.2d 62, citing People of State of New York ex rel. Halvey v. Halvey, supra, 330 U.S. 610, 615, 67 S.Ct. 903; See, also, Barclay on Behalf of Marston v. Marston, 204 Misc. 656, 123 N.Y.S.2d 196, affirmed without opinion, 283 App.Div. 658, 127 N.Y.S.2d 842.

[7] Although the question of retroactive modification has been seldom litigated, the United States Supreme Court has expressed its approval of the proposition that actions to enforce retroactively modifiable decrees should be tried in a forum that has personal jurisdiction over both parties, and that in the trial of such actions the defendant must be afforded an opportunity to set up any mitigating defenses that would be available to him if the suit were brought in the state where the alimony or support decree was originally rendered. Griffin v. Griffin, 327 U.S. 220, 233–234, 66 S.Ct. 556, 90 L.Ed. 635; See, also, Gough v. Gough, 101 Cal.App.2d 262, 267–268, 225 P.2d 668. The same rule has been expressed by the Supreme Court of New Jersey, O'Loughlin v. O'Loughlin, 6 N.J. 170, 78 A.2d 64, 68–69; see also, Johnson v. Johnson, 196 S.C. 474, 13 S.E.2d 593, 595–596, 134 A.L.R. 318; Robison v. Robison, supra, 9 N.J. 288, 88 A.2d 202, 204, certiorari denied 344 U.S. 829, 73 S.Ct. 33, 97 L.Ed. 645, and its adoption has been commended by scholars that have recently studied the problem. See, Scoles, "Enforcement of Foreign 'Non-Final' Alimony and Support Orders," 53 Col.L.Rev. 817, 823–825; Ehrenzweig, "Interstate Recognition of Support Duties," 42 Cal.L.Rev. 382, 393–394.

[8–10] It is contended, however, that a contrary rule has been established in California by MacDonald v. Butler, 68 Cal.App.2d 120, 156 P.2d 273. That case was an action to recover installments accrued under a retroactively modifiable Michigan decree for the support of minor children. The District Court of Appeal affirmed the judgment of dismissal entered on defendant's demurrer to the complaint, and it is contended that because the case was decided on demurrer it necessarily holds that no cause of action was stated under full faith and credit, comity, or otherwise. This contention reflects a failure to distinguish between the decision as res judicata and as stare decisis. It is well established that "cases are not authority for propositions not considered therein." Metcalf v. County of Los Angeles, 24 Cal.2d 267, 273, 148 P.2d 645, 648; See, also, Maguire v. Hibernia Savings & Loan Soc., 23 Cal.2d 719, 730, 146 P.2d 673, 151 A.L.R. 1062; Mortgage Guarantee Co. v. Chotiner, 8 Cal.2d 110, 114, 64 P.2d 138, 108 A.L.R. 1080; Cate v. Fresno Traction Co., 213 Cal. 190, 202–203, 2 P.2d 364; Webster v. Fall, 266 U.S. 507, 511, 45 S.Ct. 148, 69 L.Ed. 411; Schram v. Robertson, 9 Cir., 111 F.2d 722, 725, and, since the report of the MacDonald case clearly indicates that it was argued and decided solely on the question of full faith and credit, its authority as precedent is limited to the decision on that question. Moreover, propositions of law laid down in opinions of the district courts of appeal are not binding on this court. Western Lithograph Co. v. State Board of Equalization, 11 Cal.2d 156, 167–168, 78 P.2d 731, 117 A.L.R. 838; Shelton v. City of Los Angeles, 206 Cal. 544, 550, 275 P. 421; People v. Rabe, 202 Cal. 409, 418–419, 261 P. 303; In re Stevens, 197 Cal. 408, 423–424, 241 P. 88; Bohn v. Bohn, 164 Cal. 532, 537–538, 129 P. 981; People v. Davis, 147 Cal. 346, 350, 81 P. 718.

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[2] Similarly, Handschy v. Handschy, 32 Cal.App.2d 504, 90 P.2d 123, and Barns v. Barns, 9 Cal.App.2d 427, 50 P.2d 463, are disapproved insofar as they are inconsistent with this opinion on the question of the litigability of the issue of modification.

[11] It is suggested that even if there are no binding California authorities on the question, we should follow certain sister-state decisions holding that alimony and support obligations created by a prospectively and retroactively modifiable decree are enforceable only in the state in which the decree was rendered. The policy implicit in those decisions is that a modifiable duty of support in one state "is of no special interest to other states and * * * is not enforceable elsewhere under principles of Conflict of Laws." Restatement, Conflict of Laws, § 458, comment *a*. This policy was rejected by this court in the Biewend case, see also, Hiner v. Hiner, 153 Cal. 254, 257, 94 P. 1044, and by the Legislature of this state in enacting the Uniform Reciprocal Enforcement of Support Act. Code Civ.Proc. §§ 1650–1690. In proceedings commenced pursuant to the provisions of that act, the California courts must recognize and enforce foreign alimony and support decrees whether modifiable or not, Code Civ.Proc. § 1670, and must afford the defendant an opportunity to litigate the issue of modification. Code Civ.Proc. § 1682; Griffin v. Griffin, supra, 327 U.S. 220, 233–234, 66 S.Ct. 556. If we should now refuse to follow the policy expressed by the Legislature in the Uniform Act, and by this court and the United States Supreme Court in the Sampsell and Griffin cases, and should hold that even though the courts of this state have personal jurisdiction over the defendant his obligations under a prospectively and retroactively modifiable sister-state support decree cannot be enforced in this state, the result would be anomalous. There would then be two rules in California, one for proceedings commenced under the Uniform Act, and a contrary one for all other proceedings to enforce foreign-created alimony and support obligations.

[12, 13] Moreover, there is no valid reason, in a case in which both parties are before the court, why the California courts should refuse to hear a plaintiff's prayer for enforcement of a modifiable sister-state decree and the defendant's plea for modification of his obligations thereunder. If the accrued installments are modified retroactively, the judgment for a liquidated sum entered after such modification will be final and thus will be entitled to full faith and credit in all other states. Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 438–439, 64 S.Ct. 208, 88 L.Ed. 149, and cases cited. If the installments are modified prospectively, the issues thus determined will be res judicata so long as the circumstances of the parties remain unchanged. Snyder v. Snyder, 219 Cal. 80, 81, 25 P.2d 403; Ralphs v. Ralphs, 86 Cal.App.2d 324, 325, 194 P.2d 592; Molema v. Molema, 103 Cal. App. 79, 81, 283 P. 956. Moreover, the interests of neither party would be served

by requiring the plaintiff to return to the state of rendition and reduce her claim for accrued installments to a money judgment. In the present case, for example, defendant, a domiciliary of this state, would have to travel 3,000 miles from his home, family, and job to secure a modification of plaintiff's allegedly stale claim and to protect his interests in any proceeding for the enforcement of his support obligation that she might institute in New Jersey. If defendant is unable to afford the time or money to travel to New Jersey to make an effective appearance in plaintiff's proceedings in that state, his substantive defenses to plaintiff's claims will be foreclosed. By the same token, unless plaintiff elected to proceed under the Uniform Reciprocal Enforcement of Support Act,[3] which has been adopted in New Jersey, N.J.S.A. § 2A:4–30.1 to 30.22, defendant's failure to pay the installments as they came due would force her constantly to relitigate his obligation to support. Repeated suits for arrearages would have to be brought in New Jersey as installments accrued, to be followed by repeated actions in California to enforce the New Jersey judgments for accrued installments, with the net result that the costs of litigation and the dilatoriness of the recovery would substantially reduce the value of the support to which plaintiff is entitled.

Furthermore, there is no merit to the contention that as a matter of practical convenience the issue of modification should be tried in the courts of the state where the support decree was originally rendered. Proof of changed circumstances in support cases is no more difficult than in custody cases and, as noted above, a California court that has jurisdiction of the subject matter must undertake to adjudicate a plea for modification of custody rights established by a sister-state decree. Sampsell v. Superior Court, 32 Cal.2d 763, 197 P.2d 739. Moreover, in most states the problem of modification is dealt with according to general equitable principles, and the law of the state in which the support obligation originated can be judicially noticed, Code Civ.Proc. § 1875, and applied by the California courts.

Accordingly, we hold that foreign-created alimony and support obligations are enforceable in this state. In an action to enforce a modifiable support obligation, either party may tender and litigate any plea for modification that could be presented to the courts of the state where the alimony or support decree was originally rendered.

The judgment is reversed.

GIBSON, C. J., and EDMONDS and CARTER, JJ., concur.

SPENCE, Justice.

I dissent.

This case is before us on rehearing. On the first hearing, no claim was made that the prior New Jersey decree for plaintiff's support was modifiable retroactively as well as prospectively. We therefore assumed in our first opinion that such support decree was a final judgment, and that it was "entitled to full faith and credit in California." Worthley v. Worthley, Cal., 267 P.2d 23, 25. Upon rehearing, it has been shown that the New Jersey support decree was not a final judgment for the reason that it was modifiable both retroactively and prospectively under the law of New Jersey. The majority opinion therefore concedes that "we are not constitutionally bound to enforce defendant's obligations under it", but it holds that the trial court should have enforced the New Jersey decree with such modifications as might have appeared proper. I cannot concur in these views.

Prior to the decision in the present case, this state has never sanctioned the modification by its courts of any decree of a sister state for the support of a wife. Biewend v. Biewend, 17 Cal.2d 108, 109 P.2d 701, 132 A.L.R. 1264; Handschy v. Handschy, 32 Cal.App.2d 504, 90 P.2d 123; Barns v. Barns, 9 Cal.App.2d 427, 50 P.2d 463. I would adhere to the established law of this state and avoid the confusion which is bound to result from the disapproval of the above-cited cases. See Barns v. Barns, supra, 9 Cal.App.2d 430, 50 P.2d 464, 465.

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[3] Code Civ.Proc. § 1654: "The remedies provided in this title [the Uniform Reciprocal Enforcement of Support Act] are in addition to and not in substitution for any other remedies."

Furthermore, the New Jersey judgment which plaintiff seeks to enforce in California is modifiable retroactively, as well as prospectively, under the law of New Jersey; but the majority opinion nevertheless requires its enforcement and modification by the courts of this state. This will result in confusion worse confounded, as the courts of each of several states, including New Jersey, might be called upon to modify the same decree, both retroactively as well as prospectively. In my opinion, the New Jersey decree, until made final by the courts of that state, is based upon shifting sands, which furnish no firm foundation upon which to predicate a judgment in any other jurisdiction.

The courts of New York dealt with a similar New Jersey decree in 1948. Champey v. Champey, Sup., 80 N.Y.S.2d 206. The wife there sought to enforce the New Jersey decree in the courts of New York. The judgment in favor of the wife was reversed by the Supreme Court, Appellate Division, and it said: "This action could not be maintained until the amount of the arrears accruing under the decree obtained in New Jersey, was definitely fixed by the courts of that state. This was not done here. Madden v. Madden, 136 N.J.Eq. 132, 40 A.2d 611." The wife then had the amount fixed by the New Jersey court and thereafter obtained enforcement of such final judgment in the courts of New York. Champey v. Champey, Sup., 92 N.Y.S.2d 838.

With respect to the admittedly valid Nevada decree of divorce which followed after the New Jersey decree for support of the wife, this court has held that such a divorce decree terminates all rights to further payments under a prior decree for wife support, even though the prior support decree was entered in this state. Cardinale v. Cardinale, 8 Cal.2d 762, 68 P.2d 351. The majority does not mention the Cardinale case. It seems illogical to me for this court to hold that the trial courts here must enforce, as a matter of comity, a prior New Jersey support decree which is modifiable both retroactively and prospectively, when it held in the Cardinale case that it would not enforce, under similar circumstances, a prior California support decree which was modifiable only prospectively.

Certain cases cited in the majority opinion are clearly distinguishable. They involved in effect the modification by our courts of foreign decrees with respect to the custody and support of children who had become domiciled in this state. Such matters as custody and support of children are not subject to binding contracts between the parents, no final judgment is ever entered anywhere with respect to such custody and support, and the state where the children may become domiciled has a paramount interest in the welfare of such children.

The majority opinion makes reference to the Uniform Reciprocal Enforcement of Support Act. Code Civ.Proc. §§ 1650–1690. A reading of that act shows that it has no bearing on the problem before us. It sets up certain procedures for criminal and civil enforcement, but when the civil procedures are followed and this state acts as a responding state, it makes its own initial determination of the amount of support to be imposed. Code Civ.Proc. §§ 1682–1683.

Further, the majority assumes that the present law places a hardship on plaintiff "by requiring the plaintiff to return" to New Jersey to obtain a final judgment before seeking to enforce it here. There is nothing in the record to show that plaintiff is not still residing in New Jersey or that the law of New Jersey would require her actual presence for the purpose of obtaining such final judgment. It appears to me far better to require that the New Jersey decree should be made final in that state before the courts of this state should be compelled to attempt its enforcement or modification.

Under the cited cases, plaintiff has stated no cause of action for enforcement or modification of the New Jersey decree. The trial court therefore properly denied plaintiff any relief, and regardless of the ground upon which the trial court may have based its ruling, I would affirm the judgment.

SHENK and SCHAUER, JJ., concur.

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132 Cal.App.2d 809

Mildred E. MAWHINEY, Plaintiff and Appellant,

v.

SIGNAL TRUCKING CO., a corporation, Defendant and Respondent.

Civ. 20487.

District Court of Appeal, Second District, Division 3, California.

May 10, 1955.

Action against landowner, who had dug pit, installed shoring and engaged invitees to do work in pit, for injuries sustained when, after landowner's shoring had been removed by unknown persons, invitees' shoring collapsed, causing death to an invitee. The Superior Court, Los Angeles County, Eugene P. Fay, J., rendered judgment of nonsuit, and plaintiff appealed. The District Court of Appeal, Vallée, J., held that evidence whether landowner had had notice, actual or constructive, of the dangerous condition of the pit was insufficient to take issue of negligence to jury.

Judgment affirmed.

1. Negligence 🔑32(2.10), 52

Employee of contractor whom property owner engaged to work on premises was an invitee, to whom owner owed duty to use ordinary care to furnish a reasonably safe place to work, or to warn of danger.

2. Negligence 🔑48

Where dangerous condition on invitor's premises is brought about by natural wear and tear, or act of third person or of God, or by a cause which was not due to negligence of invitor or employees, invitor, to be liable to invitee, must have had either actual or constructive knowledge of dangerous condition or have been able by exercise of ordinary care to have discovered condition to involve an unreasonable risk, and his negligence in such cases is founded upon failure to exercise ordinary care in remedying defect after discovery or after a man of ordinary prudence should have discovered it.

3. Negligence 🔑32(1), 48, 66(1, 2)

Property owner is not an insurer of invitees' safety, and is liable for injuries suffered on premises only by reason of his superior knowledge of existing danger to invitees who may enter grounds while in ignorance of peril, and recovery cannot be had when owner or occupant has no knowledge of danger, where invitee has such knowledge, where danger is obvious, or where plaintiff is contributorily negligent.

4. Negligence 🔑52

An invitor is not required to give an invitee warning or notice of obvious danger, but is entitled to assume that invitee will perceive that which would be obvious to him upon the ordinary use of his own senses.

5. Negligence 🔑56(3)

An action for damages may not be founded upon negligence arising out of violation of a statutory duty unless such violation is proximate cause of injury.

6. Negligence 🔑56(3)

Where landowner dug pit on premises and installed shoring therein, and engaged invitees to do work in pit, and shoring was removed by unknown persons and invitees installed own shoring, which collapsed, causing injury, landowner's alleged violation of code provision creating specifications for shoring was not proximate cause of injury, and liability could not be predicated thereon.

7. Negligence ⚷136(16)

In action for injuries sustained by invitees who had been engaged to do work by landowner in pit which landowner had dug and in which landowner had installed shoring, for injuries sustained when, after landowner's shoring had been removed by unknown person, shoring which invitees installed collapsed, evidence whether landowner had had notice, actual or constructive, of dangerous condition of the pit was insufficient to take issue of negligence to jury.

8. Evidence ⚷513(1)

In action against landowner, who had dug pit, installed shoring and engaged invitees to do work therein, for injuries sustained when, after landowner's shoring had been removed by unknown persons, invitees' shoring collapsed causing injury, trial court properly refused to permit plaintiff to ask of expert witness a hypothetical question concerning adequacy of shoring installed by landowner.

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Hahn, Ross & Saunders, Los Angeles, for appellant.

Crider, Tilson & Ruppé and Elber H. Tilson, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by plaintiff from a judgment of nonsuit in an action for the alleged wrongful death of her husband, Shelley Mawhiney.

Defendant, a trucker, operated an 11-acre depot for servicing and storing its trucks. Defendant hired Higbie as a contractor to connect gasoline storage tanks, which were buried about 9 feet under ground, with pumps to be installed by defendant. Mawhiney was an employee of Higbie. Defendant and Higbie agreed that defendant would do the digging down to where the valves at the top of the storage tanks would be exposed and that when the digging was completed, Higbie would be notified and proceed with the work.

Defendant's employees dug the excavation which was in the shape of a teardrop: about 15 to 20 feet long and varying in width from 4 to 8 feet. It was from 6 to 9 feet deep. At one end there was a 6 foot square concrete pit or box through the near wall of which the piping from the tanks was to be inserted so as to connect with the pumps. The entire area was fill. The surface consisted of about 3 inches of blacktop. Under this there was a 6-inch layer of decomposed granite followed by 2 or 3 more inches of blacktop. Below was fill material.

The excavation was completed and shoring was installed by defendant on March 31, 1952. The shoring consisted of four vertical 2-inch by 6-inch planks, each 4 or 5 feet long, placed on each side of the excavation; the vertical planks were placed about 3 feet apart and the top of each plank was about 6 to 9 inches from the top of the trench; on each side of the excavation a 2-inch by 6-inch plank was installed so as to run along the verticals; crosspieces or braces, 2 inches by 6 inches, were installed across the width of the trench so that each end butted against a vertical plank on each side of the trench; there were the same number of crosspieces as verticals; the crosspieces were cut long and driven into place with a sledge hammer so that the entire shoring was held intact. No sheeting was installed. Wilson, defendant's superintendent, frequently checked the progress of the excavation and inspected the shoring after it was finished.

On March 31 Higbie was notified the excavation was completed. He examined it and the shoring that day. The next day, Vickery, Higbie's foreman, and Oldfield, Higbie's employee, worked in the excavation connecting a pipe on the south side. The shoring remained in place all day. No loose dirt fell into the excavation. Wilson inspected the progress of the work about three times on April 1. When Vickery and Oldfield left at 4:30 p. m. on

April 1, the shoring was intact as described above.

On the morning of April 2, Mawhiney substituted for Oldfied as Vickery's helper. When they arrived at the job they found that there was no shoring in the excavation; it had been entirely removed. There was no evidence as to who removed it. Neither man notified defendant the shoring was missing, nor did either of them request defendant to replace it. Vickery testified he asked Mawhiney to get him some boards and "we would put two temporary braces merely as safety, because it looked safe to me. I supervised and put them in myself, the two shoring boards that were installed that morning"; they put up "safety timbers," not cribbing or shoring; they did not duplicate the cribbing or shoring that had been in there the day before; "whatever lumber or timber or bracing or whatnot was in the hole at the time that the accident occurred was put in there by" Vickery and Mawhiney; the timbers were "to keep this small stuff from coming down on your feet and legs, we weren't afraid of the place." The "safety timbers" described by Vickery were two 1-inch by 6-inch planks installed in a vertical position on each side of the east end of the excavation near the cement pit in which the pumps were to be installed, about 4 to 5 feet apart. Two 2-inch by 6-inch planks were installed as crosspieces between the vertical planks, and across the width of the hole. The crosspieces were not put in with a sledge hammer; they were pushed in by hand. The wood used by Vickery was found by Mawhiney outside the excavation. Neither Vickery nor Mawhiney asked anyone for additional shoring. They worked up to the time of the accident with the shoring just described.

Wilson visited the excavation for a few minutes during the morning of April 2. He did not notice anything different about the shoring; it appeared the same as it was the day before. Neither Vickery nor Mawhiney said anything to him about its having been removed.

The accident occurred about 12:45 p. m. on April 2. Before Vickery and Mawhiney started work after lunch, they checked the lumber in the hole and found it as they had placed it. At the time of the accident Vickery was inside the cement pit connecting a pipe to the pump; Mawhiney was in the excavation holding the pipe with a wrench. The first notice that Vickery had of the accident was the sound of wood breaking. He later found that the ladder, which was adjacent to the cement pit and adjacent to the temporary shoring, had broken as well as one of the 1-inch by 6-inch planks he had installed. He also found that a chunk of material about a cubic yard in size had broken from the north side of the trench from a point where his temporary shoring had been installed and had fallen on Mawhiney, causing his immediate death. The chunk consisted of the upper portion of the side of the excavation, the blacktop, decomposed granite, and other material above the fill.

It was stipulated that defendant's premises were fenced in, a night watchman was on duty, and only authorized persons were allowed on the grounds.

The nonsuit was granted on the ground there was no proof of negligence.

Plaintiff contends it was a question for the jury to decide whether defendant took the steps that could be reasonably expected of it to render safe the excavation in which Mawhiney was working.

[1-4] Mawhiney was an invitee of defendant and it was its duty to use ordinary care to furnish him a reasonably safe place within which to work, or to warn of danger. Raber v. Tumin, 36 Cal.2d 654, 658, 226 P.2d 574; Revels v. Southern California Edison Co., 113 Cal.App.2d 673, 678-679, 248 P.2d 986; Oldham v. Atchison, T. & S. F. Ry. Co., 85 Cal.App.2d 214, 218, 192 P.2d 516. Where the dangerous condition was brought about by natural wear and tear, or an act of a third person, or an act of God, or by a cause which was not due to the negligence of the owner or his employees, then to impose liability on the owner he must have had either

actual or constructive knowledge of the dangerous condition or have been able by the exercise of ordinary care to have discovered the condition which, if known to him, he should have realized as involving an unreasonable risk to invitees on his premises. His negligence in such cases is founded upon his failure to exercise ordinary care in remedying the defect after he has discovered it or as a man of ordinary prudence should have discovered it. Hatfield v. Levy Brothers, 18 Cal.2d 798, 806, 117 P.2d 841. The owner of property is not an insurer of the safety of his invitees. He becomes liable for their injuries suffered on his property solely by reason of his superior knowledge of the existing danger to invitees who may enter his grounds while in ignorance of the peril. Perbost v. San Marino Hall-School for Girls, 88 Cal.App.2d 796, 803, 199 P.2d 701. A recovery cannot be had when the owner or occupant has no knowledge of the danger, where the plaintiff has such knowledge, where the danger is obvious, or where the plaintiff is guilty of contributory negligence. Solen v. Singer, 89 Cal.App.2d 708, 714, 201 P.2d 869. An invitor is not required to give an invitee warning or notice of obvious danger but is entitled to assume that the invitee will perceive that which would be obvious to him upon the ordinary use of his own senses. Delk v. Mobilhomes, Inc., 118 Cal.App.2d 529, 532, 258 P.2d 75.

Defendant concedes it had the duty to exercise ordinary care to provide Mawhiney with a reasonably safe place to work. It claims it did so; that when it turned the excavation over to Higbie on April 1, the hole was in a reasonably safe condition for the performance of the work to be done by Mawhiney and other laborers.

Plaintiff and defendant agree that it was defendant's duty to install shoring in the excavation. Defendant did shore the trench; whether this shoring was adequate is not material because it was removed before the accident. The sufficiency of defendant's shoring is a moot question; no one can say whether the accident would have occurred if it had remained in the excavation. Plaintiff argues that "the removal of the shoring must have been done" by defendant's personnel because defendant's premises were fenced in, a watchman was on duty, and only authorized personnel were allowed on its grounds. On the basis of this assumed inference, she then claims it may be presumed that defendant had notice of the dangerous condition of the trench and that it consequently had the duty to restore sufficient safeguards to protect invitees.

Plaintiff's assumed inference as to who removed the original shoring is mere speculation. There is no evidence as to the identity of the persons who removed the shoring. The record is void of any such evidence. Only Vickery, Mawhiney, and the witness Gater, who was an employee of an electric company that had a maintenance contract with defendant and who was working near the excavation on the day of the accident, knew of the removal of defendant's shoring material; but none of them brought this information to the attention of defendant. When Wilson stopped at the trench the shoring installed by Vickery and Mawhiney was in place; it appeared the same as it was the day before; and he did not notice any difference. Neither Vickery nor Mawhiney said anything to him about the removal of the original shoring. Plaintiff does not contend that defendant received notice of the removal of its shoring through Wilson's visit to the excavation, after Vickery and Mawhiney had installed "safety timbers," the morning of April 2. She asserts the shoring installed by Vickery and Mawhiney was substantially the same as that originally constructed by defendant. If the substituted shoring was the same as that installed by defendant, it cannot be reasonably inferred that Wilson would have been able to detect the difference during the short time that he visited—he did not come to inspect—the excavation. There was no evidence that defendant or any of its employees had notice, actual or constructive, of the dangerous condition of the excavation prior to the accident.

[5, 6] Plaintiff further contends defendant was negligent as a matter of law. She

claims defendant did not comply with the specifications of sections 8110 to 8112 of the Administrative Code relative to sheet-piling and shoring, and that violation of these safety orders constitutes negligence per se. This contention ignores the fact that none of defendant's shoring was in the trench at the time of the accident. If defendant's shoring had remained in the excavation and it had collapsed, then the question of compliance with safety orders and the construction of shoring in accordance with sound practices would have been material factors in this case. If it be assumed that defendant's shoring was constructed in violation of the safety orders, this would not establish liability on the part of defendant. An action for damages may not be founded upon negligence arising out of the violation of a statutory duty, unless such violation is a proximate cause of the injury. Sweet v. Los Angeles Railway Co., 79 Cal. App.2d 195, 200, 179 P.2d 824; Friedman v. Pacific Outdoor Advertising Co., 74 Cal. App.2d 946, 951–952, 170 P.2d 67; 19 Cal. Jur. 636, § 67. The faulty shoring which caused the accident was installed by Vickery and Mawhiney, Higbie's employees, not by defendant.

[7] The evidence was insufficient to warrant submission of the question of negligence to the jury.

[8] Plaintiff claims the court erred in sustaining defendant's objection to a hypothetical question she asked her expert witness. The purpose of the question and of plaintiff's offer of proof was to show that the shoring installed by defendant was inadequate. There was no error. As we have seen, the adequacy of defendant's shoring was immaterial. The accident was not caused by reason of the inadequacy of that shoring. The opinion of the expert would have been material only if defendant's shoring had been in the excavation at the time of the accident and had given way.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

G. MATHYS, Plaintiff and Appellant,
v.
Richard H. TURNER, also known as R. H. Turner, Defendant and Respondent.
Civ. 20426.

District Court of Appeal, Second District, Division 3, California.

May 10, 1955.

Hearing Granted July 6, 1955. *

Action was brought to recover for legal services rendered to defendant by plaintiff's assignor and for costs incurred by plaintiff's assignor in employing investigators. The Superior Court of Los Angeles County, Clarence M. Hanson, J., entered judgment for plaintiff for an allegedly inadequate amount, and the plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that the Superior Court did not abuse its discretion in determining value of legal services rendered in connection with paternity suit.

Judgment affirmed.

1. Appeal and Error 🔑219(2)

Where plaintiff, in action to recover for legal services rendered to defendant by plaintiff's assignor and for costs incurred by plaintiff's assignor in employing investigators, did not request trial court to make separate findings as to costs and attorney's fees, it was too late to urge the objection on appeal that separate findings should have been made as to costs and attorney's fees. West's Ann.Code Civ.Proc. § 634.

2. Attorney and Client 🔑140
Evidence 🔑574

In evaluating services of attorney, court is not required to receive expert testimony nor is it bound by opinions expressed by experts, even though they be uncontradicted.

3. Attorney and Client 🔑140

Question of reasonable value of legal services was a factual one and was largely within discretion of trial court.

4. Appeal and Error 🔑984(5)

Where question of reasonable value of legal services was a factual question, question on appeal was only whether there was a manifest abuse of discretion by trial court in determining reasonable value of legal services.

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* Opinion vacated 294 P.2d 947.

5. Attorney and Client ⚷141

Trial court did not abuse its discretion in allowing only $1,500 for legal services and costs in connection with a paternity suit.

6. Attorney and Client ⚷140

The value of an attorney's services is not always to be determined by amount of time devoted to the work.

7. Attorney and Client ⚷140

Even if there be no question as to time expended by attorney in rendering legal services, court must determine time necessarily and profitably expended by attorney and should make no allowance for that which was excessive.

◆

S. V. O. Prichard, Beverly Hills, for appellant.

Algerdas N. Cheleden, Los Angeles, for respondent.

SHINN, Presiding Justice.

This is an action in which the plaintiff as assignee of one Bernard B. Laven sought recovery of $10,905.10 under separate causes of action, the first an express promise to pay $10,000 to Mr. Laven for legal services, the second for the reasonable value of the services in the sum of $10,000. In each cause of action it was alleged that Mr. Laven had expended $905.10 in connection with certain litigation at the special instance and request of defendant. The court awarded plaintiff $1,500 "including services and costs." Plaintiff appeals.

[1] The first point on the appeal is that the court should have made separate findings as to the amount allowed for costs and the amount awarded as attorney's fees. The appellant argues at length that it is impossible for this court to know how much was allowed as attorney's fees. There would be merit in this point if the objection had not been waived by plaintiff. The minutes of the court show that the court announced its judgment in favor of plaintiff in the sum of $1,500 and ordered "findings may be submitted by both parties." The record does not show whether the court signed the plaintiff's findings or those of the defendant. We may assume, however, as a fact most favorable to the plaintiff, that the findings are those submitted by the defendant. It does not appear in the record nor is it stated in the plaintiff's briefs that plaintiff requested the court to make separate findings as to costs and attorney's fees. Section 634 of the Code of Civil Procedure requires that proposed findings be served; that objection thereto may be made within five days and that the court shall not sign findings until the lapse of that time. The purpose is to allow objections to the findings as proposed and to request other or different findings. We think the present case presents a classical illustration of the propriety of that procedure. Had the plaintiff raised the point in the trial court that he raises here, it is altogether likely that the court would have made separate findings. It is now too late to urge the objection. Estate of Wacholder, 76 Cal.App.2d 452, 456, 457, 173 P.2d 359; Del Ruth v. Del Ruth, 75 Cal.App.2d 638, 644, 645, 171 P.2d 34; Tooke v. Allen, 85 Cal.App.2d 230, 238, 239, 192 P.2d 804.

The remaining point is that regardless of the amount allowed as costs the balance was as a matter of law wholly disproportionate to the value of the services rendered and grossly inadequate. Although plaintiff's briefs recite in full detail the history of the litigation in which the services of Mr. Laven were employed, a general statement will suffice. In October 1951, Mildred Barath, who was also known under other names, accused Mr. Turner of being the father of her recently born child and an action for support was brought by the child. Mr. Laven was employed to defend that action. In the early stages of the litigation Mr. Turner was ordered to pay $100 per month pendente lite for the child's support and $750 as attorney's fees. Mr. Turner is a Caucasian. He contended that Mildred had been married to a Mr. Johns, a Negro, and that she claimed she was not wholly Caucasian. Mr. Turner and Mr. Laven engaged the services of investigators and as a result of the investigation there was discovered the record of Mildred's marriage to James Cecil Johns. On production of this record, and on motion, the court vacated its previous order for support of the child. The paternity suit was never tried. Mr. Laven was replaced by other counsel and the child's demand was settled for $2,000.

Mr. Laven testified he spent more than 300 hours in working on the case. The court found that at all times he was an Assistant United States Attorney receiving a salary of $6,500 per year, working from 8:30 in the morning to 5:00 in the afternoon, and having the privilege of practicing law in addition to these duties. During the time of his employment he was paid $3,685 as attorney's fees and costs but the court found that the costs were not segregated from the attorney's fees. It thus appears that the allowance of $1,500 would bring the amount paid to Mr. Laven to $5,185, inclusive of monies expended by him in the course of the litigation. In addition to that amount Turner paid $2,000 to two investigators and $1,800 to another. The litigation therefore cost him $8,985, which would not include any fees paid to the attorney who followed Mr. Laven and effected a settlement nor the $2,000 paid in the settlement, nor the $100 per month which was paid pendente lite. While some of these facts were collateral to the principal question of the value of Mr. Laven's services, the court could scarcely have been expected to overlook the fact that at a cost of around $13,000 Mr. Turner's acquaintanceship with Mildred had been an expensive one.

Eminent lawyers called as plaintiff's experts appraised the value of Mr. Laven's services at a minimum of $10,000 upon which the sums paid him on account should be credited. While these opinions deserved and no doubt received the careful consideration of the court it has been observed that most experts expressing opinions as to the value of services whether the valuations be high or low gauge the value by what they consider their own services would have been worth under similar circumstances. The experienced trial judge no doubt evaluated the services of Mr. Laven upon a much broader and more impartial basis.

[2] It is well settled that in evaluating the services of an attorney the court is not required to receive expert testimony nor is it bound by the opinions expressed by the experts even though they be uncontradicted. Agnew v. Larson, 82 Cal.App.2d 176, 185 P.2d 851; Albertsworth v. Glens Falls Indemnity Co., 84 Cal.App.2d 816, 825, 192 P.2d 66; Joost v. Castel, 33 Cal.App.2d 138, 91 P.2d 172; 8 West's Cal. Digest, Attorney and Client, 🔑140, p. 614 and Vol. 21, Evidence, 🔑571(6), p. 642.

[3–7] The question of the reasonable value of the services was a factual one and the determination was largely within the discretion of the trial court. We have only the question whether there was a manifest abuse of that discretion. Biaggi v. Sawyer, 75 Cal.App.2d 105, 115, 170 P.2d 678. We see no abuse of discretion. Neither would we have considered it an abuse of discretion had the court allowed substantially more than the amount that was allowed. The value of an attorney's services is not always to be determined by the amount of time devoted to the work. Even if there be no question as to the time expended the court must determine the time that was necessarily and profitably expended and, of course, should make no allowance for that which was excessive. The court expressed the opinion that 300 hours was an excessive amount of time to spend on the case and this appears to have been a fair view to take of the matter. If the court believed that the litigation presented no great difficulty or complexity and that the service which was of greatest value to Mr. Turner lay in the investigation which resulted in the discovery of Mildred's marriage record, we would not find ourselves in disagreement.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

132 Cal.App.2d 800

Wallace LINVILLE, Plaintiff and Appellant,

v.

Madeline Patterson LINVILLE, Defendant and Respondent.

Civ. 20518.

District Court of Appeal, Second District, Division 1, California.

May 10, 1955.

Hearing Granted July 6, 1955.

Husband's action for divorce, wherein wife filed cross-complaint. The Superior Court, Los Angeles County, Burdette J. Daniels, J., rendered interlocutory judgment of divorce for the wife on ground of husband's cruelty and the husband appealed from portions of the judgment. The District Court of Appeal, Drapeau, J., held that evidence substantially supported the trial court's finding of an executed oral agreement transmuting the husband's separate property into community property.

Affirmed.

1. Appeal and Error ⚷989

In disposing of contention that findings are not supported by record, appellate court's power begins and ends with determination as to whether there is any substantial evidence to support findings.

2. Divorce ⚷253

In divorce case, whether statements of wife and conduct of husband indicated intent on part of husband to transmute his separate property into community interest with wife was question for trier of fact.

3. Husband and Wife ⚷266

All that is required to show executed oral agreement of transmutation of separate property into community property is proof of acts and conduct of parties in dealing with their property.

4. Contracts ⚷6

An "executory contract" is one in which some act remains to be done, while an "executed contract" is one in which everything is completed at time of agreement without outstanding promise calling for fulfillment by further act of either party.

See publication Words and Phrases, for other judicial constructions and definitions of "Executed Contract" and "Executory Contract".

5. Husband and Wife ⚷264

Evidence presented in divorce case substantially supported trial court's finding of executed oral agreement transmuting husband's separate property into community property.

6. Divorce ⚷235, 308

Where husband was receiving $400 per month salary and would earn from $200 to $300 per month editing a journal and was receiving substantial monthly rentals from several properties he owned, action of trial court in allowing alimony of $100 per month and $300 per month for support of three minor children was proper exercise of trial court's discretion.

John C. Goff and Robert L. Moore, Los Angeles, for appellant.

George H. Pratt, Los Angeles, for respondent.

DRAPEAU, Justice.

Plaintiff husband sought a divorce from defendant. Defendant answered and filed a cross-complaint for divorce. Both alleged cruelty on the part of the other.

The trial court found that plaintiff treated defendant in a cruel and inhuman manner without cause; that the ranch home of the family in Baldwin Park was purchased with funds which were originally the separate property of plaintiff, but that it had been transmuted into community property by an executed oral agreement of the parties; that plaintiff is able to pay $100 per month for the support of each of the three minor children and $100 per month for the support of defendant; and that defendant is a fit and proper person to have custody and care of said children.

In accordance with such findings, the court awarded to defendant:

(1) a divorce on her cross-complaint;

(2) the custody of the minor children;

(3) the Baldwin Park residence as her separate property; and ordered plaintiff to pay $400 per month for support of the children and defendant wife.

Plaintiff appeals from those portions of the interlocutory judgment of divorce which (1) decrees that the Baldwin Park property is community property and awards it to defendant; and (2) orders him to pay $400 per month for support and alimony.

It is first urged that the evidence fails to establish an oral agreement transmuting appellant's separate funds into community property. In other words, that the finding respecting such agreement is not supported by the record.

[1] "In disposing of such a contention, this court's power begins and ends with a determination as to whether there is any substantial evidence to support the findings." Estate of Raphael, 91 Cal.App.2d 931, 936, 206 P.2d 391, 393.

Respondent testified that the Baldwin Park ranch was acquired in April of 1944, and that in discussing the venture she asked appellant: "Is this going to be our house and our home? Is it going to be our property, or is it going to be the way it has always been, where everything is supposed to be yours?" And appellant answered: "It will be ours."

In 1947, appellant was having some difficulty with his business and thought of selling the home. Respondent told him that rather than sell it, she would teach school. She said: "It is our house * * *. It is my house, and I want to go into it, and teach school so we can keep the house * * * he agreed that if I wanted to do that, that was all right. * * * I taught school for six years."

In 1951, the house was in need of repairs. Respondent discussed this with appellant who said he could not afford to do it then. Respondent offered to get a loan and pay it off, because "it was our house, our property, and I didn't want to lose it." Appellant agreed. Respondent borrowed $2,400; they both signed the note and respondent paid it off.

Respondent's brother testified that he discussed the Baldwin Park property with appellant. They agreed that it was a very attractive place, but appellant thought it should be sold. When the witness asked him why he did not sell it, appellant replied: "Madeline has an interest in this property. I have to respect her voice, and she doesn't want to sell it."

Appellant denied in its entirety, all the testimony of respondent hereinbefore summarized, except that respondent signed the note for the repair loan and made the payments thereon. He also denied that he ever had any conversation with respondent's brother in which he discussed the sale of the property.

[2] Whether the statements of respondent and the conduct of appellant indicated an intent on the part of the latter to transmute his separate property into a community interest with respondent was a question for the trier of fact. Marvin v. Marvin, 46 Cal.App.2d 551, 557, 116 P.2d 151; Nevins v. Nevins, 129 Cal.App.2d 150, 276 P.2d 655.

[3, 4] As stated in Estate of Raphael, 91 Cal.App.2d 931, 939, 206 P.2d 391, 395: "All that is required to show an executed oral agreement of transmutation is proof of the parties' acts and conduct in dealing with their property. Kenney v. Kenney, supra, [220 Cal. 134, 30 P.2d 398]. In an executory contract some act remains to be done, while in an executed contract everything is completed at the time of the agreement without any outstanding promise calling for fulfillment by the further act of either party. Mather v. Mather, 25 Cal.2d 582, 154 P.2d 684. The object of the oral agreement of transmutation was fully performed when the agreement was made for it immediately transmuted and converted the separate property of each spouse into community property, and nothing further remained to be done."

In the cited case, the widow Raphael testified that decedent told her "'we were partners * * * and we had to file taxes, and he said that everything he had was mine, and everything I had was his; that we were partners in everything, and everything was fifty-fifty’ ”.

Other cases in which testimony of an oral agreement was held to constitute sufficient proof to support a finding that separate property had been transmuted into community property were referred to in the Raphael case:

Kenney v. Kenney, 220 Cal. 134, 30 P.2d 398, where the husband testified that the parties had orally agreed, both before and after marriage, that all property then owned by them or subsequently acquired was to belong to them equally or “fifty-fifty.”

Stice v. Stice, 81 Cal.App.2d 792, 798, 185 P.2d 402, 406, in which the wife testified that the husband “ ‘always said that everything we had was community property—belonged to both of us’ ”, and that “ ‘he said it hundreds of times’ ”.

Durrell v. Bacon, 138 Cal.App. 396, 398, 32 P.2d 644, 645, where the husband testified that his wife, who had separate property, told him “ ‘ “what is mine is yours and what is yours is mine * * * this money will go into a home for us; it is just as much yours as mine.” ’ ”

And as stated in Estate of Sill, 121 Cal. App. 202, 204, 9 P.2d 243, 244:

“It clearly appears * * * that the agreement or understanding between the parties is not required to be in any particular words and need not be attended with any particular formality as long as it may be fairly inferred from all of the circumstances in evidence that a community interest was intended by the parties.” In the Sill case, the words used were: “ ‘It is just as much yours as it is mine; this is our home.’ ”

See also Faust v. Faust, 91 Cal.App.2d 304, 308, 204 P.2d 906.

[5] Tested by the foregoing principles, it is clear that the evidence presented substantially supports the trial court’s finding of an executed oral agreement transmuting separate property into community property.

[6] Appellant also contends that the amounts awarded for alimony and child support are so grossly excessive as to constitute an abuse of discretion by the trial court.

Appellant testified at the trial that he was receiving $400 per month salary from Western Highway Institute. He also estimated that he would earn from two to three hundred dollars per month editing the Journal for Petroleum Educational Institute. In addition, appellant testified that he was receiving substantial monthly rentals from several other properties owned by him.

In the circumstances, the allowance of alimony in the sum of $100 per month, and $300 per month for the support of the three minor children constituted a proper exercise of the discretion lodged with the trial court.

For the reasons stated, the judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

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132 Cal.App.2d 783

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
Lawrence C. VALDEZ, Defendant and Appellant.
Crim. 885.

District Court of Appeal, Fourth District, California.
May 6, 1955.

Defendant was convicted of possession of heroin. The Superior Court, Fresno County, Milo Popovich, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Griffin, J., held that evidence was sufficient to entitle defendant to have question of his claimed entrapment submitted to jury, and trial court’s refusal of defendant’s offered instruction on question of entrapment was error requiring reversal.

Reversed and new trial ordered.

Criminal Law ⟹739(1), 772(6), 1173(2)

In prosecution for possession of heroin, evidence was sufficient to entitle defendant to have question of his claimed entrapment submitted to jury, and trial court's refusal of defendant's offered instructions on question of entrapment was error requiring reversal. Health and Safety Code, § 11,500.

◆

Annette La Rue, Fresno, for appellant.

Edmund G. Brown, Atty. Gen., James D. Loebl, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant and appellant was convicted by a jury of the crime of violating section 11500 of the Health and Safety Code (possession of heroin). He was committed to state's prison.

The facts show that on March 26, 1954, two police officers went to defendant's apartment in Fresno, knocked at the door, and entered after defendant opened it, showed their identification, and searched the two-room apartment consisting of a bedroom and kitchen which were occupied by defendant, his pregnant wife, and four children. A package was found on a shelf in the kitchen containing seven little bindles of heroin. The officers asked defendant about it and at first he denied any knowledge of it or its contents. After further questioning, he said: "Well, it's mine. I bought it from some fellow in Chinatown. * * * It contains heroin." He was asked if he used heroin and defendant answered: "I sniff it." The contents of the bindles were found to contain, in the aggregate, seven grains of diacetyl morphine, commonly known as heroin. Defendant admitted he had no prescription for its possession or use.

On the witness stand defendant admitted having the bindles and that he told the officers he knew they contained heroin, but then claimed his statements to them at the time of arrest were false; that in fact he found the package some 30 days prior thereto, behind a loose panel in the wall in the public bathroom which was down and across the hall from his apartment, and which was used by other occupants of the apartment house; that after he discovered it he just left it there; that sometime later one Peemy came to his apartment in reference to a ride to Huron, a nearby town, and told defendant he had just been released from jail; that he refused to give him the ride; that a few weeks later this same person was coming down the stairs in the apartment house, stopped defendant, and inquired if a certain young lady by the name of "Angie" lived there; that he told him he would inquire about it; that he, defendant, went to the bathroom, obtained the package, took it to his apartment door, told Peemy of his previous find, and asked him if he knew what it was; that Peemy said he did; that it was dope; that he was a user of it; and that he called it "medicine"; that he told Peemy it was not his and he could not give him any of it; that after Peemy left he returned the package to its place in the bathroom and had nothing to do with it thereafter; that on March 26, about 9:30 a. m. Peemy returned to his apartment, aroused him from his sleep, and insisted on having some of that "medicine"; that defendant told him he had thrown it away; that he would not have given him any, anyhow; that after some further insistence that he was sick and needed some of that "medicine" that defendant showed him on a previous occasion, and after he made some promises about giving defendant some presents, tires, etc. (which promises defendant did not believe), he went to the bathroom, down the hall, to see if the package was still there; that he found it was, and returned it to his apartment, and to get rid of him he gave him one bindle from the package and temporarily placed the other bindles in his (defendant's) pocket; that Peemy then left the apartment and about 15 minutes later the officers knocked at the door and he (defendant) then removed the package from his pocket and placed the seven bindles on the kitchen shelf and allowed the officers to come in and search the place; that he told a different story to the officers at that time because he was afraid they were going to take his wife to jail to search her, and because she was in this country as an "illegal alien".

On cross-examination of the officers it was brought out by counsel for defendant that Peemy was an undercover agent acting for the arresting officers; that on a previous occasion Peemy was sent to defendant's apartment and he purchased one bindle of heroin for $7; that on the day of arrest he was endeavoring to obtain some more, under the officer's instructions; that when Peemy left defendant's apartment that morning the officers were in the vicinity and knew of his visitation; that they entered about 15 minutes after Peemy left and found the package as indicated. Peemy was not a witness at the trial and there was no testimony to contradict the story of defendant about the package being in the bathroom when the undercover agent asked defendant for some of its contents.

As we construe the argument of counsel for defendant on appeal, it is her contention that if defendant was a possessor of the narcotics on the two instances prior to March 26, as related by defendant, this possession was cured by abandonment and therefore defendant thereafter did not have possession of it on March 26, prior to the visitation of the police informant, citing People v. Noland, 61 Cal.App.2d 364, 143 P.2d 86, 87, wherein it is said: "A person has 'possession' of a chattel who has physical control with the intent to exercise such control, or, having had such physical control, has not *abandoned* it and no other person has obtained possession." (Italics ours); and 1 Cal.Jur.2d p. 2, sec. 2. It is therefore contended that if defendant was in possession of it on March 26th, it was only because he was induced by Peemy to take possession of it again through the trickery and entrapment of Peemy and the officers.

Of course the jury was not bound to believe the testimony of defendant that the package was in the bathroom at any time. It might well have believed that the package remained in his apartment during the entire period. Although there may be considerable doubt about defendant's story, the factual question should have been submitted to the jury under proper instructions. The trial court refused to give two of defendant's proffered instructions on the question of entrapment offered in the general language of CALJIC No. 851, to the effect that the law will not tolerate a person, particularly a law-enforcement officer, to generate in the mind of another person who is innocent of any criminal purpose, the original intent to commit a crime thus entrapping such person into the commission of a crime which he would not have committed or even contemplated but for such inducement.

Apparently, the prosecution offered an instruction on the same subject, which was also refused in view of the court's refusal to give defendant's proffered instructions.

Defendant admitted temporary possession of the package. His sole defense, at the trial and in the argument to the jury, was that he was entrapped into taking possession of the heroin on March 26th, after he had abandoned such prior possession on a previous date. The legal principles involved in People v. Gallagher, 107 Cal. App. 425, 290 P. 504, are quite similar to the instant case. There the informer and drug addict, a known peddler of drugs, approached defendant and asked him if he wanted to buy a drug, and quoted the price. The defendant was told by the informer that he did not have it with him but suggested that defendant play around for about a half hour and come back, and that in front of an apartment house which the informer pointed out the defendant would find the drug in a can lying alongside the curb. Defendant followed these directions and when he drove up in front of the apartment house by the curb he picked up the can with the drug in it and was arrested by the officers who had secured the informer to sell the drug to the defendant. The informer did not testify at the trial but on cross-examination of the officers these facts were brought out. The defendant was charged with illegal possession of the morphine. At the trial the court refused to give an instruction on the defense of entrapment. On appeal from the conviction it was said that it was doubtless the law, as respondent contends, that the trial court should refuse to give an instruction as to any theory which is not supported by substantial evidence, but it is also well settled that a defendant is entitled to an instruction based on the theory of his defense, providing such instruction correctly states the law, and the defense is supported by substantial evidence, citing cases. It was held that the defendant's testimony, if true, when considered along with the circumstances revealed on cross-examination of the officers, was legally sufficient to justify a reasonable inference that he was the victim of an entrapment and that being so he was clearly entitled to the benefit of an instruction upon that doctrine. It quoted People v. Lawlor, 21 Cal.App. 63, 131 P. 63, to the effect that "the failure of the court to charge, at the request of the defendant upon any matter of law applicable to the facts of the case is tantamount to a misdirection of the jury." In that case it was the contention of defendant that the possession by him of the drug was brought about solely through the instrumentalities of the state's agent and those working under him, for the very purpose of causing his arrest. It was emphasized there that it was not to be understood that the court on appeal held that appellant's version of the transaction was true but that this was a question to be determined in the trial court and, if believed by the jury, it was legally sufficient to entitle him to the benefits of the doctrine of entrapment, and consequently the jury should have been instructed accordingly. We are unable to distinguish the legal principles there involved from those in the instant case if the jury should believe the defendant's testimony. At least the defendant was entitled to have the question of his claimed entrapment submitted to the jury. See also In re Moore, 70 Cal.App. 483, 233 P. 805; People v. Lanzit, 70 Cal.App. 498, 233 P. 816; People v. Lopez, 118 Cal.App.2d 235, 257 P.2d 670; 14 Cal.Jur.2d p. 449, sec. 205; People v. Bradford, 84 Cal.App. 707, 258 P. 660; People v. Makovsky, 3 Cal.2d 366, 44 P.2d 536; People v. Roberts, 40 Cal.2d 483, 254 P.2d 501. People v. Braddock, 41 Cal.2d 794, 264 P.2d 521, did not involve the question of the refusal of the trial court to give an instruction on the subject matter but whether or not the evidence showed entrapment as a matter of law.

The other claimed errors of the trial court in the reception of certain testimony may not become involved on a new trial.

Judgment and order reversed and a new trial ordered.

BARNARD, P. J., and MUSSELL, J., concur.

132 Cal.App.2d 805

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
William M. SMITH and Charles Durege, Defendants,

Charles Durege, Appellant.
Cr. 5270.

District Court of Appeal, Second District, Division 1, California.
May 10, 1955.

Defendant was convicted of first degree robbery. The Superior Court, Los Angeles County, Joe Raycraft, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Drapeau, J., held that where defendant, with three prior felony convictions, was positively identified by waitress as man who pointed his gun at her, ordered her to sit down, and ran out of cafe with man who took money from bartender, there was no miscarriage of justice and none of assigned errors would warrant reversal of judgment.

Judgment affirmed.

1. Criminal Law ⚷1186(4)

Where defendant in first-degree robbery prosecution, who had three prior felony convictions, was positively identified by waitress as man who pointed his gun at her, ordered her to sit down, and ran out of cafe with man who took money from bartender, there was no miscarriage of justice and none of assigned errors would warrant reversal of judgment. West's Ann. Const. art. 6, § 4½.

2. Criminal Law ⚷663

In prosecution for robbery, prosecuting officer had right to have defendant's revolver marked for identification.

3. Criminal Law ⚷785(16)

In robbery prosecution, instruction that testimony of one wilfully false in material part of his testimony should be viewed with distrust was proper. West's Ann.Code Civ. Proc. § 2061.

4. Criminal Law ⚷824(10)

Trial court need not of its own motion instruct jury that testimony of witness using notes to refresh his recollection should be viewed with caution

5. Criminal Law ⚷768(1), 810

In robbery prosecution, instruction that in criminal action it is advisable, in interest of both state and defendant, that verdict be returned, so that there may be early conclusion of case, was not inconsistent with other instructions in case, and was proper.

6. Criminal Law ⚷721½(1)

In robbery prosecution, action of assistant district attorney, in his argument to jury, in making statements relative to defendant's failure to explain or deny any evidence or facts in case against him, were restrained and fair and were not improper. West's Ann.Const. art. 1, § 13.

Charles Durege in pro. per.

Edmund G. Brown, Atty. Gen., and Jay L. Shavelson, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice.

A cafe in Long Beach was robbed at gun point. The time was shortly before midnight. A man held a loaded pistol on the bartender and made him give him the money in the cash register.

A waitress on duty, seeing what was going on, started away from there right now. She intended to make her escape out of a side door at the rear of the cafe. But she was intercepted by another man, who pointed a pistol at her, and told her to sit down and she wouldn't be hurt. This she did without any argument. She just sat there and looked at the man. Her observation enabled her to positively and unequivocally identify him later.

Then these two men ran out the same door the waitress had been heading for. As they were leaving they fired bullets from their revolvers into the ceiling of the cafe.

Both men were apprehended, charged with robbery first degree and with priors, tried together, convicted by a jury, and sentenced to the state penitentiary.

The man who held the gun on the bartender and who took the money did not appeal.

The other man, Charles Durege, filed a notice of appeal from the "sentence," and appears in this Court, as he did in the Superior Court, as his own lawyer.

His contentions on appeal are as follows:

1. That he was denied due process of law when this Court denied his motion to augment the record by adding to it the pamphlet of general instructions for jurors used in Los Angeles County.

2. That testimony that when he was arrested there was found on his person a 38-calibre revolver was inadmissible.

3. That it was misconduct for the assistant district attorney who tried the case to cause that particular revolver to be marked for identification, and to ask questions of witnesses about it.

4. That it was error for the trial court to admit evidence concerning this revolver "out of order."

5. That the trial court should have instructed the jury that the testimony of a witness who reads from a memorandum should be received with caution.

6. That the assistant district attorney was guilty of misconduct in his argument to the jury, in his references to defendant's failure to testify in his own behalf.

7. That defendant was compelled to testify falsely against himself.

8. That it was error for the court to give that part of a stock instruction usually given as the last instruction to a jury that "in a criminal action it is advisable, in the interests of both the state and the defendant, that a verdict be returned, so that there may be an early conclusion of the case."

9. That the instruction to the effect that a witness false in one part of his testimony is to be distrusted in others, as given, did not satisfy the law.

10. Other asserted errors in the reception of evidence.

Defendant overlooks that fundamental section of the Constitution of the State of California which provides that no judgment shall be set aside for misdirection of a jury, or for improper admission or rejection of evidence, or for any error as to any matter of procedure, unless, after an examination of the entire case, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. Constitution, Article VI, § 4½.

[1] This defendant, with three prior felony convictions, was positively identified by the waitress as the man who pointed his gun at her, ordered her to sit down, and ran out of the cafe with the man who took the money from the bartender. In the face of that testimony there was no miscarriage of justice in this case, and none of the things asserted to be errors by defendant would warrant a reversal of the judgment.

Notwithstanding this state of the case this Court has analyzed all of defendant's specifications of error and has found that not one of them has any legal merit, and that all of them taken together have no legal merit.

In People v. Lopez, 32 Cal.2d 673, 197 P.2d 757, 759, our Supreme Court considered the propriety of the use of the Los Angeles County pamphlet for the instruction of jurors, and held that it did not violate any rights of a defendant in a criminal case, but rather that it "should be of great assistance in securing to defendant a fair and impartial trial."

[2] The prosecuting officer in this case acted in good faith with the trial court, and in fairness to defendant, all through the trial. He had a right to have defendant's revolver marked for identification. People v. Beltowski, 71 Cal.App.2d 18, 162 P.2d 59. When it developed during the trial that that particular weapon, found on defendant's person when he was arrested, had been stolen by him in a burglary he committed after the robbery, it was not offered in evidence.

[3] Turning now to defendant's contentions relative to the instructions. These have been read. The jury was fully and fairly instructed upon all phases of the case. The instruction that the testimony of one wilfully false in a material part of his testimony should be viewed with distrust, as given, has been approved in many California cases. People v. Denton, 78 Cal.App.2d 540, 178 P.2d 524; Section 2061 of the Code of Civil Procedure; and see cases collected in West's Annotated California Codes, Code of Civil Procedure Section 2061, note 117.

[4] There is nothing in California law which requires a trial court of its own motion to instruct a jury that testimony of a witness using notes to refresh his recollection should be viewed with caution.

[5] The closing instruction was not inconsistent with other instructions in the case. And as given it has been repeatedly held proper. People v. Gidney, 10 Cal.2d 138, 73 P.2d 1186.

[6] The remarks of the assistant district attorney in his argument to the jury, relative to defendant's failure to explain or

deny any evidence or facts in the case against him were restrained and fair, and well within the rules of our criminal law. Article I, Section 13, Constitution; People v. Adamson, 27 Cal.2d 478, 165 P.2d 3, affirmed by the United States Supreme Court in Adamson v. People of the State of California, 332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903; People v. Levene, 107 Cal.App.2d 125, 236 P.2d 604.

There was no error in any rulings of the trial court respecting the admission of evidence.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

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132 Cal.App.2d 788

Noretta HALADA, by her guardian ad litem, Joseph R. Halada, Plaintiff and Appellant,

v.

VENICE LAKE PARK, Incorporated, Vern Willett, Does I to XII, and Roe Corporation, Defendants.

Venice Lake Park, Incorporated, and Walter L. Willette, Respondents.

Civ. 20740.

District Court of Appeal, Second District, Division 1, California.

May 9, 1955.

Hearing Denied July 6, 1955.

Action for personal injuries. The Superior Court of Los Angeles County, Newcomb Condee, J., entered judgment in favor of defendants and plaintiff appealed. The District Court of Appeal, Doran, J., held that trial judge committed reversible error in communicating to jury through bailiff the court's denial of jury's request for rereading of testimony, without consulting counsel who were present, where verdict was nine to three.

Judgment reversed.

1. Appeal and Error 🔑1069(1)
Trial 🔑313

In action for personal injuries, trial judge committed reversible error in communicating to jury through bailiff the court's denial of jury's request for rereading of testimony, without consulting counsel who were present, where verdict was nine to three.

2. Trial 🔑313

Where jury requested rereading of testimony, counsel, who were present, were entitled to be informed as to jury's request.

◆

Lynch & Reilly; Arthur M. Reilly, Los Angeles, for appellant.

Fulcher & Wynn; Carol G. Wynn, Los Angeles, for respondents.

DORAN, Justice.

This is an appeal from the judgment in favor of defendants.

The action is for personal injuries. Defendants are the owner and operators of a childrens amusement park. As recited in appellant's brief, "The defendants operated a concession where, for a consideration, children were offered an opportunity to ride a pony around a circular track. On that date (October 7, 1951) the plaintiff Noretta Halada, aged 12 years, accompanied by a friend, Rosalie Doering, aged 15 years, paid her money and was assigned one of the ponies. The only employee of the defendant on the premises was 15-year-old Pat Benninger.

"The only witnesses who testified directly as to the accident were the aforesaid Noretta Halada, Rosalie Doering, and Pat Benninger, the latter of whom gave his testimony by way of deposition, and there was a sharp conflict in the testimony of the two girls as opposed to that of Pat Benninger on every material detail of the occurrence."

The girls were riding horses, when, as testified by them, "Pat Benninger suddenly yelled at the horse and applied his whip, causing the horse to bolt forward to the right of the horse up ahead and between it and the fence which surrounded the track, causing Noretta Halada to strike her left leg against the other pony with sufficient force to snap it, whereupon she was thrown to the ground and, according to the girls, the horse which had been ridden by her continued running to the end of the track.

"All this was denied by Pat Benninger to the extent, among other things, that he denied having a whip or shouting at the ponies or having anything to do with their movements and placed himself on the near side of the 'mountain' at a distance of at least 25 feet to the side and front of the girls rather than behind them at the time of the accident when, he stated, the horse ridden by the plaintiff passed to the left of the horse in front and the plaintiff fell to the ground."

[1, 2] The issue as presented by appellant, "Is there a prejudicial irregularity requiring reversal of a judgment against the plaintiff in a personal injury action, where, after the jury has deliberated part of two days and is still deliberating during the afternoon of Good Friday, and there is every indication that there exists in the jury a serious disagreement as to liability, the trial court fails and refuses to hear the jury's request for further reading of the evidence in open court and communicates his refusal to the jury through the bailiff without consulting counsel who are present?"

The issue as presented by respondent is that, "The only issue presented by this appeal is whether or not a communication by the trial judge to the jury, through the agency of a bailiff, that the jury's request for a rereading of testimony cannot be granted because of illness of the Official Court Reporter, is reversible error."

The incident was by no means trivial, nor, was it unimportant. Counsel, who were present, were entitled to be informed as to the jury's request. Whether the outcome or the verdict would have been any different is beside the issue. The verdict was 9 to 3. In the circumstances, the action of the trial judge must be held, as a matter of law, to have been prejudicial.

The judgment is reversed.

WHITE, P. J., and DRAPEAU, J., concur.

132 Cal.App.2d 761

Katherine M. ATWOOD, Verge Crossman, Birdie Nephew, Noel Wright, Marie E. Marlar, substituted instead of Irvine F. Marlar, Harold Wright, W. B. Marlar, Hazel Eymann, John C. Wiseman, Frank K. Wiseman, Florence Morton, Newton Wiseman, Ellen Hedrick and Clarence Estes, Plaintiffs and Respondents,

and

Sue H. Clowdsley, Administratrix of the Estate of Newton Wiseman, Deceased, Gladys I. Selby, Administratrix of the Estate of John C. Wiseman, Deceased, Mary Freear, Administratrix of the Estate of Frank Wiseman, Deceased, and Jessie H. Cleveland, Administratrix of the Estate of Ellen Hedrick, Deceased, Supplemental Plaintiffs and Respondents,

v.

Andrew Ellsworth ELWOOD, as Executor of the Last Will and Testament of Commilia Elwood, Deceased, substituted by order of Court for Commilia Elwood, Deceased, Defendant and Appellant,

Irma Elwood Mazzei, Leonard Elwood, Andrew Ellsworth Elwood, Mary Elwood, Ida Birmingham, and Leona Elwood, Defendants.

Civ. 4929.

District Court of Appeal, Fourth District, California.

May 5, 1955.

Rehearing Denied May 25, 1955.

Hearing Denied June 29, 1955.

Action was brought to quiet title to undivided interests in oil-bearing lands, to establish a constructive trust, and for declaratory relief. The Superior Court of Fresno County, Milo Popovich, J., entered judgment adverse to one of the defendants, and he appealed. The District Court of Appeal, Griffin, J., held that evidence sustained finding that a constructive trust had been created.

Judgment affirmed.

1. Trusts ⚷371(2)

In action to quiet title to undivided interests in oil-bearing lands, to establish a constructive trust, and for declaratory relief, allegations of complaint set forth a cause of action based on constructive trust.

2. Trusts ⚷95

A constructive trust arises from acts of one wrongfully detaining property or obtaining it by fraud, in violation of trust, or other wrongful act.

3. Trusts ⚷92½

A constructive trust, which is created by operation of law, need not be in writing.

4. Trusts ⚷91

The theory of a constructive trust was adopted by equity as a remedy to compel one to restore property to which he is not justly entitled to another.

5. Trusts ⚷91

An involuntary or constructive trust is not created by deed, will, or other writing, but is imposed on property by law.

6. Limitation of Actions ⚷102(9)

With reference to statute of limitations, a constructive trust does not arise until transferee repudiates an oral promise to reconvey, or dies.

7. Appeal and Error ⚷197(3)

Where issue of trust relationship was fully and voluntarily litigated before trial court without objection, though it may not have been directly raised by the pleadings, appellant could not complain of such fact for the first time on appeal.

8. Trusts ⚷110

In action to quiet title to undivided interests in oil-bearing lands, on ground of constructive trust, evidence sustained finding that one who took title to the realty did so as an involuntary trustee and that when his wife subsequently took title to the realty and collected royalties she held them as an involuntary trustee for sums in excess of her own interest therein. West's Ann.Civ. Code, § 2223.

9. Tenancy in Common ⚷4

In action to quiet title to undivided interests in oil-bearing lands, on ground of constructive trust, evidence sustained finding that plaintiffs had certain undivided interests in the lands.

10. Trusts ⚷356(1)

When wife of constructive trustee took title to realty, either by deed from constructive trustee or as heir of constructive trustee, she took the realty impressed with the same constructive trust.

11. Descent and Distribution ⚷74

Heirs occupy the place of their ancestors.

Lawrence W. Young, Fresno, for appellant.

Duard F. Geis, Willow, Joseph L. Joy, Fresno, H. W. Glensor, San Francisco, for respondents.

GRIFFIN, Justice.

This is an action brought by Katherine M. Atwood, Verge Crossman, Birdie Nephew, Noel Wright, Marie E. Marlar, Harold Wright, W. B. Marlar, Hazel Eymann, John C. Wiseman, Frank K. Wiseman, Florence Morton, Newton Wiseman, Ellen Hedrick and Clarence Estes, plaintiffs, and Sue H. Clowdsley, administratrix of the estate of Newton Wiseman, deceased, Gladys I. Selby, Administratrix of the estate of John C. Wiseman, deceased, Mary Freear, administratrix of the estate of Frank Wiseman, deceased, and Jessie H. Cleveland, administratrix of the estate of Ellen Hedrick, deceased, designated supplemental plaintiffs, against Andrew Ellsworth Elwood, as executor of the last will and testament of Commilia Elwood, deceased, substituted by order of court for Commilia Elwood, deceased, defendant and appellant, and defendants Irma Elwood

Mazzei, Leonard Elwood, Andrew Ellsworth Elwood, Mary Elwood, Ida Birmingham and Leona Elwood, being certain heirs who were made defendants because they refused to join as plaintiffs herein. They will hereinafter be referred to as plaintiffs.

The complaint in the first cause of action is an ordinary action to quiet plaintiffs' title against appellant to certain claimed undivided interests in and to certain oil-bearing lands in Kern County referred to as Section 2, and containing approximately 40 acres. As a second cause of action the claimed title of plaintiffs and appellant is alleged. It is then claimed that Burton Elwood, deceased husband of Commilia Elwood, held certain deeds executed by plaintiffs, their ancestors, or their representatives, wherein the property was deeded to said Burton Elwood, in trust, for the purpose of securing a patent on the described land; that the patent was obtained, but Burton Elwood failed and refused to reconvey said property to plaintiffs and that appellant now, in violation of said trust, claims the whole of the property and the royalties obtained thereon as belonging to the estate of Commilia Elwood, deceased. The third count is for declaratory relief, in which a determination of the respective rights of plaintiffs and appellant are sought, as well as a determination of the respective titles of each of said parties.

The manner in which the respective parties obtained and now claim an interest in the land here under consideration is quite involved. As a part of the background, it appears that in 1899, six men, named J. C. Marlar, J. M. Elwood, Jonathan Elwood, Burton Elwood, Judson F. Elwood, and George Wiseman, all farmers and related by blood or marriage, took up a piece of oil land in Kern County (Section 3). They performed labor upon it and oil was discovered. A corporation was formed (Kings River Oil Company) and equal shares of stock were issued to the respective parties. By some agreement between them three of these men, J. C. Marlar, Jonathan Elwood and J. M. Elwood, his son, located of record on May 29, 1899, the 40 acres adjoining section 3 (Section 2—the property here involved). It appears from the evidence that it was agreed as to this 40 acres that there were to be six interests, the three original locators and Burton Elwood, Judson F. Elwood and George Wiseman. This interest of these six men was not to be considered a part of the corporation assets, and it appears that it was to be more of a joint venture or copartnership interest in that property. Oil was discovered on this 40 acres and it was leased to an oil company in 1906. Dividends or royalties were paid semi-annually over a period of years by the lessee to Burton Elwood. He in turn retained his one-sixth interest therein and apportioned the remaining five-sixths interests to the respective parties above mentioned. Subsequently George Wiseman died in 1909. Burton Elwood continued to pay his one-sixth interest proportionately to his widow and heirs by checks. J. M. Elwood died in 1910. J. C. Marlar died in 1912. Jonathan Elwood died in 1915. Judson F. Elwood died in 1926, and a similar procedure was followed in respect to the payments of their one-sixth interests in and to the royalties. Probate proceedings were had in respect to the estates of these deceased men and it does not affirmatively appear from the inventories or decrees of distribution that the particular interests of the respective parties in and to this venture were listed as assets therein. However, the decrees of distribution contain omnibus clauses which plaintiffs claim carried the estate to the respective heirs involved in this action who are seeking to quiet title to their respective interests. Burton Elwood, the lone survivor of the six original men or copartners or joint venturers, obtained deeds or conveyances from the survivors and their respective heirs about the year 1921, for the purpose of placing title to the 40 acres in him as one individual for the apparent and claimed reason that it was to facilitate the application for and securing of the government patent rights to the entire 40 acres to protect the leaseholders. It appears that after the patent was obtained in the name of Burton Elwood, individually, in 1924, both he and his wife Commilia Elwood signed and acknowledged deeds to five-sixths of the 40-acre interests to the respective heirs here involved or their ancestors, apportioned according to their respective interests which were determined by Burton Elwood. All of these deeds remained undelivered except one which was delivered to Flora Marlar, and it was recorded on June 8, 1925. However, with the exception of Mrs. Marlar, Burton Elwood continued to make semi-annual royalty payments to the respective parties according to the interests determined by him.

Without the knowledge or consent of these parties, on May 1, 1931, Burton Elwood signed and acknowledged a deed of gift purporting to convey to his wife Commilia Elwood the whole of said 40-acre tract. This deed was not recorded but was placed in a depositary accessible to both parties. On March 11, 1949, Burton Elwood died, and his wife immediately recorded the deed on March 12, 1949, claimed full ownership of the entire property, and refused to pay further dividends to the parties here in interest. On May 14, 1952, they subsequently brought this action against her. During the trial Commilia died and the executor of her estate and her two children, Andrew Elwood and Irma Mazzei were made party defendants.

A considerable number of exhibits were received in evidence and volumes of evidence were taken in an endeavor to establish the claimed trust. Thereafter, the court found generally in favor of the plaintiffs and against the appellant. Due to the death of all of the original joint venturers or copartners, there was very little evidence of the nature of the original agreement between them. This is also true in respect to the claim that the conveyances to Burton Elwood were given only for the purpose of perfecting the patent title. Appellant contends that the original agreement was that three of the number would file the location on the 40-acre tract and that subsequently the three others named were to have a one-sixth interest therein; that it was agreed the royalties therefrom would be paid one-sixth to each partner or his heirs as long as any one partner remained alive, and then the property, in its entirety, would belong to the surviving partner. The plaintiffs agreed that a one-sixth interest originally belonged to the respective parties but contend that there was no agreement between them about the surviving partner having title to the entirety. The claim is that each partner's interest passed to his heirs upon his death and that those heirs here involved acquired title thereto and that the remaining partner, Burton Elwood only held title to their interest in trust, for their benefit, and it was the duty of Burton Elwood and his successors in interest to return the proportionate shares of their interest therein under the trust.

A letter was written on May 11, 1935, by Burton Elwood to plaintiff Katherine M. Atwood, one of the heirs and distributees of the oil royalties, and granddaughter of Jonathan Elwood, deceased, one of the original locators. This was a reply to a request of hers as to what interest she had in the oil property and royalties, and the manner in which the property was acquired. He wrote:

"Dear little Katie and Family:

> "I just received your letter dated May 10th. The money I am sending you twice a year is from our Section Two oil property which consists of 40 acres joining the Kings River Oil property. This property was taken up by Father Roe (Jonathan Elwood) and Wiseman and John Marlar and never was incorporated. We verbally agreed to give your Dad (Judson Elwood) a 1/6 interest in it. After the death of all the locators I had to go on and get a patent to it to protect our leaseholders. This property was not appraised in Jud's estate as his name was never on record with it. It is leased and always has been to the same company that has the Kings River lease but the checks come direct to me and I devide it to the heirs twice a year. Your part this time was 25-66/100. * * *
>
> "Ever, Uncle Bert."

As will be seen, there is nothing in this letter indicating any agreement between the partners that the survivor should become the absolute owner of all of the 40-acre tract. In fact, it fully supports plaintiffs' contention. The fact that Burton Elwood and his wife subsequently signed deeds to the respective heirs according to their proportionate shares and continued to pay oil royalties during all of this time destroys appellant's argument about that portion of the claimed agreement.

The court specifically found that plaintiffs, supplemental plaintiffs, and the named defendants were owners entitled to possession of a specific fractional interest in said property; that the purpose of the deed of the respective heirs to "Burton Elwood was for the purpose of enabling Burton Elwood to obtain a patent to said property in the most convenient manner and Burton Elwood thereupon became a trustee of the interests of said parties and for their benefit"; that an actual controversy did exist between plaintiffs and appellant; that Burton Elwood took a certain designated interest in the property by virtue of the patent and that all other interests purporting to be vested in him by reason thereof were held in trust by him for the benefit of the other parties here concerned; that Commilia Elwood, wife of Burton Elwood, took no interest in the property under the deed of May 1, 1931, for the reason that it was not delivered to her, but that she did take a $^{98}/_{504}$ interest in it in her own right, as heir of Burton Elwood. It then found plaintiffs were entitled to a judgment in accordance with the interests set forth in the findings, and to have their title quieted in said real property as against defendant Commilia Elwood, her heirs or executors. The court apportioned the oil royalties to plaintiffs accordingly.

The only appeal is by defendant Andrew Ellsworth Elwood, as executor of the last will and testament of Commilia Elwood, deceased. He contends: (1) That plaintiffs cannot maintain a quiet title action on the general allegations set forth in the first cause of action for the purpose of establishing that the appellant is holding the title to the property in trust for plaintiffs, because they were not, at the time of the filing of the action, the legal owners of the property; that legal title had passed to Burton Elwood free and clear of any alleged trust by the very terms of the deeds or conveyances; that these deeds, being introduced in evidence by plaintiffs, cannot be questioned by them as to their legal effect, and that the owner of an equitable title cannot maintain an action to quiet title against the owner of the legal title, citing such cases as Strong v. Strong, 22 Cal.2d 540, 546, 140 P.2d 386; Buchner v. Malloy, 155 Cal. 253, 100 P. 687; and Ephraim v. Metropolitan Trust Co., 28 Cal.2d 824, 836, 172 P.2d 501.

[1] In the instant action plaintiffs do not depend in whole upon the quiet title action to obtain the desired relief. The second and third causes of action clearly set forth, in considerable detail, the evidentiary facts, together with the claim that an actual controversy exists as to the validity and purpose of the deeds executed. They included a prayer that the court declare those interests and that Burton Elwood took such interests of plaintiffs in trust for their use and benefit; that an accounting be had; and for general relief. The findings and judgment, as entered, generally follow these pleadings which are sufficient to afford the relief obtained. South v. Wishard, 123 Cal.App.2d 642, 267 P.2d 827; In re Sharp's Estate, 17 Cal. App. 634, 120 P. 1079; Stromerson v. Averill, 22 Cal.2d 808, 141 P.2d 732.

(2) Appellant argues that since there was no confidential relationship alleged as existing between the grantors, plaintiffs herein, and the grantee, at the time the deeds were executed and delivered; since no fraud or misrepresentation was claimed; since there was no showing of any oral or written agreement between them at the time indicating any trust agreement; and since the deeds were absolute on their face, plaintiffs have not established any sufficient trust agreement upon which they can recover; that acts done by the grantee after the deed was delivered do not constitute grantee a trustee; that since no written trust agreement was shown, and since the court failed to make a specific finding as to whether such agreement was oral or written, reversible error resulted, citing such cases as Fairchild v. Raines, 24 Cal.2d 818, 151 P.2d 260; Sheehan v. Sullivan, 126 Cal. 189, 192, 58 P. 543; Knouse

v. Shubert, 48 Cal.App.2d 685, 121 P.2d 74; Civil Code, § 852; and 24 Cal.Jur. 940, sec. 186.

The trial court specifically found that Burton Elwood held the property "as an involuntary trustee" for the persons named, and that subsequently his wife took the property, collected the royalties, and held same as an "involuntary trustee" for sums in excess of $^{98}/_{104}$ interest therein.

[2] Section 2223 of the Civil Code provides that "One who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner." A constructive trust arises from acts of one wrongfully detaining property or obtaining it by fraud, in violation of trust or other wrongful act. Simpson v. Gillis, 1 Cal.2d 42, 32 P.2d 1071; 43 West's California Digest, Trusts, 🔑91, p. 310.

[3-5] In Stromerson v. Averill, 22 Cal.2d 808, 815, 141 P.2d 732, 736, it was said: "A constructive trust which is created by operation of law need not be in writing. * * *" And in Bainbridge v. Stoner, 16 Cal.2d 423, 428, 106 P.2d 423, 427, it was held that "The theory of a constructive trust was adopted by equity as a remedy to compel one to restore property to which he is not justly entitled, to another. * * *" See also Crabtree v. Potter, 150 Cal. 710, 89 P. 971; and McMillen v. McDonald, 127 Cal.App.2d 302, 273 P.2d 683. Involuntary or constructive trust is not created by deed, will, or other writing, but is imposed on property by law. In re Harris' Estate, 9 Cal.2d 649, 72 P.2d 873; 43 West's California Digest, Trusts, 🔑91, p. 312.

The evidence here discloses a close family, marriage, or blood relationship, and in addition, a relationship of actual trust and confidence over a period of many years. In Steinberger v. Steinberger, 60 Cal.App.2d 116, 140 P.2d 31, under a somewhat similar set of circumstances, this question was adequately discussed and it was there said that under the parole evidence rule a party is prohibited from varying the terms of a written instrument by oral testimony; that an express trust, arising in parole, is unenforceable as an express trust, but since that was not an action to enforce the oral express trust, and being an action to enforce a constructive trust which was claimed to have arisen by operation of law upon the repudiation of a promise to reconvey, such an action was maintainable; that an express oral promise to reconvey is unenforceable but the repudiation of that promise should compel the grantee to restore the grantor to the status quo. It then states that it is well settled in this state that breach of an oral promise to reconvey by a transferee or his administrator when the transferee is in a confidential relationship with the transferor at the time of the transfer constitutes sufficient "fraud" to create a constructive trust. In re Estate of Cover, 188 Cal. 133, 143, 204 P. 583, 588, is then cited wherein the court defines the terms "confidential" and "fiduciary" relationships as follows: "Confidential and fiduciary relations are, in law, synonymous, and may be said to exist whenever trust and confidence is reposed by one person in the integrity and fidelity of another." However, it is said that it is not clear from the cases whether the courts mean a confidential relationship in fact must exist or whether it must also be a relationship based on status. It concluded that the basis of the confidential relationship exception is that under section 2224 of the Civil Code the equity courts will prevent one person who is in a confidential relation with another from becoming unjustly enriched by reason of a breach of the trust, and that a confidential relation in fact should be the test. It was there said that the cases are clear that where there is some sort of a status between the grantor and the grantee and confidence is imposed, a constructive trust will be imposed upon repudiation of the oral promise to reconvey, citing many cases.

[6-8] In McMillen v. McDonald, supra [127 Cal.App.2d 302, 273 P.2d 684], it was held that an acceptance of property conveyed to grantees when they " 'well knew and fully understood and recognized * * * that they were required and obligated to reconvey said real property' " carries with it at least an implied promise to reconvey where conduct of the parties as found is inconsistent with any other con-

clusion. It is well settled that with reference to the statute of limitations, a constructive trust does not arise until the transferee repudiates an oral promise to reconvey, or dies. Steinberger v. Steinberger, supra. In the instant case the issue of trust relationship was fully and voluntarily litigated before the trial court without objection, although it may not have been directly raised by the pleadings. Accordingly, appellant cannot complain of this fact for the first time on appeal. Fischer v. Ostby, 127 Cal.App.2d 528, 274 P.2d 221. From an examination of the entire record and the evidence produced we conclude that the findings are sufficient; that the evidence produced sufficiently supports them; and that they are sufficient to bring plaintiffs within the exception indicated.

(3) Appellant claims that plaintiffs had no title to the property in the first instance since inventories and decrees of distribution in the several estates in evidence were received for a limited purpose and did not specifically mention this property. It is true that some limitation was placed upon the reception of some of the decrees as to the purpose for which they were offered and received. However, they were received in evidence and the court stated they would be received for the limited purpose "heretofore stated" which purpose, as we construe the record, was to show that those certain plaintiffs involved were legatees or devisees thereunder, and "as tending * * * to prove the descent of this property" and to show the omnibus clause in the decrees whereby these certain plaintiffs claim title to their respective interests, even though those interests were not particularly described therein.

[9] The trial court fully considered these decrees and the evidence in respect to plaintiffs' claimed titles. The finding that plaintiffs had such title as is indicated in the judgment herein, has sufficient evidentiary support. Bates v. Howard, 105 Cal. 173, 183, 38 P. 715; In re Estate of Yorba, 176 Cal. 166, 167 P. 854.

[10, 11] (4) The last claim is that since the trial court held that the deed of the 40-acre tract on May 1, 1931, from Burton Elwood to his wife was of no force and effect because of nondelivery, title still remained in Burton Elwood, or his estate and accordingly the decree here entered against the executor of Commilia Elwood's estate had no force and effect to quiet title to that property. The action was originally instituted against Commilia Elwood prior to her death. She was the one claiming title to the property, either by the deed or inheritance from her husband, in whose name title previously stood. The court found she was entitled to a $^{98}/_{504}$ interest in the property as an heir of Burton Elwood, and also found that when he took the interest of plaintiffs in said property he took it, impressed with a constructive trust for the benefit of the rightful owners. When Commilia Elwood took it, either by deed or as heir, she took it impressed with the same trust. Steiner v. Amsel, 18 Cal.2d 48, 54, 112 P.2d 635. Accordingly, the decree here entered is effective insofar as her title and interest in and to the trust property is concerned. In re Estate of Yorba, 176 Cal. 166, 167 P. 854. Heirs occupy the place of their ancestors. She held the property inherited from her husband precisely as he held it, subject to the same conditions and equities. Carlson v. Carlson, 124 Cal.App. 207, 12 P.2d 165; 9 Cal.Jur. 472, sec. 20. There is no showing that there were any other heirs than Commilia Elwood. This sufficiently disposes of the questions raised on appeal.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

132 Cal.App.2d 771

Mary MEDEIROS, Plaintiff, Cross-Defendant and Appellant,

v.

Annie SILVA, Mamie P. Cotta, as Special Administratrix of the Estate of Manuel Medeiros, deceased, and John F. Medeiros, Defendants and Respondents,

Annie Silva, Cross-Complainant.

Civ. 8597.

District Court of Appeal, Third District, California.

May 6, 1955.

Rehearing Denied June 1, 1955.

Widow's action to set aside a deed of community real property granted by her deceased husband to one of his children by former marriage, allegedly without consideration. From a judgment of Superior Court, Stanislaus County, B. C. Hawkins, J., the widow appealed. The District Court of Appeal, Schottky, J., held that a decree of distribution in proceeding for probate of the decedent's will did not on the principle of res judicata bar the widow's action, where the realty in question had not been listed in the probate inventory, though the widow had filed and then dismissed a contest of the will.

Reversed.

1. Appeal and Error 🔑917(1)

Where there was no trial on merits of widow's action to set aside deceased husband's gift of community property, but only trial of special defense that widow had never elected to claim community interest in lieu of a bequest and defense of res judicata, complaint allegations that property was community property and that conveyance was without consideration would have to be taken as true on appeal as well as at trial.

2. Husband and Wife 🔑265, 273(1)

Gift of community property by husband without wife's consent may be set aside in its entirety by wife during husband's lifetime and as to one-half after his death.

3. Courts 🔑472(4)

Jurisdiction of superior court sitting in probate to try title to property as between heirs and personal representative is not exclusive, and superior court under its general equitable jurisdiction may also, in absence of timely objection, try such title in widow's action to set aside husband's gift of her share of community property made before his death.

4. Executors and Administrators 🔑315(6)

Decree of distribution did not on principle of res judicata bar action by decedent's widow to recover her share of community realty he had conveyed without consideration, where realty in question had not been listed in probate inventory.

◆

John H. Machado, San Jose, Nathan B. McVay, Modesto, for appellant.

Zeff & Halley, Modesto, for respondents.

SCHOTTKY, Justice.

Manuel Medeiros died on March 20, 1949, leaving surviving as heirs at law his wife, Mary Medeiros, and four children by a former marriage, Manuel Medeiros, Jr., Mamie P. Cotta, John F. Medeiros and Annie Silva. On March 21, 1949, a deed of gift executed by Manuel Medeiros on February 16, 1942, was recorded, said deed naming Annie Silva as grantee and describing approximately 36 acres of land in Stanislaus County.

On April 9, 1949, John F. Medeiros filed a petition for the probate of decedent's will, said will having been executed on March 2, 1949. Said will contained a bequest to the wife, Mary Medeiros, of money in bank and certain personal property, but with the following provision:

> "* * * It is expressly specified herein that the foregoing bequest to my wife shall be in lieu of any rights that my said wife, Mary, shall have in my possessions and to my property by way of homestead rights, by way of community property rights, as my widow or otherwise, or by way of any other claim whatsoever upon my estate,

> and in case any such rights are claimed by my said wife, all property bequeathed to her herein shall become part of the residue of my estate and shall go to my said children, John F. Medeiros, Annie Silva and Mamie P. Cotta, share and share alike."

Said will also provided:

> "I give and devise all real property, together with any personal property not otherwise disposed of herein, which I may own or possess at the date of my death to my son, John F. Medeiros; my daughter, Annie Silva, and my daughter, Mamie P. Cotta, in equal shares of one-third to each of said children."

On April 29, 1949, a contest of said will was filed by the surviving wife, Mary Medeiros, and Manuel Medeiros, Jr., and thereafter, on May 9, 1949, Mamie P. Cotta was appointed special administratrix with general powers.

On November 12, 1949, plaintiff, Mary Medeiros, filed the instant action against Annie Silva, Mamie P. Cotta, as special administratrix of the estate of Manuel Medeiros, deceased, and John F. Medeiros, as defendants, to set aside the said deed of February 16, 1942, and to have it adjudged that she was the owner of the real property described therein, alleging that said real property was the community property of deceased and plaintiff; that said deceased had executed said deed without her knowledge and consent; and that there was no consideration for said deed.

On March 11, 1950, an answer and cross-complaint was filed by Annie Silva, Mamie P. Cotta, as special administratrix of the estate of decedent, and John F. Medeiros, denying the material allegations of the complaint and alleging that on February 16, 1942, the real property in controversy was conveyed to Annie Silva and that she has ever since been the owner thereof.

On August 4, 1950, Mary Medeiros and Manuel Medeiros, Jr. filed a dismissal of the will contest theretofore filed by them. On August 8, 1950, Mamie P. Cotta, as special administratrix, filed an inventory and appraisement of the property of the estate of said decedent, which inventory did not include as property of the estate the real property described in said deed. On August 15, 1950, the will of decedent was admitted to probate and letters testamentary were issued to John F. Medeiros. On August 25, 1950, John F. Medeiros, as executor, filed his first and final account and report and petition for distribution, and on September 6, 1950, a decree of distribution was made in the matter of the estate of Manuel Medeiros, deceased. By the terms of the decree appellant is to receive certain personal property, the children are to receive certain other minor items, and the decree states that any and all real property owned by the deceased at the time of his death, whether now known or hereafter discovered, shall be distributed in equal shares to John F. Medeiros, Annie Silva and Mamie P. Cotta.

On October 1, 1951, respondents Annie Silva and John F. Medeiros were by order of court permitted to file an amended answer and cross-complaint which, in addition to the denials and allegations of their original answer and cross-complaint, alleged as additional defenses:

First: That said widow, appellant herein, never at any time made an election of any kind claiming a community interest instead of the bequest made to her under the provisions of the will; that she never at any time appeared in the proceedings of the estate claiming that any part of the property belonged to her as community property and that the same should not be disposed of by decree of distribution in accordance with the terms of the will of the deceased; and that the decree had become final and was res adjudicata on the issues raised in the pleadings in the action; and

Second: That all the issues involved in plaintiff's complaint had been previously adjudicated in the matter of the estate of Manuel Medeiros, deceased, and that the decree of distribution therein conclusively adjudicated all issues in appellant's complaint.

Plaintiff's demurrer to said special defenses was overruled and an answer to the amended cross-complaint was filed. Thereafter a trial was had solely on the special defenses and the court made the following findings of fact, among others:

First: That appellant, Mary Medeiros, never at any time in the proceedings of the said estate made an election of any kind claiming a community interest instead of the bequest made to her under the provisions of the will of the deceased and that she never in the estate proceedings claimed that any of the property of said deceased belonged to her as community property and that the same should not be disposed of by decree of distribution in accordance with the terms of the will of the deceased.

Second: That the decree of distribution in the matter of the estate of Manuel Medeiros is res adjudicata on the pleadings in the action of appellant, Mary Medeiros, against respondents, Mamie P. Cotta and John F. Medeiros, and could not be raised in any collateral proceedings.

Third: That the decree of distribution conclusively adjudicated the rights of the parties in the property belonging to Manuel Medeiros, deceased.

Fourth: That decedent, Manuel Medeiros, transferred the property described in plaintiff's complaint and in said deed to respondent, Annie Silva, and that said Annie Silva was the owner in fee simple of the real property therein described.

Fifth: That appellant, Mary Medeiros, had no interest in the real property described in said deed and in said complaint.

The court then concluded that the superior court sitting in probate had exclusive jurisdiction to determine the title described in plaintiff's complaint and in said deed; that Mary Medeiros had elected to take her distributive share of the estate under the terms of the will under the decree of distribution in said estate; that the decree of distribution of the estate of Manuel Medeiros was conclusive upon the rights of the parties to the action; that appellant had by her election under the will of the decedent relinquished any community rights which she might have in the real property described in her complaint; that appellant, Mary Medeiros, had no right, title, or interest in and to the real property described in the deed; and that the title to said real property is vested in respondent, Annie Silva, individually, free and clear of any claim of the appellant, Mary Medeiros.

Judgment was entered in accordance with said findings and conclusions and plaintiff has appealed from said judgment.

Appellant contends that the court erred in its determination that the superior court, sitting in probate, had exclusive jurisdiction to determine the title to the real property and in holding that the decree of distribution in the estate of Manuel Medeiros is res adjudicata as to the rights of appellant in said real property.

[1] As has been hereinbefore pointed out, there was no trial on the merits of the action filed in the superior court by appellant, but the trial was limited solely to the special defenses set forth in the amended answer and cross-complaint of respondents. This being so, it is conceded by respondents here, as it was at the trial, that the real property in question must be considered to have been the community property of appellant and decedent at the time it was conveyed by decedent to respondent Annie Silva and that it was conveyed by gift without consideration.

[2–4] The same issues are involved in the instant case as were involved in the very recent case of Medeiros v. Cotta, 130 Cal.App.2d 740, 279 P.2d 814. In fact, the actions are identical except that they involve different deeds to different daughters of deceased. We held in that case that (1) a gift of community property by husband without the wife's consent may be set aside in its entirety by the wife during the husband's lifetime and as to one-half after his death, and (2) that the jurisdiction of the superior court sitting in probate to try title to property as between heirs and personal representative is not exclusive, and the superior court under its general equitable jurisdiction may also, in the absence of timely objection, try such title in widow's action to set aside husband's gift of her share of community property made before his death.

Upon the authority of that case the judgment is reversed.

VAN DYKE, P. J., and PEEK, J., concur.

Francis W. HUDSON and Merle S. Hudson, his wife, Plaintiffs and Appellants,

v.

Thomas WEST and Pearl M. West, his wife, Defendants and Respondents.*

Civ. 8513.

District Court of Appeal, Third District, California.

May 9, 1955.

Hearing Granted July 6, 1955.

Action to quiet title to realty and waters flowing thereon. Judgment for defendants in the Superior Court, El Dorado County, Ralph McGee, J., and the plaintiffs appealed. The District Court of Appeal, Finley, J. pro tem., held that the trial court properly gave judgment for defendants notwithstanding their pleadings were not labeled a cross complaint, that findings supported judgment and that evidence was sufficient to sustain the judgment for defendants based on findings of a prescriptive right to the waters acquired by the defendants.

Judgment affirmed.

1. Pleading 🔑147

A cross complaint is a pleading separate and apart from the answer, and it is required to be complete and sufficient in and of itself and cannot be aided by the averments of the answer

2. Pleading 🔑4

Nature of a pleading will be determined from the allegations therein regardless of the title it bears.

3. Pleading 🔑411

A judgment quieting title in defendants could not be complained of by plaintiffs on the grounds that defendants' pleading did not constitute a cross complaint where plaintiff proceeded to judgment without raising the point even though it was entirely obvious from the defendants' pleading that they were asking for the very affirmative relief which was granted by the trial court. West's Ann.Code Civ.Proc. § 452.

4. Appeal and Error 🔑192(1)

Generally where pleadings are not questioned in the trial court it is too late to question their adequacy for the first time on appeal. West's Ann.Code Civ.Proc. § 434.

5. Waters and Water Courses 🔑152(10)

A finding that for more than five years preceding action defendants had used all the waters on their property for beneficial purposes for irrigating and other purposes was not insufficient to support judgment quieting title in defendants on the ground that finding was contradicted by laws of nature because plaintiffs had raised good gardens and it was a matter of judicial notice that no garden would grow in that locality unless amply irrigated, where plaintiffs did not offer to prove amount of water needed and used by them to irrigate and there was no room to doubt that any great quantity was used by the plaintiffs.

6. Appeal and Error 🔑931(1)

An appellate court must give findings of fact such a construction as will uphold rather than defeat the judgment, reading all findings together so as to resolve any ambiguities and inconsistencies therein in favor of sustaining the judgment.

7. Appeal and Error 🔑1071(1)

Judgment may not be set aside unless the conflict is clear and the findings incapable of being harmoniously construed.

8. Waters and Water Courses 🔑247(1)

A judgment quieting title in defendant to realty together with waters for irrigation thereon, was not unsupported because of finding that certain allegations contained in the plaintiff's complaint respecting diversion of waters were not true, where the finding could be disregarded as surplusage and

* Opinion vacated 306 P.2d 807.

judgment sustained on basis of evidence to support another finding, materiality of which could not be denied.

9. Waters and Water Courses ⚷152(8)

In action to quiet title to realty together with the waters thereon, evidence was sufficient to support the judgment for the defendant based on the finding of a prescriptive right to the natural flow of water through a ravine and the defendants' use thereof.

◆

Bradford, Cross, Dahl & Hefner, Sacramento, for appellants.

Hughes & Maul, Placerville, for respondents.

FINLEY, Justice pro tem.

This appeal is from a judgment in favor of defendants quieting title to certain described real property in El Dorado County, together with "all ditches, water ways and water courses, of whatsoever kind or character situate upon said real property, and all waters arising on, or flowing on, or upon, said real property," and adjudging that plaintiffs have no estate or interest therein.

The action was tried on plaintiffs' second amended complaint, which sets forth two causes of action, and defendants' so-called answer to the first amended complaint which by stipulation was deemed to be the answer to the second amended complaint. Defendants' pleading, which bears the title, "Answer to First Amended Complaint", consists of general denials to most of the allegations in each paragraph of both causes of action and then sets up six additional so-called defenses to the first cause of action and five additional so-called defenses to the second cause of action. None of them is entitled or referred to as being "a cross-complaint", but in the so-called fifth, sixth and seventh defenses to the first cause of action and in the fifth and sixth defenses of the second cause of action defendants' property is described and ownership thereto is asserted both generally and by reason of alleged adverse possession for more than five years. Claim of ownership is made to all water, ditches, water ways, etc., on this property. In the prayer of this pleading defendants pray that they be decreed the owners of this property, water, etc., and that all who assert an adverse interest therein be forever enjoined and restrained from so doing.

The first point raised by plaintiffs here is that this pleading does not constitute a cross-complaint and therefore the trial court erred in giving judgment quieting defendants' title. It is urged that defendants' pleading is labelled as and must be regarded as a strictly defensive pleading and therefore it cannot serve as the basis for the granting of affirmative relief.

[1–3] Section 452 of the California Code of Civil Procedure provides that a pleading is to be liberally construed for the purpose of determining its effect in order that substantial justice may be done between the parties. It is true that a cross-complaint is a pleading separate and apart from the answer. In general it is required to be complete and sufficient in and of itself and cannot be aided by the averments of the answer. Luse v. Peters, 219 Cal. 625, 28 P.2d 357; Case v. Kadota Fig Ass'n, 35 Cal.2d 596, 220 P.2d 912. But it is also well established that the nature of the pleading will be determined from the allegations or averments therein regardless of the title it bears. Gregory v. Bovier, 77 Cal. 121, 19 P. 232; Pickwick Stages, Northern Division, v. Board of Trustees, 189 Cal. 417, 208 P. 961; Case v. Kadota Fig Ass'n, supra. Particularly is this so when, as here, the plaintiff proceeded to judgment in the trial court without raising the point even though it was entirely obvious from defendants' pleading that they were asking for the very affirmative relief which was granted by the trial court. McDougald v. Hulet, 132 Cal. 154, 64 P. 278. The so-called defenses hereinabove referred to were complete within themselves without aid of the strictly defensive portions of the pleading. No default for failing to answer the affirmative allegations in the pleading was taken or requested of the court by defendant and there is no claim that plaintiff was misled or that any advantage was taken of them on this account. It is not apparent to us nor have appellants pointed out how they were in anywise injured by the fact that when the trial court denied them judgment based upon its determination that they had no title it thereupon went further and quieted title in defendants. It would seem to be of no legal concern to plaintiffs where title lay if it did not rest with them.

[4] As a general rule, where pleadings are not questioned in the trial court, it is too late to question their adequacy for the first time on appeal. Sec. 434, Code Civ. Proc.; Gordon v. Clark, 22 Cal. 533; Rubel v. Peckham, 94 Cal.App.2d 834, 211 P.2d 883; Miller v. Busby, 101 Cal.App.2d 83, 224 P.2d 754; Nanny v. Ruby Lighting Corp., 108 Cal.App.2d 856, 239 P.2d 885; Lucy v. Lucy, 22 Cal.App.2d 629, 71 P.2d 949; McDougald v. Hulet, 132 Cal. 154, 64 P. 278.

The only other assignments of error have to do with the findings made by the trial court. Appellants claim that these findings are conflicting, that some are contrary to and at variance with the indisputable laws of nature of which the court should have taken judicial notice and that they are not supported by the evidence.

The facts of the case are as follows:

Plaintiffs and defendants are owners of land near Smithflat, El Dorado County, plaintiffs having purchased their property in May, 1948, and defendants having acquired theirs in 1945. Defendants' property lies to the northeast, and at a higher elevation than plaintiffs', and the two parcels are separated by property owned by one Clarke. Red Ranch Ravine is a gulch which originates on property lying to the northeast of defendants' land, owned by Jones and Reckers, and runs in a southwesterly direction, generally parallel with what is known as Red Ranch Ravine Road, through the lands of defendants, Clarke and plaintiffs.

Plaintiffs, and some of their predecessors in interest, testified that prior to October, 1950, when defendants built a dam on their property, they had procured irrigation water from Red Ranch Ravine in sufficient amounts to raise good gardens, but that since the building of the dam by defendants the water in the ravine dried up and they were deprived of irrigation waters. Plaintiffs estimated that there were some six inches of water flowing through the ravine when they acquired the property in 1948. However, the case presented by defendants would indicate not only that the water flowing in the ravine onto plaintiffs' property was only in nominal amounts, but also that there were and are other sources from which plaintiffs could have secured, and probably did secure, water for their own limited irrigation purposes.

Defense witnesses testified that Red Ranch Ravine, which originates on the property of Jones and Reckers, is fed by waters from three springs located on the same property; that these waters have always been used by Jones and Reckers for their own irrigation purposes; that the water which flows through the ravine onto defendants' property consists of seepage and run-off irrigation water from the Jones and Reckers property; that defendants have, since their acquisition of title, used all the water thus flowing onto their lands to irrigate their orchard and that what little water flowed beyond and into Clarke's property consisted merely of seepage; that prior to 1950 defendants irrigated by means of two conduit ditches leading from the ravine into the cultivated portion of their property; and that in October, 1950, the dam was built so as to make more economical use of these waters by sprinkler irrigation.

It further appears that plaintiffs could have, and probably did, secure irrigation water from at least three other sources. Immediately to the north of plaintiffs' property and on the lands owned by Clarke there is a natural spring. The waters from this spring, as well as waters coming from Hangtown Creek, lying to the north of Clarke's property, and waters from the El Dorado Irrigation District ditch, flow through a ditch originating on the Clarke land, under Red Ranch Ravine Road via a steel conduit, and ultimately onto and through plaintiffs' land. In addition, certain leakage waters from an irrigation district syphon lying to the east of plaintiffs' land drained into Red Ranch Ravine just as it enters plaintiffs' land.

Appellants assert that the trial court erred in making finding number VII, which they claim is erroneous in a number of respects. Said finding reads as follows:

> "That it is true that for more than five (5) years preceding the commencement of said action the defendants have used all the waters arising on, or flowing on or upon, the said real property owned by defendants for beneficial purposes, to wit, for irrigating an orchard and pasture and for watering fowl and live stock and have for a period of more than five (5) years preceding the commencement of said action paid all taxes levied, assessed or payable against the said real property."

Appellants maintain first that finding number VII is contradicted by the laws of nature and cannot stand. In this they argue that since the record, standing uncontradicted, proves that plaintiffs and their predecessors raised good gardens, and since it is a matter of judicial notice that no garden will grow in that locality unless it is amply irrigated, and since the record shows that there were no other sources from which plaintiffs could secure water in supply adequate to so irrigate, it is contrary to the laws of nature to find that all waters in Red Ranch Ravine were used by defendants for five years prior to 1951, when in fact good gardens were raised up to and including 1950, when the dam was constructed in the ravine by respondents.

[5] This would appear to be nothing more than an assertion that the evidence is insufficient to sustain the judgment of the trial court based as it is on finding VII. With this we cannot agree. At no time did plaintiffs offer to prove the amount of water needed and used by them to irrigate, and there is room to doubt that any great quantity was used since plaintiff admitted that "he never had much of a garden" and pastured only three cows and three calves. In view of this and the substantial testimony concerning the existence of other sources of water supply, it would seem reasonable to assume that appellants could secure sufficient irrigation waters for their limited purposes while at the same time defendants were using all the waters flowing onto their lands through Red Ranch Ravine. Thus we find no error or contradiction in the finding herein challenged.

Appellants next contend that the judgment is incorrect in that it is based upon inconsistent and contradictory findings, namely findings IV and VII.

Finding IV is: "That, except as hereinbefore set forth, the allegations contained in plaintiffs' Second Amended Complaint are not true." The allegations in paragraph V of said complaint are substantially: (a) That said defendants West constructed a dam across the ravine; (b) That said dam has stopped the flow of water as it was wont to flow from and across the lands of defendants onto the lands of plaintiffs; (c) That defendants West have taken, used and diverted all of the water flowing in said water course; and, (d) That plaintiffs have not been able to use any water from said ravine because defendants constructed the dam and did take, use and divert said water. Appellants urge that finding IV that these allegations in the complaint are not true is inconsistent with and in conflict with finding VII.

[6, 7] This argument is not worthy of prolonged discussion. It is incumbent upon an appellate court to give the findings of fact such a construction as will uphold rather than defeat the judgment, reading all findings together so as to resolve any ambiguities and inconsistencies therein in favor of sustaining the judgment. Woodbine v. Van Horn, 29 Cal.2d 95, 109, 173 P.2d 17; 24 Cal.Jur. pp. 1009–1011. And, a judgment may not be set aside unless the conflict is clear and the findings incapable of being harmoniously construed. 24 Cal.Jur. p. 967.

[8] The findings herein seems to be completely reconcilable. Even if this were not so, it is plain that finding IV could be disregarded as surplusage and the judgment sustained on the basis of the sufficiency of the evidence to support finding VII, the materiality of which cannot be denied.

Appellants' final argument is but a reiteration of conflicting evidence, an assertion that they, as lower riparian owners, were illegally deprived of their proportionate share of the waters naturally flowing through Red Ranch Ravine, and a contention that finding VII, upon which the judgment is based, is not supported by the evidence.

[9] Suffice it to say that the evidence, as hereinbefore discussed, is sufficient to sustain the judgment in favor of defendants. Although it may be true that plaintiffs had certain riparian rights in and to the natural flow of water through the ravine and that defendants' use of the waters flowing upon their lands was unreasonable in relation to that right, it is also true that the judgment is based upon the finding of a prescriptive right thereto acquired by defendants Moore v. California Oregon Power Co., 22 Cal.2d 725, 140 P.2d 798; E. Clemens Horst Co. v. Tarr Mining Co., 174 Cal. 430, 163 P. 492, and plaintiffs' complaint therefore came too late.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

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132 Cal.App.2d 447

Ralph W. JOHNSON, Marie E. Johnson, William F. Bottoms and Mary A. Bottoms, Petitioners-Respondents,

v.

CITY OF SAN PABLO, a Municipal Corporation, Gertrude Yurko, Lloyd T. Bolt, William H. Olson, R. W. Pelletreau, J. M. Snider, and George W. Moitoza, Respondents-Appellants.

Ralph W. JOHNSON, Marie E. Johnson, William F. Bottoms and Mary A. Bottoms, Petitioners-Respondents,

v.

CITY OF SAN PABLO, a Municipal Corporation, Gertrude Yurko, Lloyd T. Bolt, William H. Olson, R. W. Pelletreau, J. M. Snider, and George W. Moitoza, Respondents-Appellants.

CITY OF SAN PABLO, a Municipal Corporation, Petitioner-Appellant,

v.

CITY OF RICHMOND, a Municipal Corporation, John DeRoy, Gust J. Allyn, C. D. Erickson, James P. Kenney, Fred M. Martin, Ed J. J. McKeegan, John J. Sheridan, D. M. Bradley, Gay G. Vargus and R. H. Miller, Respondents.

CITY OF SAN PABLO, a Municipal Corporation, Petitioner-Appellant,

v.

CITY OF RICHMOND, a Municipal Corporation, John DeRoy, Gust J. Allyn, C. D. Erickson, James P. Kenney, Fred M. Martin, Ed J. J. McKeegan, John J. Sheridan, D. M. Bradley, Gay G. Vargus and R. H. Miller, Respondents.

Nos. 16116, 16117, 16118, 16119.

District Court of Appeal, First District, Division 1, California.

April 21, 1955.

Rehearing Denied May 20, 1955.

Hearing Denied June 16, 1955.

Proceedings in mandamus and certiorari, against cities of San Pablo and Richmond, attacking validity of proceedings under which the cities were seeking to annex overlapping territory. The Superior Court, County of Contra Costa, Jordan Martinelli, J., entered judgments upon findings that proceedings instituted by city of San Pablo, under Annexation Act of 1913, were void, and that proceedings instituted by city of Richmond, under uninhabited territory act of 1939, were valid, and appeals were taken. The District Court of Appeal, Fred B. Wood, J., held, inter alia, that evidence supported trial court's findings that 2,800 acre tract of land which was permanently covered by waters of San Pablo Bay was uninhabited and was substantially and clearly separable and distinguishable portion of territory and could not be annexed in proceedings under 1913 act.

Judgments affirmed.

1. Municipal Corporations ⚷33(1)

Where proceedings have been instituted by two cities to annex same territory, city which has instituted proceedings first in time has jurisdiction to proceed to exclusion of other city. Government Code, §§ 35000–35003, 35100–35158, 35300–35326.

2. Municipal Corporations ⚷29(4)

Under Annexation Act of 1913, independent uninhabited areas may not be included in body of land proposed for annexation to a city. Government Code, §§ 35100–35158, 35300–35326.

3. Municipal Corporations ⚷33(1, 8)

Issue, in annexation proceedings, of what constitutes independent and separate area, is question for trier of facts, and reviewing court's function thereon is to determine whether that finding is supported by evidence. Government Code, §§ 35100–35158, 35300–35326.

4. Municipal Corporations ⚷33(6)

In proceeding involving validity of annexation proceedings, instituted by city of San Pablo, under Annexation Act of 1913, evidence supported finding that 2,800 acre tract of land which was permanently covered by waters of San Pablo Bay was uninhabited and was substantially and clearly separable and distinguishable portion of territory so that it could not be annexed in proceedings under act. Government Code, §§ 35000–35003, 35100–35158, 35113.

5. Municipal Corporations ⚷33(6)

In proceeding involving validity of annexation proceedings instituted by City of San Pablo, under Annexation Act of 1913, evidence supported findings that certain territories which city of Richmond proposed to annex under Uninhabited Territory Act were uninhabited, zoned for industrial use, and not subject to annexation under 1913 act. Government Code, §§ 35000–35003, 35100–35158, 35113.

6. Municipal Corporations ⚷29(4), 33(1)

Attempt by city of San Pablo, in proceedings under Annexation Act of 1913, to include two separable and distinguishable uninhabited portions of territory was improper and rendered proceedings void. Government Code, §§ 35000–35003, 35100–35158, 35113.

7. Mandamus ⚷78

Municipal Corporations ⚷33(8)

Determinations of city council of San Pablo that certain territory was inhabited so as to be subject to annexation to city under Annexation Act of 1913, was not conclusive so as to preclude judicial review, in proceeding in mandamus and certiorari against city, where parties to mandamus and certiorari proceedings had treated matter as an issue and evidence was taken thereon without objection. Government Code, §§ 35000–35003, 35100–35158, 35113, 35300–35326.

8. Appeal and Error ⚷169

Issues which were not raised at trial were not properly before reviewing court.

9. Municipal Corporations ⚷33(1)

Issuance of alternative writ of mandate and writ of review enjoining city of Richmond from taking any further steps in proceeding in annexation proceeding tolled period for hearing on annexation petition until writs were discharged. Government Code, § 35307.

10. Municipal Corporations ⚷33(6)

In proceeding involving validity of annexation of territory to city of Richmond, evidence supported trial court's findings that annexation petition was duly executed by corporate landowners involved, notwithstanding contentions that persons signing on behalf of corporations did so without authority and without attaching corporate seals and that petition was not signed before notary public. West's Ann.Corp.Code, § 801(b).

11. Municipal Corporations ⚷33(9)

Allegations in petitions attacking validity of annexation proceedings that "respondents have acted without and in excess of their powers, authority, and jurisdiction," and "to circumvent lawful annexation proceedings previously instituted to annex property" to other city were insufficient to allege fraud and failed to present justiciable controversy.

12. Municipal Corporations ⚷29(2)

No law prohibits a municipality, when its present municipal necessities require it, from extending its boundaries by annexation, even though such extension may possibly prevent future expansion of another municipality. Government Code, §§ 35000–35003, 35100–35158, 35113, 35300–35326.

13. Municipal Corporations ⚿63(1)

Wisdom or expediency of annexation of territory is not concern of courts. Government Code, §§ 35000–35003, 35100–35158, 35113, 35300–35326.

14. Municipal Corporations ⚿33(8)

Where two cities were seeking to annex same territory, one such city was a "party beneficially interested" within meaning of phrase so as to be entitled to writ of review to attack validity of other city's proceedings. West's Ann.Code Civ.Proc. § 1069.

See publication Words and Phrases, for other judicial constructions and definitions of "Party Beneficially Interested".

15. Mandamus ⚿23(1)

Where two cities were seeking to annex same territory one such city was a "party beneficially interested" within meaning of phrase so as to be entitled to writ of mandate to attack validity of other city's proceedings. West's Ann.Code Civ.Proc. § 1086.

Robert T. Anderson, Berkeley, Richard C. Johnston, James P. O'Drain, R. W. Pelletreau, Richmond, for appellants.

Tinning & DeLap, Dana Murdock, Richmond, for petitioners-respondents in Nos. 16116 and 16117.

Thomas M. Carlson, City Atty. of Richmond, Frederick Bold, Jr., Spe. Asst. to the City Atty., Richmond, for respondents in Nos. 16117 and 16119.

FRED B. WOOD, Justice.

Proceedings for the annexation of overlapping territory to the cities of San Pablo and Richmond, respectively, were in progress when proceedings in mandamus and in certiorari were instituted against each city. There resulted four separate judgments, each holding the Richmond annexation proceeding valid and the San Pablo annexation proceeding invalid. San Pablo has appealed.

[1] If valid, the San Pablo proceeding, as the first in time, gave San Pablo jurisdiction to the exclusion of Richmond. Accordingly, we will consider first the validity of the San Pablo proceeding.

The San Pablo Annexation Proceeding

The San Pablo annexation proceeding was conducted under the Annexation Act of 1913, §§ 35100–35158 and §§ 35000–35003, Gov.Code. It had progressed to and including the adoption by the city council of a resolution approving the circulation of a petition for annexation (see § 35113) when temporarily restrained upon the issuance of the alternative writ of mandate and the writ of review in cases Nos. 16116 and 16117.

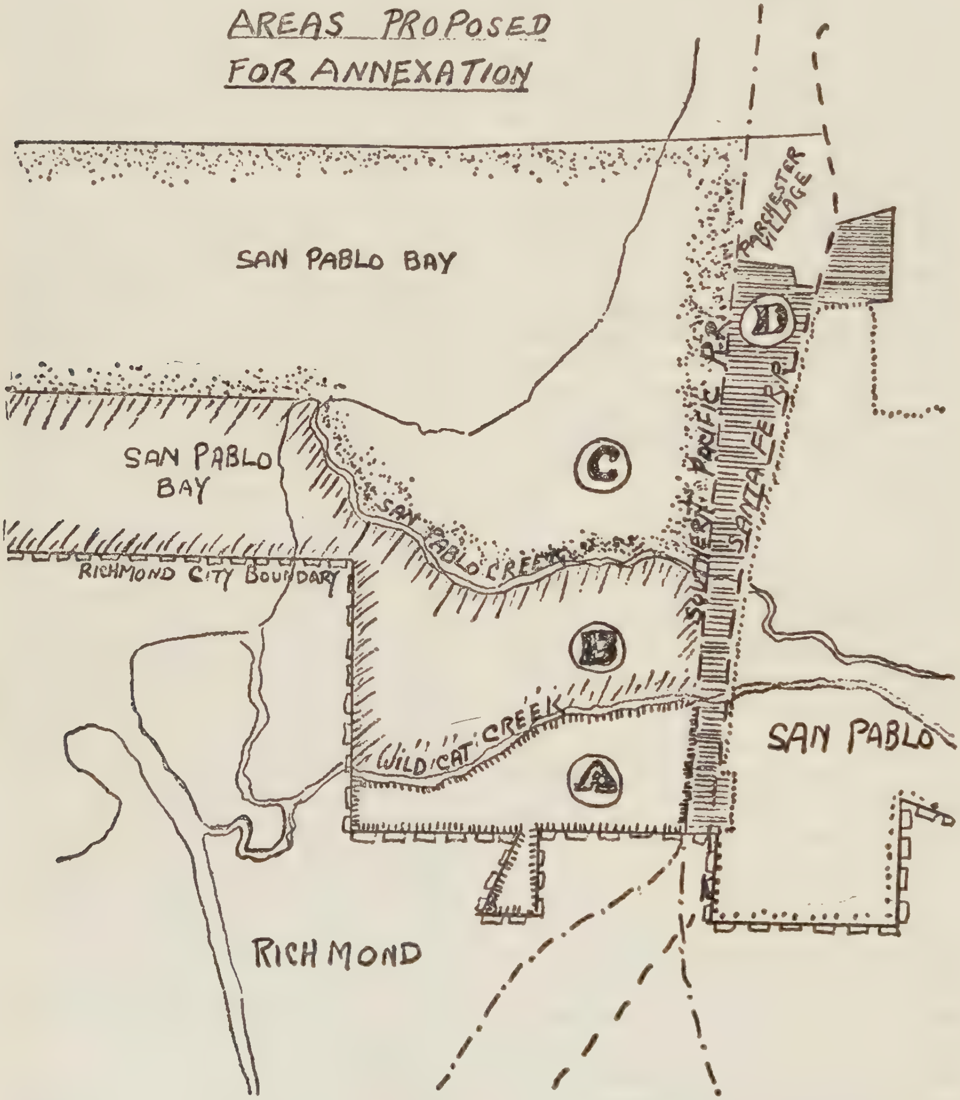
The trial court concluded that the San Pablo proceeding was invalid and of no effect. That conclusion rested upon findings that substantial, separable and distinguishable uninhabited areas were included in the territory proposed for annexation and that certain steps taken in the proceeding were jurisdictionally defective for failure to observe the applicable statutory requirements. We will consider first the question concerning the inclusion of uninhabited territory.

The court found that the territory proposed for annexation "consists of approximately 6.2 square miles, substantial and clearly separable and distinguishable portions of which are uninhabited territory as 'uninhabited territory' is defined in the Uninhabited Territory Act of 1939, two separable portions of said territory are inhabited residential subdivisions, portions of said territory are clearly separable, the predominant uses of which are industrial, agricultural, marsh and tide lands and submerged lands." The court specifically described as "uninhabited" the area proposed for annexation to Richmond, and the greater portion of that area was included in the territory proposed for annexation to San Pablo.

The evidence appears to support the finding, at least as to the submerged lands and the area which was also proposed for annexation to Richmond.

William Edward Finley, acting planning director of the city of Richmond, testified that there are about 4,215 acres in the San Pablo annexation territory[1] of which some 2,870 acres are totally covered by water at all times.

The witness, both on the witness stand and in the report of the planning commission to the Richmond city council, divided this territory into four areas designated A, B, C, and D. In analyzing the territory he found it necessary to determine some natural boundaries because they were so different in nature and character. He had to do this to differentiate. They are indicated upon the accompanying diagram, except that the western boundaries of areas B and C are not shown on the diagram. Those areas extend westerly into San Pablo Bay a distance of about 2.8 miles beyond the portions thereof shown on the diagram.


AREAS PROPOSED FOR ANNEXATION
SAN PABLO BAY
PARCHESTER VILLAGE
D
SOUTHERN PACIFIC R.R.
SANTA FE R.R.
C
SAN PABLO BAY
SAN PABLO CREEK
RICHMOND CITY BOUNDARY
B
WILD CAT CREEK
A
SAN PABLO
RICHMOND

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[1] Approximately three times the presently incorporated area of San Pablo.

Area A extends northerly from the north boundary of Richmond to Wild Cat Creek, and westerly from the Southern Pacific tracks to the Richmond city limits. It contains 199 acres, is primarily residential, has 862 residential dwelling units and a population of about 3,500.

Area B, extending northerly from Wild Cat Creek to San Pablo Creek, and westerly from the Southern Pacific tracks to the Richmond boundary and into San Pablo Bay to the Marin-Contra Costa line, contains 1,445 acres, of which 1,000 are under water. It is zoned for heavy industry. at present used predominantly for agricultural purposes, with scattered industries and a few homes. It has 33 scattered residences and a population of 115.

Area C extends northerly from San Pablo Creek to the westerly extension of the north line of Parchester Village (excluding Parchester Village) and from the Southern Pacific tracks westerly to the Marin-Contra Costa boundary. It is predominantly industrial and agricultural, has a population of 80, 23 residences, and contains 2,209 acres, including 339 of uplands, the remainder being under water. He excluded Parchester Village from his recommendation for annexation to Richmond because it was concentrated in population and was not asking for annexation to Richmond as were the people in North Richmond.

Area D extends northerly from the Richmond city limits between the Southern Pacific and Sante Fe tracks to a line south of Parchester Village. At its northerly end Area D extends across the Santa Fe tracks to include a portion of the Tank Farm property immediately east of the Santa Fe tracks. It contains 232 acres, 50 percent developed for industry and 50 percent vacant; 3 residences with two registered voters. It is zoned for heavy industry, is choice industrial land because served by two main line railroads and should be reserved for such purposes. The portion of D which is east of the Santa Fe tracks was not included in the proposal for annexation to San Pablo. Richmond planning commission's attitude was that if annexation were had under the Uninhabited Act this portion ought to be included in the annexation to Richmond. The territory seeking annexation to Richmond is identifiable by boundaries or physical characteristics.

Parchester Village is a single family residence area which is fully developed.

The land in areas B and C has scattered homes throughout; i. e., farm houses, dwellings of a substandard character, yet people live there.

[2] In determining whether this evidence supports the findings in question, we are governed by the basic principle that a separate and independent uninhabited area may not be included in a body of land proposed for annexation to a city under the 1913 act.

The test whether a given area is uninhabited is furnished by section 35303; "* * * territory shall be deemed uninhabited if less than twelve registered voters reside within it * * *."

[3] What is an independent and separate area presents a more difficult question. It is a question of fact and no precise formula has been evolved, perhaps none can be evolved, to serve as a ready test. It is of course the function of the trier of the facts to decide such a question in the first instance. A reviewing court's function is that of ascertaining whether the finding made in a particular case is supported by the evidence in the case.

In People v. Town of Ontario, 148 Cal. 625, 84 P. 205, portions of territory annexed to a city under the 1889 act were uninhabited. The trial court held that those portions were properly included. The Supreme Court affirmed upon the ground that the evidence sustained the conclusion of the trial court that the territory "taken as a whole, may fairly be said to be inhabited" notwithstanding "the presence of several uninhabited tracts or parcels, each exceeding five acres in area." 148 Cal. at page 641, 84 P. at page 212.

In Rogers v. Board of Directors of City of Pasadena, 218 Cal. 221, 22 P.2d 509, an original proceeding in the Supreme Court, a contention that certain territory being annexed under the 1913 act contained large separable parcels of uninhabited lands was overruled, the court saying: "An examination of the map which is included in the record fails to support the assertion that the unoccupied portions of the territory are separable and independent of the main inhabited portions. There are streets and roads in the whole tract, and the inhabitants are scattered throughout its area. While this court doubtless has power in a clear case to determine that a case falls outside the scope of the act of 1913 [citations], this is not such a case." 218 Cal. at page 223, 22 P.2d at page 509.

In People ex rel. Strong v. City of Whittier, 133 Cal.App. 316, 24 P.2d 219, one uninhabited parcel was about the size of a city lot and served as the site of the city's pumping plant. The other was a very small piece of ground consisting entirely of a railroad right of way. Each of the other parcels was inhabited. The legal description showed "the property to be one single body of land lying southwesterly of the old city lines and contiguous thereto." 133 Cal.App. at page 320, 24 P.2d at page 220. These facts did not support the trial court's conclusion that separate and independent uninhabited areas were included. Applying the rule enunciated in People v. Town of Ontario, supra, 148 Cal. 625, 84 P. 205, the appellate court held that "the whole proposed 'addition' to the city of Whittier is in fact and in law one single inhabited body of land." Page 321 of 133 Cal.App., page 221 of 24 P.2d.

In Capuchino Land Co. v. Board of Trustees, 34 Cal.App. 239, 243, 167 P. 178, 180, the court observed that the uninhabited area held to be separate and independent was "a compact rectangular body of land embracing 1,890 acres, which has apparently never been subdivided or intersected with streets, has not a house upon it, and consists entirely of grazing, marsh, and tide lands. It is separated from the Lomita Park tract by the tracks of the Southern Pacific Railroad and of the San Francisco & San Jose Railroad, so that the inhabitants of the Lomita Park tract cannot by any stretch of reasoning be said to be inhabitants of the larger area adjacent. In no reasonable sense can it be said that this tract of land, which from the map appears to be almost if not quite as large as the present city of San Bruno, when regarded as a unit, be said to be inhabited, nor to have any electors within its boundaries to whom the question of its annexation to the city of San Bruno could have been submitted under the terms of the statute of 1889."

In People ex rel. City of Pasadena v. City of Monterey Park, 40 Cal.App. 715, 181 P. 825, 827, the court affirmed a judgment which held that separate uninhabited areas had been improperly included in a petition for annexation under the 1913 act. The principal area consisted of a "new sewer farm" situated some distance from the city, connected with the city boundary by several narrow strips of land, some of the strips being portions of public streets. "The only inhabitants of the annexation territory were eight persons who lived in three houses, all of which were situated on one acre on the strip lying east of the old sewer farm, at a point 3.54 miles from the north limits of the new sewer farm." It thus appeared that "all of the tracts involved in the annexation territory were uninhabited, except the tract on which said eight persons lived." 40 Cal.App. at page 720, 181 P. at page 827.

[4] We conclude that in our case the evidence supports a finding that the 2,800 acre tract of land which is permanently covered by the waters of San Pablo Bay is uninhabited, and is a "substantial and clearly separable and distinguishable portion" of the territory proposed for annexation. With these physical characteristics, such a large tract, one which greatly exceeds in size the inhabited area, can hardly be regarded as so incidental to the inhabited area as to justify a conclusion that the territory proposed to be annexed, regarded as a whole, may fairly be said to be inhabited.

[5] We think the same may be said of the area which is included also in the Richmond annexation territory. It is uninhabited and is zoned for industry and thus is not legally available for residential use. That is a substantial distinguishing

characteristic, not unlike the uninhabited and physically uninhabitable quality of the submerged lands. In either case the condition might change (zoning restrictions might be modified and submerged lands might be filled) but until such a change occurs the distinguishing character of each area continues, if the area continues in fact to be uninhabited. The fact that the industrially zoned area under discussion is bounded by two main line railroads is an added, though not a controlling, circumstance. The presence of the railroads doubtless contributes greatly to make this area peculiarly suitable for industrial uses.

[6, 7] These facts justify the legal conclusion that the inclusion of these two separable and distinguishable uninhabited portions was improper and rendered the San Pablo annexation proceeding void.[2]

In view of this conclusion it is unnecessary to consider the other findings upon which the trial court's conclusion of invalidity was based.

The Richmond Annexation Proceeding

The Richmond annexation proceeding was brought under the provisions of the Annexation of Uninhabited Territory Act of 1939, Gov.Code, §§ 35300–35326 and §§ 35000–35003.

The county boundary commission approved the proposed boundaries, the petition was circulated, signed and filed, and the city council at a special meeting adopted a resolution fixing the time and place for the hearing of protests to the proposed annexation,—all on March 9, 1953, in the sequence indicated. At its regular meeting held later that day, the city council ratified the action it had taken at the special meeting.

This action, duly and regularly taken, gave Richmond exclusive jurisdiction in view of the invalidity of the San Pablo annexation proceeding.

The trial court concluded that all proceedings had and taken for the annexation of territory to Richmond were valid, regular and in compliance with law.

At the outset of the trial, counsel for San Pablo stated that the only attack they were making upon the Richmond annexation proceeding was (1) that the Richmond proceeding was barred because commenced subsequent to the initiation of the San Pablo proceeding, and (2) the Richmond proceeding was vitiated by fraudulent intent. This, it would appear, as later indicated by the trial court, was still appellants' theory at the conclusion of the taking of evidence.

[8] San Pablo now additionally claims that the petition for annexation to Richmond was insufficient and that Richmond lost jurisdiction because its council did not hear the petition within the prescribed 40-day period. Although these additional points are not properly before us, in view of the theory upon which the case was tried, we have considered them and find them wanting in merit.

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[2] Appellants further state that the San Pablo city council, when it gave consent to the commencement of annexation proceedings, impliedly found that all of the territory in question was inhabited and that such a finding was "final and conclusive in the absence of a showing that there was an abuse of discretion or fraud on the part of the * * * council in making such finding."

If appellants are thereby claiming that the character of that territory (inhabited or uninhabited) is not the subject of judicial inquiry in the current actions, they are mistaken. It is an issue under the pleadings. The parties treated it as an issue during the trial. The fact that the 2,800 acre tract of submerged land is an uninhabited, separable and distinguishable portion of the area, appears upon the face of the record. The additional evidence taken by the court (including the testimony of Mr. Finley) went in without objection.

Under the circumstances, it is clear that the issue under discussion is justiciable and that the trial court was entitled to consider all of the evidence introduced thereon. See English v. City of Long Beach, 114 Cal.App.2d 311, 316–317, 250 P.2d 298; City of Anaheim v. City of Fullerton, 102 Cal.App.2d 395, 401–403, 227 P.2d 494; People ex rel. City of Pasadena v. City of Monterey Park, supra, 40 Cal.App. 715, 722–723, 181 P. 825; Capuchino Land Co. v. Board of Trustees, supra, 34 Cal.App. 239, 167 P. 178.

[9] *Richmond did not lose jurisdiction for failure to hear the petition within 40 days after March 9th,* the date of passage of the city council's resolution giving notice of the proposed annexation. (See § 35307 as added by Stats. 1949, ch. 79, p. 125.) The resolution of March 9th fixed April 6th at 8:00 p. m. as the time for the hearing of objections to the proposed annexation. The alternative writ of mandate and the writ of review which issued against the city of Richmond on April 7th, in cases 16118 and 16119, enjoined the city from taking any further steps in the proceeding until 50 days after March 6th or until further order of the court. Those writs were not discharged and the injunctions dissolved until April 29, 1953. Obviously, the running of the 40-day period was tolled during the period of the restraint (April 7th to April 29th) so that if the hearing was not held until May 4, 1953, as appellant contends,[3] it was held in time. So, even if it were an issue in the case, the point would be without merit.

[10] *Appellants further claim that the persons who signed the petition for annexation on behalf of certain corporations owning land in the area, did so without authority* and without attaching the corporate seals; also, that the petition was not signed before a notary public. A complete answer is that each of the signers in question, called to the witness stand by the appellants, as their witness, testified that he was duly authorized to execute the document by the corporation of which he was an officer. As to all but one of them, this testimony was supplemented by documentary evidence of authority. We do not find in the statutes any mandate that requires the affixing of a corporate seal (see Corp. Code, § 801, subd. (b)) or the attachment of a notarial certificate to make the signature to such a petition effective. We conclude that the evidence amply sustains the trial court's finding that the petition was duly executed by the corporate landowners in question.

[11-13] *Appellants' remaining point is asserted fraud upon the part of the city of Richmond and the landowners who sought annexation to that city.*

In their opening brief appellants say that "at the trial * * * appellants requested leave to amend their petitions to include an allegation of fraud and offered to introduce testimony on that point. The trial court denied the motion * * * and refused to admit the offered evidence." This is assigned as reversible error.

Their petitions did not allege fraud. An allegation that "respondents have acted without and in excess of their powers, authority, and jurisdiction" obviously did not sound in fraud. They did allege that the Richmond proceeding is an invalid attempt "to circumvent the lawful annexation proceedings previously instituted to annex property to the city of San Pablo"; that its effect would be "to annex to * * * Richmond a long narrow strip of territory in an endeavor to prevent the lawful annexation by the City of San Pablo"[4] of certain territory and "to prevent for all times any general westward expansion by the City of San Pablo * * *."

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[3] There is no evidence as to what happened after April 29th, the last day of the trial.

[4] In making this contention San Pablo is wielding a two-edged sword. It cuts both ways.

Richmond was the first to receive an annexation request, which was put on the agenda for the city council meeting of March 2nd. At that meeting, the council referred the request to Richmond's planning commission for report in 30 days.

There is evidence that San Pablo's mayor told his planning commission at its meeting on March 2nd that similar proceedings had been started in Richmond and that "the first city that reached a certain point first cut off the other city" and that in order to get the "jump" on Richmond it would be necessary for the San Pablo council to have a recommendation from the San Pablo planning commission.

(The extension of San Pablo's boundary westerly to the county line, thus including the 2,800 acre tract of submerged lands, would prevent Richmond from expanding northerly as effectively as would Richmond's annexation strip cut off San Pablo's expansion westerly.)

That such is the type of asserted fraud of which appellants complain, is emphasized by the amendment to their petitions which they offered and the court refused. The gist of the amendment was that the city of Richmond and the petitioning landowners "commenced and conducted said annexation proceedings for the sole purpose of blocking the City of San Pablo," and that Richmond and said landowners "had no intention of completing said annexation proceedings and have never intended to complete such annexation proceedings."[5]

Such allegations do not present a justiciable controversy. As held in People ex rel. Peck v. City of Los Angeles, 154 Cal. 220, 227, 97 P. 311, 314, "there is no law which prohibits another municipality, when its present municipal necessities require it, from extending its boundaries by annexation because such extension may possibly prevent future expansion of another municipality." As held in City of Burlingame v. County of San Mateo, 90 Cal.App.2d 705, 711,[6] 203 P.2d 807, 811, after an extensive review of the authorities, the "wisdom or expediency of the annexation of this territory is not a concern of the courts. We can go no further than to see that existing laws are complied with," and the "motives of the city council of Burlingame [in our case, Richmond], 5 Cal.Jur. 640, or of Mills Estate, Incorporated [in our case, the petitioning landowners], 1 Cal.Jur. 336, cannot be inquired into so long as they proceeded according to established law." See also People ex rel. Forde v. Town of Corte Madera, 115 Cal.App.2d 32, 45–47, 251 P.2d 988.[7] In the case of Richmond the pertinent limitations imposed by the statute are that the annexed territory must be contiguous to the city (contiguity not to depend upon a strip of land over 300 feet long and less than 200 feet wide) and that less than 12 registered voters reside within it. §§ 35002.5, 35302, and 35303. The Richmond annexation territory met these requirements.

San Pablo's Capacity To Sue

[14, 15] Respondents contend that the city of San Pablo is not a "party beneficially interested" within the meaning of those words as used in sections 1069 and 1086 of the Code of Civil Procedure and therefore has not the capacity to apply for a writ of mandate or of review. They impliedly concede that San Pablo has the legal capacity to be a party defendant in either type of proceeding involving the very same issues. We think San Pablo has very definite justiciable "interests" in the controversy. One is an interest that there be an early determination of the validity and relative priority of each of the proceedings. If each proceeding were to be prosecuted to completion without such a determination, neither city would know which (if either of them, instead of the county) should levy taxes, inspect buildings, collect inspection fees, and furnish fire, police and other governmental services in the disputed area.

Although the capacity of a city thus to participate seems not to have heretofore been expressly questioned and decided, it has been tacitly recognized in such cases as City of Burlingame v. County of San Mateo, supra, 90 Cal.App.2d 705, 203 P.2d 807, and City of Anaheim v. City of Fullerton, supra, 102 Cal.App.2d 395, 227 P.2d 494. A city's interest in such a case is as real as that of a school district when some of its territory is being annexed to a city. See Jefferson Union School Dist. v. City Council, 129 Cal.App.2d 264, 277 P.2d 104.

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[5] Incidentally, this alleged intent not to complete the annexation is gainsaid by appellants' argument that consummation was effected after too long a delay in the hearing of protests: "On said May 4, 1953, Richmond first read its Ordinance No. 1398, which ordinance was finally passed and adopted on May 11, 1953; a certified copy of the ordinance was filed with the Secretary of State on May 12, 1953."

[6] A petition for a hearing by the Supreme Court was denied.

[7] An illustration of fraudulent use of the 1939 Act which vitiates an annexation proceeding is furnished by City of Anaheim v. City of Fullerton, supra, 102 Cal.App.2d 395, 227 P.2d 494; taking an area that has more than 12 registered electors, dividing it into two parts to keep within that limit as to each part and commencing a separate annexation proceeding for each part, when the two are really one.

A city council's refusal to give protesting landowners a fair hearing was one of the factors that vitiated an annexation proceeding, under the 1913 act, in Foth v. City of Long Beach, 125 Cal.App.2d 520, 270 P.2d 868.

Each of the judgments is affirmed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; SCHAUER, J., dissenting.

132 Cal.App.2d 790

In the Matter of the ESTATE of Lowell Webster LYONS, Deceased.

Lawrence J. HALL, Petitioner and Respondent,

v.

Lowell LYONS, Contestant and Appellant.

Civ. 20730.

District Court of Appeal, Second District, Division 2, California.

May 9, 1955.

Hearing Denied July 6, 1955.

Proceeding on petition for letters of administration. Petition was opposed by decedent's son. The Superior Court, Los Angeles County, Victor R. Hansen, J., granted letters, and son appealed. The District Court of Appeal, Fox, J., held that where no one having priority for appointment as decedent's administrator had applied and petitioner, who had paid decedent's funeral expenses, was a person legally competent to serve as administrator, petitioner could properly be appointed, irrespective of his statute as creditor.

Order affirmed.

1. Executors and Administrators 🔑**20(7)**

In proceeding on petition for letters of administration, evidence supported trial court's inference that decedent's son, who opposed petition, did not intend to probate estate and did not wish it to be probated. Probate Code, § 422.

2. Executors and Administrators 🔑**17(6)**

Where no one having priority for appointment as decedent's administrator had applied and petitioner, who had paid decedent's funeral expenses, was a person legally competent to serve as administrator, petitioner could properly be appointed, irrespective of his status as creditor. Probate Code, § 422(10), 427.

3. Executors and Administrators 🔑**20(5)**

Statement, in petition for appointment as decedent's administrator, that estate consisted of personal property of total estimated value of approximately $3,000 sufficiently stated character and estimated value of property of estate. Probate Code, § 440(3).

4. Executors and Administrators 🔑**20(5)**

A petition for appointment as decedent's administrator need not describe property in estate, and is sufficient if it states that property is realty or personalty. Probate Code, § 440(3).

5. Executors and Administrators 🔑**20(10)**

Decedent's son, as decedent's heir was a person interested in estate and had right to appeal from appointment of another as administrator.

6. Executors and Administrators 🔑**20(6)**

One must be a person interested in estate in order to oppose a petition for letters of administration. Probate Code, § 442.

7. Executors and Administrators 🔑**20(6)**

A "person interested in estate", such as may oppose petition for letters of administration includes only those who, either absolutely or contingently are entitled to share in estate. Probate Code, § 442.

See publication Words and Phrases, for other judicial constructions and definitions of "Person Interested in Estate".

8. Executors and Administrators 🔑**20(6)**

Personal representative of estate of testatrix who had left property to decedent, who survived her, was not a "person interested in decedent's estate", and had no standing to oppose petition for letters of administration of decedent's estate. Probate Code, § 442.

Elon G. Galusha, Los Angeles, for appellant.

Betts, Ely & Loomis and James A. Williams, Los Angeles, for respondent.

FOX, Justice.

This is an appeal by Lowell Lyons from an order of the probate court appointing Lawrence J. Hall administrator of the estate of Lowell Webster Lyons.

Decedent, father of appellant, passed away on December 10, 1953. He was a resident of Los Angeles County and left an estate therein. On June 3, 1954, respondent filed a petiton for letters of administration in the matter of the estate of Lowell Webster Lyons. Hearing was set for June 23d. On that date appellant appeared in person and by counsel. He sought a continuance of the hearing on the petition. His motion was granted and the hearing was continued to July 7, 1954. On that date appellant was personally present with his attorney. Further continuance was requested but the motion was denied since no legal ground was shown, and appellant had failed to file a petition on his own behalf for letters of administration of the estate, and indicated he did not intend to file such petition.[1]

In the brief hearing that followed appellant did not challenge either the qualifications or competency of respondent to act as administrator of the estate. His sole objection was based on the argument that respondent was not a creditor because his claim for funeral expenses did not arise until "after the man died." As the trial court observed, respondent's status as a creditor was not material in the circumstances of this case.

[1] Respondent pointed out that "we recognize the fact that the heirs have the first right, and if they care to file a petition and administer the estate, naturally they have priority." Prob.Code, sec. 422. From the failure of appellant to file a petition to probate the estate for nearly seven months after decedent's death, and the failure to file such petition even after a two weeks' continuance had been granted, and from what had been said in open court, the trial judge drew the inference that appellant did not intend to probate the estate nor did he wish it probated. Such an inference is amply supported.

[2] The court thereupon granted respondent's petition. This he was authorized to do, for respondent was a "person legally competent" to serve in such capacity. Prob. Code, sec. 422(10). Furthermore, no one having a priority for such appointment had filed any petition therefor. Prob. Code, sec. 427; Hinkel v. Crowson, 188 Cal. 378, 382, 206 P. 58; In re Estate of Keane, 56 Cal. 407, 410.

Appellant asserts that "no assets to be administered were set forth in the petition for appointment as required by law." Such

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1. The following colloquy took place between the court and counsel for appellant:

"The Court: Why have they not filed?

"Mr. Galusha: Up to the present time there is about $500.00 in the estate and we thought we would save the costs.

"The Court: Don't you intend to file?

"Mr. Galusha: We didn't think it was a proper thing to do * * *

"The Court: In other words, there is about $500.00 in the estate, but you don't think you should probate it and thereby permit the funeral expenses to be paid.

"Mr. Galusha: I am not trying to get out of that, but I want an itemized list of the expenses. There is a bill of $800.00, which has been reduced by our payment of $135.00.

"The Court: It is your intention to pay it?

"Mr. Galusha: I want to find out what the bill is and
then we can determine what we can do.

"Mr. Williams (Attorney for Petitioner): They have refused to pay it and refuse to administer the estate which will amount to over $3,000.00.

"The Court: (to Mr. Galusha): * * * What standing do you have? You have filed no papers and you have indicated to the Court that you don't intend to. * * *"

is contrary to the record. The verified petition stated:

[3, 4] "Said decedent at the time of his death was a resident of the County of Los Angeles, State of California, and left estate in the County of Los Angeles, State of California, consisting of personal property of the total estimated value of approximately $3,000.00." This is a sufficient statement of the character and estimated value of the property of the estate as required by Probate Code, section 440(3).[2] A description of the property is not required. "Its character sufficiently appears by a statement that it is realty or personalty." (20 Cal.Jur.2d 230, sec. 154.) Furthermore, the last paragraph of section 440 provides that "No defect of form or in the statement of jurisdictional facts actually existing shall make void an order appointing an administrator * * *" It is thus clear that respondent's petition adequately set forth that there were assets in the estate to be administered. In fact, appellant admitted during the course of the hearing that there was an estate of at least $500, and that there was an unpaid bill for decedent's funeral expenses. These facts showed that there was an estate which needed to be administered.

[5–8] One other matter requires brief notice. Decedent's sister, Mable Alice Lyons, passed away on November 27, 1953, leaving an estate in Los Angeles County. By an holographic will she left all her property to her brother, the decedent herein. He died two weeks later and prior to the probate of her will. Appellant herein is the administrator of her estate with the will annexed. In this capacity he seeks to appeal from the order appointing respondent administrator of his father's estate. It is of course recognized that individually, as an heir, appellant is interested in the estate herein, and therefore has the right to appeal. However, as a representative of his aunt's estate he is not interested in his father's estate. Her estate does not claim to be getting anything from the estate herein. One must be a "person interested" in the estate in order to oppose a petition for letters of administration. Such a person includes only those who, either absolutely or contingently, are entitled to share in the estate. Prob. Code, sec. 442; In re Estate of Bily, 96 Cal.App.2d 333, 334–335, 215 P.2d 78, 15 A.L.R.2d 861. Since appellant, as the personal representative of Miss Lyons' estate, is not interested in the estate herein, his appeal in such representative capacity must be dismissed. In re Estate of Webster, 59 Cal.App.2d 1, 4, 137 P.2d 751. The appeal of Lowell Lyons as administrator of the estate of Mable Alice Lyons, with will annexed, is dismissed.

The order appointing Lawrence J. Hall administrator of the estate of Lowell Webster Lyons, deceased, is affirmed.

MOORE, P. J., and McCOMB, J., concur.

132 Cal.App.2d 702

ESTATE of John ZIMMERMANN, Deceased.

Lina De Haan et al., Petitioners,

and

Herbert Brownell, Jr., Attorney General of the United States, as Successor to the Alien Property Custodian, Petitioner in Intervention and Appellant,

State of California, Respondent.

Civ. 8423.

District Court of Appeal, Third District,
California.
May 3, 1955.

Estate proceeding, wherein United States Attorney General intervened for recovery, as successor to alien property custodian, of funds, which had been distributed to State of California for want of known heirs, but which were claimed by German heirs. The Superior Court, Sacramento County, J. O. Moncur, J., denied intervenor's claims, and intervenor appealed. The District Court of Appeal, Van Dyke, P. J., held that United States Attorney General was entitled to have funds otherwise payable to German heirs paid over to him under the Trading with the Enemy Act.

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[2] The pertinent portion of the section reads: "A petition for letters of administration * * * must state: * * * (3) The character and estimated value of the property of the estate."

Judgment reversed with directions.

1. Aliens ⚷9

State, in exercise of its sovereign power, may provide conditions under which aliens may inherit and may wholly prohibit such inheritance.

2. Escheat ⚷2

State's power to determine devolution of title to property of person dying and leaving property within state boundaries is so broad that state may take the property itself and deny right of anyone to succeed thereto either by will or succession or may provide for transfer by will or succession by inheritance and fix conditions of such transfer or succession.

3. Escheat ⚷2

Under exercise of state's plenary power to determine devolution of title to property of person dying and leaving property within state boundaries, state may, by general laws provide that, in absence of known heirs, the property shall pass to state and may further provide that, under specified conditions, heirs who would have taken had they been known, may receive property which state has so received.

4. Aliens ⚷9

When California resident died intestate and left property in California, resident's alien German heirs received title to such property immediately upon resident's death, subject to probate of his estate and to condition that, within five years of such vesting, heirs would appear and demand the property, which had been distributed to state in absence of known heirs. Probate Code, §§ 259, 300, 1026, 1027.

5. Escheat ⚷7

Where estate of California resident was probated and residue thereof was distributed to the state of California for want of known heirs, State obtained title to the property by such decree of distribution, but such title was defeasible if resident's German heirs appeared within time limit and asserted a valid claim. Probate Code, §§ 259, 300, 1026, 1027.

6. Aliens ⚷10

Trial court's determination, in estate proceeding, that German claimants were heirs of deceased California resident and that reciprocal rights of inheritance existed between Germany and the United States concluded question whether the claims were valid. Probate Code §§ 1026, 1027.

7. War and National Defense ⚷12

Where funds of deceased California resident were deposited in state treasury because of lack of known heirs, and German heirs thereafter appeared within time limit and asserted valid claim, United States Attorney General who, as successor to the alien property custodian, intervened after making of vesting order, was entitled to have funds otherwise payable to German heirs paid over to him under provisions of the Trading with the Enemy Act. Trading with the Enemy Act, §§ 1–40, 50 U.S.C.A.Appendix, §§ 1–40; Probate Code, §§ 259, 300, 1026, 1027; West's Ann.Code Civ Proc. §§ 1300 et seq., 1350–1356, 1354.

8. Escheat ⚷8(2)

Purpose of statute pertaining to recovery of property deposited with state in unclaimed property fund is to prevent futile and unnecessary probating of estates of deceased owners of claims to deposited property. West's Ann.Civ.Proc. § 1354.

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Paul V. Myron, Deputy Director, Dept. of Justice, Washington, D. C., Lloyd H. Burke, U. S. Atty., Northern Dist. of Cal., San Francisco, Cal., Valentine C. Hammack, Sp. Asst. to the Atty. Gen., James D. Hill, George B. Searls & Irwin A. Seibel, Dept. of Justice, Washington, D. C. Mary Eschweiler, Atty., Office of Alien

Property, Dept. of Justice, San Francisco, Cal., for appellant.

Edmund G. Brown, Atty. Gen., William J. Power, Deputy Atty. Gen., for respondent.

VAN DYKE, Presiding Justice.

This is an appeal by the intervening Attorney General of the United States from that portion of a judgment denying recovery of part of the property that had been distributed to the State of California out of the Estate of John Zimmermann, deceased, for want of known heirs. Intervener had entered a vesting order under the Trading with the Enemy Act, 50 U.S.C.A. Appendix, §§ 1–40, thereby claiming to have vested in himself as Alien Property Custodian all interest in the funds so distributed to the State of California that were being claimed by German citizens who were heirs of the deceased. The facts presented by the record which are without dispute are as follows: John Zimmermann, a resident of Napa, California, died therein intestate on May 19, 1946. After probate of his estate there remained for distribution the sum of $7,373.73. There were no known heirs and hence the court in probate distributed the funds to the respondent State of California by decree of distribution dated June 20, 1947. Pursuant to statute, the funds so distributed were deposited in the state treasury on January 26, 1948. On May 3, 1948, this proceeding was instituted by German heirs of John Zimmermann. They were then, and at all times material herein, enemy aliens. Herein they sought to recover their shares of the funds that had been distributed to the state. In this proceeding the trial court found, and no contention is made that the finding was wrong, that there existed between Germany and the United States the reciprocal inheritance rights required by Section 259 of the Probate Code. On April 11, 1952, the Attorney General of the United States issued a vesting order declaring that the interests of said German heirs were thereby vested in him pursuant to the provisions of the Trading with the Enemy Act. 50 U.S.C.A.Appendix, § 39. Thereafter he filed a petition in intervention herein praying that he recover as Alien Property Custodian the funds in controversy. The trial court denied the claims of the intervener. In order to state the theory under which the trial court acted it is necessary to now refer to various legislative enactments relative to the inheritance rights of aliens under our laws.

[1–3] It is well settled that the state, in the exercise of its sovereign power, may provide the conditions under which aliens may inherit and, indeed, may wholly prohibit such inheritance. Gorny v. Trustees of Milwaukee, 93 F.2d 107, 115 A.L.R. 1000; Commonwealth v. Thomas, 140 Ky. 789, 131 S.W. 797. So broad is the power of the state to determine the devolution of title to the property of a person dying and leaving property within its boundaries that it may take the property itself and deny any right of anyone to succeed thereto either by will or by succession, or it may provide for transfer by will or succession by inheritance and fix the conditions of such transfer or succession. In the exercise of this plenary power the state may by general laws provide that in the absence of known heirs the property of a person dying intestate shall pass to the state and it may provide further, if it will, that under specified conditions heirs, who, had they been known would have taken, may recover property which the state has so received. As was said in Commonwealth v. Thomas, supra, 140 Ky. at page 800, 131 S.W. at page 800:

> "* * * The state may in its generosity, or sense of fairness, say that it will not in such case hold the proceeds against the original claimant, if he subsequently appears, and may provide for his reimbursement. It may do less, as by shortening the time in which it will make reimbursement, or it may exact conditions. In the instance here the state has declared that, for escheated property which it dedicates to purposes of education, it will not make reimbursement. Rather, it fails to make provisions for it in such instances. It was in the competency of the state to so provide, or fail to provide as it saw fit. The policy is one of legislative

discretion, and is not a condition precedent to the state's exercise of power."

In Gorny v. Milwaukee, supra, 93 F.2d at page 109, it was said:

> "* * * 'The power to escheat is a sovereign power and when the sovereign escheats he may do so absolutely or conditionally, with or without reservation of right of refund * * *. If no law authorizes a refund there can be no refund enforced. There is no common law right of refund * * *.'"

[4–7] Under our statute laws operative at the time of death of John Zimmermann, alien heirs situated as were these German heirs could succeed to the property of one dying intestate, and our laws so implement this right that immediately upon death of the intestate title is cast in his heirs subject to probate of his estate and subject to the further condition that within five years of such vesting nonresident alien heirs appear and demand the property. Prob.Code, sec. 1026; In re Estate of Caravas, 40 Cal.2d 33, 37, 250 P.2d 593; Prob.Code, sec. 300; In re Estate of Sorensen, 44 Cal.2d 306, 281 P.2d 870. The title so vested in the alien nonresident heirs of John Zimmermann was subject to probate and to the provisions of Section 1027 of the Probate Code, which section provides that when the probate proceedings have been completed, save for distribution of the residue of the estate, the court must distribute the property remaining for distribution "to known heirs, devisees or legatees entitled to succeed thereto" and if there be a balance belonging to unknown heirs, devisees or legatees then the court must distribute such balance to the State of California. The property so distributed is to be held by the State Treasurer for a period of five years from the date of the decree making such distribution, within which time any person may appear "in the superior court for the county of Sacramento and claim the estate or any part thereof" but "Rights of nonresident aliens shall be governed by the provisions of section 1026 of this code." Section 1026 provides that: "A nonresident alien who becomes entitled to property by succession must appear and demand the property within five years from the time of succession". Applying these statutory enactments to the situation in the instant case, we find that when John Zimmermann died his property, subject to probate, vested in his nonresident German heirs. His estate was probated and the residue thereof was distributed to the state for want of known heirs, pursuant to Probate Code Section 1027. By this decree the state obtained the title, but that title was defeasible if the German heirs appeared within the time limited and asserted a valid claim. They did this by initiating the present proceedings on May 3, 1948, and it is not disputed that the claims of these German citizens were valid claims save for the vesting order of the Attorney General of the United States which followed thereafter. When the German heirs appeared through the initiation of this proceeding and demanded their property the title of the state to the deposited funds was in process of being defeated. This involves, of course, the assumption that their claims were valid, a matter which was concluded by the decree of the trial court in this proceeding, when it found that the claimants were the heirs of John Zimmermann and that reciprocal rights of inheritance existed between Germany and the United States. It follows that when the Attorney General intervened, after the vesting order, he was entitled to have the funds otherwise payable to the German heirs paid over to him under the provisions of the Trading with the Enemy Act.

As we understand the position of the respondent, State of California, it claims that by virtue of legislation passed in 1947, after the death of Zimmermann, and prior to the distribution of his estate, the right of the intervener to take was destroyed. We now turn our attention to this legislation. It now appears as section 1354 of the Code of Civil Procedure, which is a part of Title 10 of Part 3 of said code, having to do with special proceedings of a civil nature. Title 10 refers to unclaimed property which is defined by section 1300 as including property distributable to the state under any provision of law, to which the state is or may become entitled or will become entitled if not claimed by the person or persons entitled thereto within the time allowed by law. Article 3 of said Title, consisting of sections 1350–1356, inclusive, refers to the prosecution of claims to such property. This group of sections treats of the manner and of the time for making claims and requires, except where the claimant is entitled to less than $500, that such claimant file a petition stating the facts constituting the claimant's right to recover. If, after a trial upon any issues raised, the court is satisfied of the claimant's right, it grants him a certificate to that effect and upon presentation of that certificate the controller is required to draw his warrant on the treasurer for the amount of money covered thereby; or if the certificate covers any property other than money the officer of the state having possession of the property is authorized by the certificate to deliver the property to the claimant. It is obvious that, saving section 1354, none of the provisions we have referred to would affect the right of either the German heirs or the intervener to recover in the instant proceeding. But the respondent's contention is that section 1354 does, by its provisions, and under the facts presented here, forbid his recovery. As we construe that section, however, it has no application to this proceeding whatever and presents no bar to the relief which the intervener seeks. We think it necessary to quote the section in full; it reads as follows:

> "Whenever any claim is made or petition filed by the representative of an estate or other person, under the provisions of this chapter, or under any other provision of law, to recover money or other property deposited in the State Treasury or held by the State or any officer thereof to the credit, or in the name, of any account in the Unclaimed Property Fund, no recovery will be allowed unless it affirmatively appears that there are heirs or legatees who will receive such money or other property or creditors of the deceased owner of the claim whose claims are valid and are not barred, and whose claims were in existence prior to the death of such deceased owner of the claim. Where only creditors exist, and there are no heirs or legatees, said claims shall be allowed only to the extent necessary to pay such claims and the reasonable costs of administration of the estate, including court costs, administrator's fees and attorney's fees. This section shall apply to all claims which are pending at the time that this section goes into effect as well as to claims arising hereafter."

[8] The respondent asserts that because under the peculiar facts of this case the original petitioners, the German heirs, cannot recover the funds they claim, due to the fact that their right to do so has been destroyed by the vesting order, the intervener also cannot recover because he is neither an heir nor a legatee of decedent John Zimmermann. We think this construction of the section does violence to its entire context. We hold that the section is confined entirely to claims made by heirs or legatees, and to claims in behalf of creditors, of a person who has died while owning a claim to recover deposited property. To attempt to broaden this legislation to include living claimants to such property would nullify that part which forbids recovery unless it appears that the recovery shall be received by heirs or legatees, for there can be in law no heirs or legatees of a living claimant; and of course the provision referring to creditors of a deceased owner of a claim can apply only when the owner of a claim has died. Throughout, the statute refers to "deceased owners" of claims. It is apparent that the purpose of the legislation was to prevent futile and unnecessary probating of the estates of deceased owners of claims to deposited property. In re Estate of Costa, 109 Cal.App.2d 735, 241 P.2d 621. If such property was ordered delivered to the personal representative of such a deceased owner and as to such decedent there were neither creditors nor heirs nor legatees, the only effect of probate would be to waste a portion of the property in the cost of probate proceedings, and to then return the residue to the state. Other than this, the statute has no effect.

It results that the statute offers no bar to the claims of the intervener and that the judgment appealed from, which denied the intervener a recovery of the deposited funds, must be reversed.

The judgment is reversed, with directions to the trial court to enter its judgment granting such recovery.

PEEK and SCHOTTKY, JJ., concur.

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Ruben Corrales ACOSTA, Defendant and Appellant.

Cr. 5306.

District Court of Appeal, Second District, Division 1, California.

May 9, 1955.

Rehearing Denied May 23, 1955.

Hearing Granted June 8, 1955. *

Defendant was convicted of, inter alia, driving or taking a vehicle without owner's consent and with intent to either permanently or temporarily deprive owner of title or possession. The Superior Court, Los Angeles County, Joe Raycraft, J., rendered judgment, and defendant appealed. The District Court of Appeal, Doran, J., held that where Mexican laborer, who spoke no English, was being driven in back seat of taxicab, and taxicab driver, believing that laborer was planning to rob him, left taxicab while it was in motion, and laborer steered taxicab from rear seat, there was no violation of statute rendering punishable the driving or taking of a vehicle without owner's consent with intent to either permanently or temporarily deprive owner of title or possession, with or without intent to steal.

Judgment reversed.

Automobiles ⚷339

Where Mexican laborer, who spoke no English, was being driven in back seat of taxicab, and taxicab driver, believing that laborer was planning to rob him, left taxicab while it was in motion, and laborer steered taxicab from rear seat, there was no violation of statute rendering punishable the driving or taking of a vehicle without owner's consent with intent to either permanently or temporarily deprive owner of title or possession, with or without intent to steal. Vehicle Code, § 503.

◆

Ellery E. Cuff, Public Defender, William H. Sanson, Noel B. Martin, Deputy Public Defenders, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Marvin Gross, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Appellant was charged by information in Count I with grand theft of an automobile. Count II with the violation of Section 503 of the Vehicle Code involving a taxicab. Count III with manslaughter and Count IV with manslaughter. A jury found defendant guilty of Counts II, III and IV and not guilty of Count I.

The appeal is from the judgment as to Count II only and in that connection it is contended that,

> "I.
>
> "The evidence failed to establish a corpus delicti in this: that the prosecution established, by direct testimony, complete disproof of the union, or joint operation, of act and criminal intent in the series of acts immediately preceding the next following the driver's abandonment of the cab.
>
> "II.
>
> "Appellant's defense was that, having by misadventure found himself the sole occupant of the moving cab, all that followed was the result of accident and misfortune, and without criminal intent. It was, therefore, prejudicial error on the part of the trial court to re-

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* Opinion vacated 290 P.2d 1.

fuse appellant's requested instruction, CALJIC 71–E.

"III.

"The trial court's failure to instruct the jury *sua sponte* on the law covering appellant's defense of accident and misfortune is reversible error."

The issue is somewhat technical. Inasmuch as it is principally a factual question, the evidence in part, as recited in appellant's brief, is as follows:

"The appellant is a Mexican agricultural worker lawfully in the United States. On April 3, 1954, he was employed at the Kito Ranch situated on the westerly side of Hawthorne Boulevard between the intersection of that street with Sepulveda Boulevard and its intersection with Highway 101. Appellant could not speak English.

"On the afternoon of April 3, 1954, appellant borrowed $5.00 from friends and, in company with others, left the Kito Ranch and went to the El Toro Cafe in Torrance, California. He remained there approximately five hours, spending practically all of his money buying rounds of drinks and playing the music box. He himself had four or five bottles of beer.

"On leaving the El Toro Cafe, appellant went with a friend to another cafe, Tony's Place, at 2409 Redondo Beach Boulevard in the extreme northeasterly section of Redondo Beach and a short distance from Hawthorne Boulevard, where music was being played and dancing was in progress. Appellant watched for a time, then began dancing alone, making something of a nuisance of himself. Because his actions were a distraction to the entertainment of other patrons, he was expelled from the cafe. He promptly came back through the side door and again began dancing alone, whereupon the police were called and appellant was removed from the cafe. Through the proprietor of Tony's Place, who acted as an interpreter, the police talked to appellant. When the officers asked about dancing by himself, appellant said he just wanted to have a little fun. He had no money to pay for a cab, whereupon the proprietor agreed to pay the charge if appellant were taken home.

"The proprietor of Tony's Place at first thought he was under the influence of liquor but did not smell alcohol on appellant's breath. He talked clear, walked straight, and there was nothing in his speech indicating intoxication.

"The cab driver, Frank Griffith, does not speak or understand Spanish. He picked up appellant as a fare at Tony's Place about 10:00 p. m., with instructions to take him to Kito's Ranch.

"About a year previously a fare of Griffith, who was sitting in the front seat, had attempted to rob him and Griffith on that occasion had escaped by opening the door and rolling out of the cab.

"Appellant was in the back seat. As the cab was being driven south on Hawthorne Boulevard, traveling thirty to thirty-five miles an hour, when within three or four minutes of the intersection of Hawthorne with Sepulveda Boulevard, appellant began speaking in Spanish to the cab driver. But he, not understanding Spanish, did not know what appellant was saying, and kept on driving. At the Sepulveda Boulevard stop sign the cab came to a halt.

"But when the cab was about three blocks south of Sepulveda, a certain series of acts began between the cab driver and appellant about which there is substantial divergence in the testimony of the parties involved.

"'The cab driver testified appellant then reached across, grabbed his clipboard (a board about fifteen inches long and nine inches wide with a metal clip to hold papers) and struck at him, then made a spring at him, both of which were blocked; the cab driver struck appellant with a flashlight; that appellant struck back with 'judo or something', whereupon the cab driver, when the car was going ten to fifteen miles an hour, headed the car into the ditch, opened his door and rolled out.

"The cab driver, not understanding appellant, thought he was going to be robbed. The car kept on going and the last the cab driver saw of appellant he was in the back seat.

* * * * * *

"On April 3, 1954, about 10:00 p. m., Hugh Douglas Von Delden, with his wife Patricia Gill Von Delden, age twenty-three years, and their child of nine months, was driving his automobile on Highway 101. At the intersection with Hawthorne Boulevard the signal was green. In the intersection his automobile was hit broadside by the cab aforesaid, resulting in the death of his wife and child."

* * * * * *

"Appellant testified in chief that he believed the cab was being driven in the wrong direction; that he was not being taken back to Kito's Ranch; that he then, and before reaching Sepulveda, asked the cab driver to stop several times but he did not stop; that the only thing he did was to raise his hand and ask the driver to stop; that the driver struck him on the forehead; that after passing an intersection the driver jumped out and he did not see him again; that he did not know the neighborhood; that the car kept in the middle of the street and he stayed in the back seat; that he reached across and took hold of the steeering wheel; that the car slowed up a little; that at the time of the accident it was going fast; that he had handled cars very little but had driven on occasion; that he did not crawl over into the front seat; that he was on the left side of the car holding on to the steering wheel with both hands; that he did not intend to take the car from the driver or have him leave the car with him in it or drive it on the highway.

"Further light is shed on what took place between appellant and the cab driver after the cab stopped at Sepulveda by the witnesses Mora, Korbi and Racine."

Section 503 of the Vehicle Code provides that "Any person who *drives* or *takes* a vehicle not his own, without the consent of the owner thereof, and *with intent* to *either permanently* or *temporarily deprive the owner thereof* of *his title to or possession* of such vehicle, whether with or without intent to steal the same, * * * shall be punished * * *."

The incident was somewhat fantastic but the fact remains that the cab driver rolled out and abandoned the car. The evidence in no sense establishes a single element of the offense charged. Appellant did not drive or "take" the car with intent to deprive the owner of possession. The doctrine of reasonable doubt as well as other applicable doctrines are still in full force and effect. The predicament of the defendant obviously was the result of the abandonment of the cab by the driver. Whether the driver was justified in so doing is beside the issue.

The judgment as to Count II is reversed.

WHITE, P. J., and DRAPEAU, J., concur.

Arcadio MORENO, Plaintiff-Respondent,
v.
LOS ANGELES TRANSIT LINES, a corporation, and Harold Franzlick, Defendants-Appellants.
Civ. 20542.

District Court of Appeal, Second District, Division 3, California.
May 9, 1955.*

Action by motorist against streetcar owner and operator for injuries sustained in intersectional collision between streetcar and motorist's automobile. The Superior Court, Los Angeles County, Thomas J. Cunningham, J., entered judgment upon verdict for motorist, and defendants appealed. The District Court of Appeal, Ashburn, J. pro tem., held that, where plaintiff was shown to have been guilty of negligence which continued to moment of accident unless causal chain was broken by defendant's failure to exercise a last clear chance to avoid accident, giving of improper instruction upon doctrine of last clear chance constituted prejudicial error.

Judgment reversed.

1. Negligence ⟹138(4)

It is not improper to instruct jury on doctrine of last clear chance when, on any valid theory, there is substantial evidence to support application of such principle.

2. Negligence ⟹136(32)

If facts are such that doctrine of last clear chance may be applied, trial judge had duty to submit such doctrine to the jury by proper instructions.

3. Negligence ⟹138(4)

In determining propriety of instruction on doctrine of last clear chance, trial judge must view evidence in light most favorable to application of doctrine and indulge in every reasonable inference in support thereof.

4. Street Railroads ⟹114(15, 21)

In action by motorist against streetcar owner and operator for injuries sustained in intersectional collision between streetcar and motorist's automobile, evidence, which revealed motorist had twice looked and had seen approaching streetcar, was sufficient to establish motorist's negligence which was of a continuing nature and constituted one of the proximate causes of the accident.

5. Street Railroads ⟹103(3)

Application of doctrine of last clear chance is not dependent upon an admission by defendant that he expected that there might be a collision.

6. Street Railroads ⟹90(5)

Streetcar motorman, who is unable to deviate from path marked by the rails, has qualified right of way and is entitled to assume that motorist, who is headed across motorman's path, will exercise ordinary care and will stop before it is too late to avoid a collision, and motorman is not required to begin stopping streetcar until he is or should be alerted to probability of motorist's failure to yield.

7. Street Railroads ⟹90(4)

Mere fact that motorist, who is headed across path of streetcar motorman, is looking in another direction is not necessarily enough to apprize motorman of probability of a collision.

8. Street Railroads ⟹103(3)

Streetcar motorman may, until he is aware, as any ordinarily prudent man in his position would be, that motorist is in position from which he cannot extricate himself through use of due care, assume that motorist will do so, but, when motorman acquires such knowledge or it is imputed to him, he must at once avail himself of any last clear chance to avoid a collision.

9. Negligence ⟹83.7

Under doctrine of last clear chance, defendant need not have actual knowledge that plaintiff is in a predicament from which he cannot escape by his own efforts but it is sufficient that defendant know, or in exercise of ordinary care should know, that plaintiff cannot escape.

10. Negligence ⟹141(9)

In personal injury action, giving of instruction, which pertained to doctrine of last clear chance, but which did not allow defendant time or opportunity for realization of plaintiff's inability to extricate himself from danger, was error.

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* Opinion vacated 286 P.2d 923.

11. Appeal and Error ⟹930(2)

Supreme Court would be required to assume on appeal that jury had understood instructions and correctly applied them to the evidence.

12. Appeal and Error ⟹1064(1)
Negligence ⟹141(9)

Where, in personal injury action, plaintiff was shown to have been guilty of negligence which continued to moment of accident unless causal chain was broken by defendant's failure to exercise a last clear chance to avoid accident, giving of improper instruction upon doctrine of last clear chance constituted prejudicial error.

◆

Melvin L. R. Harris, Henry R. Thomas and Henry F. Walker, Los Angeles, for appellants.

Sampson & Dryden, Patrick D. Horgan, Jacob Swartz, Los Angeles, for respondent.

ASHBURN, Justice pro tem.

Personal injury action. Verdict for plaintiff. Defendants Los Angeles Transit Lines and Harold Franzlick, as appellants, make no claim of insufficiency of evidence to support the verdict or of excessive damages. Counsel rely upon a claim that it was error to instruct the jury upon last clear chance, and, alternatively, that the instruction given erroneously stated that doctrine.

[1-3] It is necessary for the court to inform the jury on that matter "when, on any valid theory, there is substantial evidence to support the application of that principle. * * * if the facts be such that the doctrine *may be applied,* it is the duty of a trial judge to submit it to a jury by proper instructions * * *." Wright v. Los Angeles Ry. Corp., 14 Cal.2d 168, 179, 93 P.2d 135, 140; and the judge must view the evidence "in the light most favorable to the application of the doctrine and indulging every reasonable inference in support thereof". Daniels v. City and County of San Francisco, 40 Cal.2d 614, 617, 255 P.2d 785, 787.

The accident occurred at the intersection of Vermont Avenue and 110th Street in the City of Los Angeles. In that area Vermont, which runs north and south, has two roadways with defendant's private right of way intervening between them. The east roadway is for northbound traffic and the west one for southbound. Likewise the east car track carries cars going north and the west track is for those traveling south. Plaintiff's automobile, eastbound on 110th Street, was struck by defendant's northbound street car.

The only witnesses to the immediate facts of the accident were plaintiff, defendant Franzlick (the motorman), Mrs. Ella Lowry (a passenger on the street car) and Frank Simpson, who was leaving a cafe on the west side of Vermont and north of 110th Street. The accident occurred at or near the intersection of the northbound or east track with the center line of 110th Street. Plaintiff stopped at the stop sign on the west side of Vermont, waited for four or five southbound automobiles to pass; then started forward in low gear; he testified that when he had almost cleared the west curb line and was some 72 to 75 feet from the point of impact, he looked to the right or south and saw the northbound car, which later struck his automobile; that it was then about 325 feet from the intersection; that he then looked left or north for traffic, automobile or street car, and saw none except a second group of southbound automobiles about 150 feet away; that he then looked to the south again and saw the street car when the front of his automobile was about 50 feet from the point of accident. He placed the street car some 255 feet to the south at that time (respondent's counsel says 225 feet). At or about that 50 foot distance he shifted into second gear, the car having a standard gear shift. His own speed was fixed by him at 12 miles or less, never more than 12. Plaintiff never made any estimate of the speed of the street car, either on the ground or in court but did say that it was going a little more slowly when seen the second time. At all times before and after each of the occasions of looking at the street car, he had his head turned to the north and was looking that way though there was no traffic of any kind approaching from that direction except the group of automobiles which he had seen about 150 feet away. The motorman said that when first seen by him the plaintiff was looking to the north and continued to do so; that after first seeing plaintiff he continued to watch him. Plaintiff further testified that when he arrived practically at the northbound track he looked again to the right and the street car was almost upon him, some 15 feet away. His car was hit in the center and back of center. Plaintiff swore that he heard no gong or bell or other noise from the street car. The motorman testified that he began to ring his gong as soon as he saw plaintiff (when the street car was 80–90 feet from the impact) and continued to do so until the collision occurred; that he also began at once to stop his car, began this as soon as he saw plaintiff. No witness placed the speed of the street car at more than 25 miles at any time, except that plaintiff had it traveling 325 feet while he went 75 feet, thus making a speed of about 50 miles an hour. Defendant Franzlick testified that he first saw plaintiff's automobile when the street car was a few feet south of the safety zone, some 80 to 90 feet from the point of impact; that he was then going about 20 miles an hour; that he saw plaintiff traveling at 20 to 25 miles and looking north, plaintiff being 80 to 90 feet from ultimate collision; that he, Franzlick, then began to ring his gong vigorously and applied his brake in an immediate and continuous effort to stop the car. Also that plaintiff slowed his auto slightly and then picked up speed at once (this may have been done in the process of shifting gears).

If Franzlick's version be accepted as correct there was no last clear chance for the uncontradicted expert evidence was that it would take 132 feet to make a service stop at that speed, but an emergency stop would reduce the braking distance by 20 per cent or 22 feet, making a total distance 110 feet; but Franzlick had only 80–90 feet and so could not stop in time to avert an accident. The passenger, Mrs. Ella Lowry, corroborated this version to a considerable extent. She was in the front section of the car, heard the bell start to ring fast when the car was near the south end of the loading zone, observed that the brakes were applied at the same time; that the car was then going only 20 miles an hour and its speed was down to 15 miles at the time of accident. She also said the automobile was increasing speed and going as much as 30 miles an hour. Frank Simpson, who was on the west side of Vermont, said his attention was attracted by the bell as he came out of a cafe, that he saw the automobile and the street car moving at about the same speed (which he could not estimate); that they were close together and that the crash came quickly, maybe in less than a second.

If plaintiff saw the street car some 325 feet to the south (as he testified) when he was 72 to 75 feet from the northbound track and traveling at 20 to 25 miles an hour, he was in no danger from which he could not extricate himself. The expert testimony was that that automobile at the speed of 25 miles could be stopped in 62 feet including reaction time; but, as the car was in second gear, that fact would increase the distance by 5 per cent of the braking distance (35 feet), approximately 2 feet, making a total of 64 feet.

According to plaintiff the next time he saw the street car he was at a point which places the front end of his automobile 50 feet west of the northbound track; it scales this distance on the map in evidence. If he was going 25 miles an hour (twice the speed he gave) he could stop in 64 feet, no less. On those assumptions he was too close to the impact to extricate himself. And it was a permissible inference that the motorman knew it, for he was ringing his gong vigorously and trying to stop the street car and had been doing so ever since he first saw plaintiff. If the street car was going 25 miles an hour, the top speed fixed by any witness who attempted such an estimate, a normal stop would require 200 feet; an emergency stop would take 20 per cent less distance. In order to give the motorman a last clear chance he must be placed back at or near the 225 foot distance and at a speed of not over 25 miles; at that speed he could have made an emergency stop in 160 feet (or 20 per cent less than the normal distance of 200 feet).

The doctrine of last clear chance is stated in Girdner v. Union Oil Co., 216 Cal. 197, 202, 13 P.2d 915, 917: "The necessary elements, as deduced from the well-considered cases, may be stated in substance as follows: That plaintiff has been negligent and, as a result thereof, is in a position of danger from which he cannot escape by the exercise of ordinary care; and this includes not only where it is physically impossible for him to escape, but also in cases where he is totally unaware of his danger and for that reason unable to escape; that defendant has knowledge that the plaintiff is in such a situation, and knows, or in the exercise of ordinary care should know, that plaintiff cannot escape from such situation, and has the last clear chance to avoid the accident by exercising ordinary care, and fails to exercise the same, and the accident results thereby, and plaintiff is injured as the proximate result of such failure." This language has been repeated so often in the decisions as to become a classic definition of the rule. The crucial part of it in the case at bar is this: "* * * a position of danger from which he cannot escape by the exercise of ordinary care * * * not only where it is physically impossible for him to escape, but also in cases where he is totally unaware of his danger and for that reason unable to escape."

Counsel stress the matter of unawareness and appellants cite authorities to the effect that "the theory that he (plaintiff) was oblivious to his danger because he did not again look toward the street car cannot be invoked to show his inability to escape * * *." Rasmussen v. Fresno Traction Co., 15 Cal.App.2d 356, 369, 59 P.2d 617, 623. Counsel also invoke this language of Palmer v. Tschudy, 191 Cal. 696, 700, 218 P. 36, 38: "The rule * * * applies equally when she is wholly unaware of the danger and for that reason unable to escape it. But the rule also requires that if she is aware of the danger, or becomes aware of it, she must thereafter exercise ordinary care for her own protection. If, being aware of the danger and able to escape it by exercising ordinary care, she neglects to do so, she cannot invoke the last clear chance rule to place the burden of the resulting loss upon the other party."

[4] The facts in our case do not afford plaintiff the benefit of the "unawareness" phase of the rule. Plaintiff twice looked and saw the approaching street car, which he knew could not turn aside for him; he made no estimate of its speed, gave no testimony that he thought he had time to cross ahead of it; devoted his attention to the north, from which direction no threat of danger was approaching; gave no explanation of this; claimed no forgetfulness or other lack of appreciation of the threat of danger from defendant's car; and he could have stopped his car in safety after seeing the street car the first time. Viewed only from the standpoint of unawareness it can only be said that plaintiff's own negligence was of a continuing nature which constituted one of the proximate causes of the accident. Lest it be thought that this ruling is contrary to that of Peterson v. Burkhalter, 38 Cal.2d 107, 237 P.2d 977, we call attention to the fact that that opinion proceeds upon the assumption that, in point of fact, the plaintiff was unaware of his peril at all pertinent times.

[5] But the matter of danger from which plaintiff could not physically extricate himself by exercise of ordinary care takes on a somewhat different complexion. Of course, plaintiff "was not in a position of danger until he arrived at a point at which he could no longer stop or slow down in time to avoid a collision." Rodabaugh v. Tekus, 39 Cal.2d 290, 294, 246 P.2d 663, 665. On the other hand, "the application of the doctrine of last clear chance is not dependent upon an admission by the defendant that he expected that there might be a collision." Peterson

v. Burkhalter, supra, 38 Cal.2d 107, 111, 237 P.2d 977, 979.

If plaintiff was going 25 miles an hour and was 50 feet back from the point of collision; if he then saw the street car at least 225 feet to the south and traveling 25 miles or less per hour; if the motorman was then applying his brakes in an effort to stop the car; if all these inferences be drawn the basis for a last clear chance finding is present; for plaintiff could not stop in less than 64 feet, but defendant, inferentially aware of plaintiff's predicament, could stop within 160 feet. It will be observed that this last clear chance would have to be reached through rejecting parts of plaintiff's testimony as well as parts of Franzlick's, accepting other portions, and matching them in a way never intended by the witnesses. Plaintiff's speed must be taken at 25 miles, instead of his estimated 12, or he would be able to stop in time; defendant must have been 160 feet or more back from point of impact or he would be unable to stop in time to avert it; he must have seen plaintiff when he was that far back and have then realized plaintiff's danger, as evidenced by application of the brakes in an attempted stop, although the only evidence of when or where he saw him is the testimony of himself and of Mrs. Lowry; both of them fixed these occurrences at a point some 80–90 feet from the impact, when it was too late for the street car to stop. And it must be further inferred that the motorman, having applied his brake at a place where he could stop safely, did then release or ease it to the point where it was too late to stop; of this there is no evidence except inference; plaintiff testified merely that the car was going more slowly the second time he saw it (at 225 feet); and Franzlick and Mrs. Lowry said it was down from 20–25 miles to 15 miles or less at the time of accident. While the suggested process of reasoning would be a permissible one for the jurors to pursue deliberately or subconsciously, it nevertheless affords such an attenuated basis for last clear chance as to require close scrutiny of any instruction on the subject.

Respondent's counsel argue for a last clear chance upon the basis of a street car speed of 15 miles at the time the motorman first saw plaintiff; they are not explicit as to plaintiff's then location, but Franzlick said he first saw him at a point which scales on the map 50 feet west of the northbound track. The expert witness did testify that an emergency stop could be made by the street car in 66 feet if it was going 15 miles when the brake was applied; and Franzlick said he saw plaintiff when the street car was 80–90 feet from the point of impact, and he began the stopping process at once. This would give a last clear chance if it be assumed that plaintiff was then in peril from which he could not extricate himself. Franzlick says plaintiff himself was then 80–90 feet from the accident. If so, and if plaintiff was going 12 miles, as he says, he had ample time to stop and hence was not in the required position of peril; if plaintiff was traveling 25 miles (twice his own estimate) and was 80–90 feet west of the track he could stop in 64 feet and again he was not in peril except of his own making through failing to stop or slow down. Again we have a situation which makes a correct instruction a matter of vital consequence.

We deem it unprofitable and therefore do not pause to differentiate the factual situations involved in Peterson v. Burkhalter, supra, 38 Cal.2d 107, 237 P.2d 977; Daniels v. City and County of San Francisco, supra, 40 Cal.2d 614, 617, 255 P.2d 785; Sills v. Los Angeles Transit Lines, 40 Cal.2d 630, 255 P.2d 795; Rodabaugh v. Tekus, supra, 39 Cal.2d 290, 294, 246 P.2d 663; Sparks v. Redinger, 44 Cal.2d 121, 279 P.2d 971. The principles there applied are consistent with the views herein expressed; and it is an unsatisfactory and misleading process to try to reason by analogy from one set of facts to another.

Appellants' attack upon the instruction which was given centers upon the stated condition "Fifth: That after the defendant acquired actual knowledge of plaintiff's perilous situation, he had a clear opportunity to avoid the accident and could have done so by exercising ordinary care." The entire instruction (BAJI 205) reads: "There has grown up in our law a certain reasoning process that we sometimes call to our aid in analyzing the facts of an accident case, and which is known as the doctrine of last clear chance. It is permissible to use the doctrine only after we first find, and you may not use it unless and until you first shall have found, that in the events leading up to the accident in question, both the plaintiff and defendant were negligent.

"The doctrine of last clear chance may be invoked if, and only if, you find from the evidence that these six facts existed:

"First: That plaintiff, by his own negligence, got himself into a position of danger.

"Second: That, thereupon, either it was physically impossible for him through the exercise of ordinary care to escape from the danger, or he was totally unaware of impending danger in his position.

"Third: That the defendant had actual knowledge of plaintiff's perilous situation.

"Fourth: That it appeared to the defendant, or would have appeared to him in the exercise of ordinary care, that plaintiff either was unaware of the danger impending in the situation or was unable to escape therefrom through the exercise of ordinary care.

"Fifth: That after the defendant acquired actual knowledge of plaintiff's perilous situation he had a clear opportunity to avoid the accident and could have done so by exercising ordinary care.

"Sixth: That the defendant did not avail himself of that opportunity, but by negligent conduct proximately caused the accident.

"If all the conditions just mentioned are found by you to have existed with respect to the accident in question, then you must find against the defense of contributory negligence, because under such conditions the law holds the defendant liable for any injury suffered by the plaintiff and proximately resulting from the accident, despite the negligence of the plaintiff."

Appellants' point is that "defendant is not called upon or required to take steps in such case until the time arrives when he realizes or ought to realize plaintiff's inability to escape" and that "the given instruction requires defendant to have taken such measures upon acquiring knowledge of plaintiff's position * * * instead of as of the time defendant realizes or ought to realize plaintiff's inability or unawareness." In other words, the argument is that clause Third requires actual knowledge of plaintiff's position and clauses Fifth and Sixth require defendant to avoid the accident if he has a clear opportunity to do so after acquiring knowledge of that position, whereas the law requires such activity on defendants' part to begin with actual or imputed realization of the fact that plaintiff cannot extricate himself from the existing danger by the use of due care. The authorities support the claim that defendants' duty to act arises at this later time, if it be later in fact. Starck v. Pacific Electric Ry. Co., 172 Cal. 277, 283–284, 156 P. 51, L.R.A. 1916E, 58; Johnson v. Southwestern Eng. Co., 41 Cal.App.2d 623, 626, 107 P.2d 417; Palmer v. Tschudy, supra, 191 Cal. 696, 700, 218 P. 36; Daniels v. City and County of San Francisco, supra, 40 Cal.2d 614, 620–621, 255 P.2d 785; Sills v. Los Angeles Transit Lines, supra, 40 Cal.2d 630, 637, 255 P.2d 795; see also, Rest. of Torts, § 480, comment (b) on page 1258; 21 Cal.L.Rev. p. 261.

[6–8] A motorman, whose inability to deviate from the path marked by the rails gives him a qualified right of way, Scott v. San Bernardino Valley Traction Co., 152 Cal. 604, 610, 93 P. 677; McHugh v. Market St. Ry. Co., 29 Cal.App.2d 737, 742, 85 P.2d 467, is entitled to assume that a motorist who is headed across his path will exercise ordinary care and will stop before it is too late to avert a collision; not until he is or should be alerted to the probability of the motorist failing to yield is he required to begin the process of stopping his car, Thompson v. Los Angeles, etc., Ry. Co., 165 Cal. 748, 755, 134 P. 709; Rasmussen v. Fresno Traction Co., 15 Cal.App.2d 356, 367, 59 P.2d 617;

the mere fact that the driver of the automobile is looking in another direction is not necessarily enough to apprize him of the probability of a collision (Rodabaugh v. Tekus, supra, 39 Cal.2d 290, 294, 246 P.2d 663); the motorman is not required at all times to make a correct analysis of the situation, to know the distance and speed of the automobile and the driver's intentions; until he is aware, as any ordinarily prudent man in his position would be cognizant, of the fact that the automobilist is in a position from which he cannot extricate himself through use of due care, the motorman may assume that he will do so; when that knowledge is acquired in fact or imputed to him because he should know it, he must begin to avail himself of a last clear chance, if there be one.

[9, 10] Clause First of the instruction presupposes that plaintiff's negligence has put him in a position of danger; Second, that he be unable to escape that danger because of physical impossibility or unawareness of the danger; Third requires that defendant have "actual knowledge of plaintiff's perilous situation." First and Second require plaintiff to be in a predicament from which he cannot escape by his own efforts. Third requires actual knowledge on defendant's part that plaintiff is in that particular position, but under the authorities actual knowledge is requisite only with respect to plaintiff's position, not his inability to rescue himself. On that latter phase of the situation actual knowledge is not necessary. In the language of Girdner **v.** Union Oil Co., supra, 216 Cal. 197, 202, 13 P.2d 915, 917, it is requisite that defendant know "or in the exercise of ordinary care should know, that plaintiff cannot escape from such situation." If clause Third were intended to mean that defendant must have actual knowledge of the factors set forth in both First and Second it would be erroneous. But it is not so intended for it is immediately followed by Fourth which sets out the requirement of actual or imputed knowledge of plaintiff's inability to extricate himself from danger. The structure of the instruction matches First with Third and Second with Fourth. Then error creeps in for Fifth and Sixth require defendant to act to save plaintiff from himself immediately after the defendant acquires "actual knowledge of plaintiff's perilous situation." This phrase of Fifth is quoted from Third and plainly applies to plaintiff's dangerous position, rather than a realization, actual or implied, of his inability to extricate himself. It allows no time or opportunity for the realization covered by Fourth and accorded defendant by the applicable authorities abovecited. The instruction is erroneous.

Respondent has relied upon the asserted fact of approval of a similar instruction in Gillette v. City and County of San Francisco, 41 Cal.App.2d 758, 765, 107 P.2d 627, 630. The one there given bears number 56 in the record; it seems to be an earlier form of BAJI 205; it is referred to in the briefs as BAJI 111. The argument was that defendant Godfrey was looking straight ahead, plaintiff was in front of him, and knowledge of plaintiff's perilous position was imputed to him under the language of Hoy v. Tornich, 199 Cal. 545, 553, 250 P. 565; hence that the requirement of actual knowledge should not have been imported into the instruction. It was with reference to that argument that the court said: "The plaintiff complains because one of those instructions contained a provision, 'That the defendant had *actual* knowledge of plaintiff's perilous situation.' The complaint is without merit. Herbert v. Southern Pacific Co., 121 Cal. 227, 232, 53 P. 651." Moreover, the differences between the two instructions in paragraphs Fourth and Fifth were such that the Gillette ruling cannot constitute a controlling precedent here. Specifically paragraph Fifth of the instruction there given read: "That the defendant had a clear opportunity to avoid the accident and could have done so by exercising ordinary care." It did not contain the words "after the defendant acquired actual knowledge of plaintiff's perilous situation," the phrase that appellants attack here.

[11] This BAJI 205 is the only instruction which was given on the subject of last clear chance in the instant case. "It

must be assumed that the jury understood the instructions and correctly applied them to the evidence." Zuckerman v. Underwriters at Lloyd's, 42 Cal.2d 460, 478, 267 P.2d 777, 788.

[12] It is clear from the proof that plaintiff was guilty of negligence which continued to the moment of the accident unless the causal chain was broken by defendant's failure to exercise a last clear chance. It was, therefore, vitally important that the jury be correctly advised as to the limitations of the doctrine. That was not done here and we have concluded that the error was prejudicial.

Judgment reversed.

SHINN, P. J., and VALLÉE, J., concur.

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132 Cal.App.2d 687

Myrtle Nell KLINKER, a/k/a Nellie Myrtle Klinker, an Incompetent person, by the Guardian of her Estate Oakland Bank of Commerce, a corporation; Oakland Bank of Commerce, a corporation, as Guardian of the Estate of Myrtle Nell Klinker, an Incompetent person, Plaintiffs-Appellants,

v.

Lawrence K. KLINKER, Jane Doe Klinker, John One, John Two, John Three, Black & White, a co-partnership, John Four, a corporation, John Five, a corporation, Defendants,

Lawrence K. Klinker, Respondent.

Civ. 20764.

District Court of Appeal, Second District, Division 3, California.

May 2, 1955.

Proceeding on affidavit filed in action by guardian of estate of insane woman against her divorced husband for support and maintenance. The Superior Court of Los Angeles County, Elmer D. Doyle, J., entered order dismissing order to show cause why husband should not be made to pay support and plaintiff appealed. The District Court of Appeal, Vallée, J., held that where husband had received final divorce decree from Nevada court on ground of insanity, and where Superior Court of California in the instant action rendered judgment on stipulation decreeing that husband's divorce decree was valid, and that husband had a continuing duty to support his wife when she came into need of his assistance, Superior Court had jurisdiction to hear and determine order to show cause.

Order reversed with directions.

1. Declaratory Judgment 🔑314

In action by guardian of estate of insane woman against her divorced husband to require husband to provide support and maintenance for woman, where complaint alleged that an actual controversy existed between the woman and husband, and where husband contended that divorce decree obtained by him in Nevada was valid and woman contended the contrary, and where husband contended he was under no obligation to support woman and woman contended husband was so obligated, the complaint stated a cause of action for declaratory relief. West's Ann.Code Civ.Proc. § 1060.

2. Equity 🔑38

If a complaint for declaratory relief pleads facts sufficient to entitle the plaintiff to some equitable relief the court will assume jurisdiction of the entire controversy. West's Ann.Code Civ.Proc. § 1060.

3. Declaratory Judgment 🔑68

Future rights may be determined when a declaration of the present and actual controversy is dependent on an adjudication of such future rights. West's Ann.Code Civ.Proc. § 1060.

4. Declaratory Judgment 🔑93

Superior Court of California had jurisdiction of action by guardian of insane woman against her divorced husband for declaratory relief and for support and maintenance of woman by husband who had obtained Nevada divorce decree on ground of wife's insanity. West's Ann.Code Civ. Proc. § 1060.

5. Judgment 🔑540

The doctrine of "res judicata" is that existing final judgment on merits of cause rendered by court of competent jurisdiction is, in all subsequent actions, conclusive of rights of parties thereto and of their privies on all material issues which were or might have been determined.

See publication Words and Phrases, for other judicial constructions and definitions of "Res Judicata".

6. Judgment 🔑540

The application of doctrine of res judicata in a given case depends upon affirmative answers to questions whether issue decided in prior adjudication was identical with the one presented in instant action, whether there was final judgment on merits, and whether party against whom plea is asserted was a party or in privity with a party to prior adjudication.

7. Judgment 🔑564(1)

Doctrine of res judicata applies to those parts of judgment which have become final.

8. Judgment 🔑216, 217

A decree may be partly final and partly interlocutory, final as to its determination of all issues of fact and law, and interlocutory as to mode of execution.

9. Judgment 🔑720

Where declaratory judgment rendered on stipulation, decreed that husband's Nevada divorce decree was valid, that Nevada decree did not relieve husband of duty to support his insane wife, and that there was a continuing obligation on his part to provide for her support, such judgment was res judicata on issues tried and adjudicated and left for future determination only those issues regarding woman's need of support and husband's ability to provide.

10. Declaratory Judgment 🔑253

An action for declaratory relief is a suit in equity.

11. Judgment 🔑855(1)

The jurisdiction of court of equity to enforce its decrees is coextensive with its jurisdiction to determine rights of parties, and it has power to enforce its decrees as a necessary incident to its jurisdiction.

12. Judgment 🔑855(1)

Except where decree of equity court is self-executing, jurisdiction of the cause continues for purpose of enforcement, or leave may be expressly reserved to reinstate the cause for the purpose of enforcing the decree, or to make such further orders as may be necessary.

13. Judgment 🔑204

A court of equity can mold its decrees to suit the exigencies of the case.

14. Equity 🔑39(1)

Where equity has acquired jurisdiction for one purpose, it will retain that jurisdiction to final adjustment of all differences between the parties arising from the causes of action alleged.

15. Equity 🔑39(2)

Where a court has taken jurisdiction of a suit in equity it may determine all legal as well as all equitable issues in order to completely dispose of the matters in controversy.

16. Declaratory Judgment 🔑391

In action by guardian of estate of insane woman against her divorced husband for support, adjudication of property rights and declaratory relief, it was within power of trial court to reserve jurisdiction to enforce husband's obligation to support woman.

17. Judgment 🔑319

Where equity decree reserving jurisdiction to grant further relief has been rendered, a motion supported by affidavit setting forth the facts on which the movant relies is ordinarily sufficient to invoke the action of the court.

18. Judgment 🔑91, 481

A judgment rendered on a stipulation is conclusive of everything adjudicated by it, and it may not be collaterally attacked by a party thereto.

19. Divorce 🔑313

An existing marriage was not a jurisdictional prerequisite to judgment compelling husband to support wife, where husband was granted divorce on grounds of insanity.

20. Divorce 🔑313

Legislature has power to continue duty of one spouse to support other spouse after being granted a divorce on ground of insanity. West's Ann.Civ.Code, §§ 92, 108.

21. Courts 🔑8

California courts will enforce a duty to support an insane spouse created by law of another state.

22. Courts 🔑8

So long as enforcement of a right obtained under law of another state would not be prejudicial to recognized standards of morality and to general interests of citizens of California, California courts will enforce the right on basis of comity.

23. Courts 🔑8

Enforcement by courts of California of right of a wife divorced on ground of insanity to support from her former husband granted by law of a sister state is in harmony with public policy of California as expressed by statute. West's Ann.Civ. Code, § 108.

24. Divorce 🔑387

Where husband has obtained a divorce in Nevada from wife on grounds of insanity, and where under Nevada law a divorce on that ground does not relieve spouse of duty to support insane spouse, and where Superior Court on stipulation decreed that husband's duty to support his wife was continuous, Superior Court had jurisdiction to hear and determine order to show cause why husband should not provide for support and maintenance of wife. N.C.L.1931–1941 Supp. § 9460.

25. Mental Health 🔑84

Where affidavit had been filed in action to require divorced husband to support and maintain his insane divorced wife, affidavit must be read in connection with allegations of complaint to determine whether a need existed for support from husband and whether he had ability to pay.

Betsy Fitzgerald Rahn, Walnut Creek, Wolfe & Ordin, and Benjamin Wolfe, Los Angeles, for appellants.

Zagon, Aaron & Sandler and Marvin Manuel, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by plaintiffs from an order granting defendant Lawrence K. Klinker's motion to quash and dismiss an order directing him to show cause why he should not provide for the support and maintenance of plaintiff Myrtle Nell Klinker, who will be referred to as plaintiff.

Plaintiff and defendant were married in 1923. In 1941 plaintiff was declared to be mentally incompetent and committed to a state hospital. In 1945 defendant obtained a divorce from plaintiff in Nevada on the ground that for more than two years she had been an insane person.

On January 25, 1949 plaintiff by and through her guardian commenced the present action against defendant, alleging the foregoing facts: that the Nevada court was without jurisdiction and the judgment of divorce a nullity; that plaintiff and defendant were the owners of specified properties; and that defendant had wilfully failed to support plaintiff. The complaint alleged that an actual controversy existed between plaintiff and defendant as to (1) the status of defendant and plaintiff as husband and wife, (2) the obligation of defendant to support plaintiff, and (3) the status of the rights of the parties in certain properties. The complaint further alleged defendant had an income of $2,500 a month, he was well able to support plaintiff, and $200 a week was reasonably required therefor. The prayer was that it be adjudged (1) defendant and plaintiff are husband and wife; (2) defendant has a present and continuing obligation to provide for plaintiff's support and maintenance; (3) plaintiff have general relief.

Defendant answered, denying in large part the allegations of the complaint. The answer alleged: "that it appears upon the allegations of plaintiffs' complaint that said defendant was relieved from such obligation by the judgment of the District Court of the Eighth Judicial District of the State of Nevada, as set fourth [sic] in Paragraph VII of plaintiffs' complaint." The cause was tried. At the trial it was stipulated: 1. The Nevada decree is a final and valid decree of divorce. 2. The Nevada decree did not in any way affect the right of plaintiff to support by defendant. 3. Defendant is obligated to support plaintiff if he has the ability so to do and she is in need of support or maintenance and care. 4. At this time she is not in need of such care but has funds of her own sufficient to care for her. 5. The court shall keep continuing jurisdiction to award her support if and when it shall be claimed she is in need thereof and defendant has the ability to pay.

On August 23, 1949 a judgment was rendered. The judgment recites that "the parties having orally stipulated in open Court to material facts, determinative of the issues, and all parties having waived findings of fact," the matter was submitted. The judgment decreed: (1) The Nevada decree of divorce is valid. (2) "[T]he divorce having been granted upon the ground of defendant's insanity, plaintiff there, Lawrence K. Klinker was not thereby relieved of the obligation imposed by law, to support his wife, Myrtle Nell Klinker; that there is a continuing obligation upon the said Lawrence K. Klinker to provide for Myrtle Nell Klinker's support, maintenance and medical care within his ability to provide the same to the extent that her necessities may require, and to the extent that Myrtle Nell Klinker's separate estate does not produce revenue sufficient to meet her needs." (3) "[A]s of July 27th, 1949, Myrtle Nell Klinker does not require support or medical care at the hands of Lawrence K. Klinker; but the court reserves jurisdiction to make in future such orders from time to time as may be proper upon due notice and proper showing of need therefor requiring said defendant Lawrence K. Klinker, to furnish said support." No appeal was taken and the judgment became final.

On August 3, 1953 an affidavit was filed in this action which averred that plaintiff's income was insufficient to meet her demands and asked that defendant be ordered to pay to her a reasonable sum for her support and maintenance and for attorney's fees. An order issued directing defendant to show cause "why that certain Order, made by said Court on the 23rd day of August, 1949, and more particularly described in the affidavit of the Oakland Bank of Commerce for this Order to Show Cause in Re Modification thereof, and a copy of which affidavit shall be served upon you attached to a copy of this Order, should not be modified and further, different or additional Orders made, as requested in said affidavit." When the order to show cause came on for hearing defendant moved to dismiss it on the grounds: 1. No state will directly enforce a duty of support created by the law of another state. 2. The action is for separate maintenance and such action cannot be maintained unless the parties are husband and wife. 3. The court had no power to reserve jurisdiction to make future orders for plaintiff's support. 4. The affidavit for the order to show cause was insufficient. The motion was granted "upon the grounds of lack of jurisdiction of this court to proceed is granted upon said grounds." Plaintiffs appeal.

As grounds for reversal plaintiffs urge: 1. The Nevada decree did not abrogate the duty to support the insane spouse. 2. The judgment in the present action is *res judicata* as to the duty of defendant to support plaintiff. 3. Defendant cannot be heard to say that he will accept the benefit of the judgment in this case holding his divorce in Nevada valid and then say that that part of the judgment which decrees that he must continue to support plaintiff is invalid. 4. The court had jurisdiction to hear and determine the order to show cause. Defendant counters: 1. The support provisions of the 1949 judgment herein are void for lack of jurisdiction; (a) an existing marriage is a jurisdictional prerequisite to a judgment compelling one spouse to support the other; and (b) plaintiffs' argument for *res judicata* is based upon erroneous premises. 2. The court exceeded its power in purporting to reserve jurisdiction to make future orders for plaintiff's support.

[1–4] The action, in addition to being for support and for an adjudication of property rights, was one for declaratory relief. The complaint alleged that an actual controversy existed between plaintiff and defendant; defendant contended the Nevada decree was valid and plaintiff contended the contrary; defendant contended he was under no obligation to support plaintiff and plaintiff contended he was so obligated. "Any person * * * who desires a declaration of his rights or duties with respect to another * * * may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an action in the superior court for a declaration of his rights and duties in the premises, * * *. He may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of such rights or duties, whether or not further relief is or could be claimed at the time. The declaration may be either affirmative or negative in form and effect, and such declaration shall have the force of a final judgment." Code Civ. Proc. § 1060. The complaint stated a cause of action for declaratory relief. Maguire v. Hibernia Savings & Loan Soc., 23 Cal.2d 719, 728, 146 P.2d 673, 151 A.L.R. 1062; Lord v. Garland, 27 Cal.2d 840, 851–852, 168 P.2d 5; Kessloff v. Pearson, 37 Cal.2d 609, 613, 233 P.2d 899; Chas. L. Harney, Inc. v. Contractors' State License Bd., 39 Cal.2d 561, 564, 247 P.2d 913. If a complaint for declaratory relief pleads facts sufficient to entitle the plaintiff to some equitable relief the court will assume jurisdiction of the entire controversy. Jones v. Feichtmeier, 95 Cal.App.2d 341, 344, 212 P.2d 933. Future rights may be determined when a declaration of the present and actual controversy is dependent on an adjudication of such future rights. Staley v. Board of Medical Examiners, 109 Cal.App.2d 1, 6, 240 P.2d 61. We think it patent that the court had jurisdiction of the action.

[5–8] The doctrine of *res judicata* is that an existing final judgment on the merits of a cause rendered by a court of competent jurisdiction is, in all subsequent actions, conclusive of the rights of the parties thereto and of their privies on all material issues which were or might have been determined. French v. Rishell, 40 Cal.2d 477, 479, 254 P.2d 26; Dillard v. McKnight, 34 Cal.2d 209, 213, 209 P.2d 387, 11 A.L.R.2d 835; Bliss v. Security-First Nat. Bank, 81 Cal.App.2d 50, 58, 183 P.2d 312. The application of the principle in a given case depends upon affirmative answers to these questions: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? Bernhard v. Bank of America, 19 Cal.2d 807, 813, 122 P.2d 892; Dillard v. McKnight, supra, 34 Cal.2d 209, 214, 209 P.2d 387; Citizens Nat. Trust & Savings Bank of Los Angeles v. Hawkins, 87 Cal.App.2d 535, 541, 197 P.2d 385; In re Estate of Eaton, 38 Cal.App.2d 180, 182–184, 100 P.2d 813. The doctrine of *res judicata* applies to those parts of a judgment which have become final. Moore v. Wood, 26 Cal.2d 621, 629, 160 P.2d 772. "'A decree may be partly final and partly interlocutory; final as to its determination of all issues of fact and law, and interlocutory as to its mode of execution.' 10 R.C.L., p. 555." Perry v. West Coast Bond, etc., Co., 136 Cal.App. 557, 559, 29 P.2d 279, 280.

[9] In the present proceeding the issues which defendant seeks to have adjudicated are identical with the ones presented on the trial of the action; there was a final judgment on the merits—the only questions left open for future determination should they arise were the necessities of plaintiff for support, maintenance, and medical care and defendant's ability to provide the same; and the party against whom the plea is asserted was a party to the prior adjudication. The judgment is *res judicata* on the issues tried and adjudicated, i. e., that the Nevada decree is valid; that defendant was not relieved by the Nevada decree of the obligation to support and maintain plaintiff; and that there is a continuing obligation on his part to provide for her support and maintenance within his ability to do so to the extent that her necessities may require.

[10-17] An action for declaratory relief is a suit in equity. Zimmer v. Gorelnik, 42 Cal.App.2d 440, 447, 109 P.2d 34. The jurisdiction of a court of equity to enforce its decrees is coextensive with its jurisdiction to determine the rights of the parties, and it has power to enforce its decrees as a necessary incident to its jurisdiction. Except where the decree is self-executing, jurisdiction of the cause continues for this purpose, or leave may be expressly reserved to reinstate the cause for the purpose of enforcing the decree, or to make such further orders as may be necessary. Dedrick v. California Whaling Co., 16 Cal.App.2d 284, 288, 60 P.2d 551; 18 Cal.Jur.2d 243, § 59; 30 C.J.S., Equity, § 616, p. 1014. A court of equity can mold its decrees to suit the exigencies of the case. Connell v. Crawford, 92 Cal.App. 715, 719, 268 P. 948. Where equity has acquired jurisdiction for one purpose, it will retain that jurisdiction to the final adjustment of all differences between the parties arising from the causes of action alleged. Pailhe v. Pailhe, 113 Cal.App.2d 53, 64-65, 247 P.2d 838; First Nat. Trust & Savings Bank of San Diego v. Cerveny, 93 Cal.App.2d 255, 258-259, 208 P.2d 1018; Murphy v. Sheftel, 121 Cal.App. 533, 541, 9 P.2d 568; Vallera v. Vallera, 64 Cal.App.2d 266, 270-271, 148 P.2d 694; McAuliff v. McFadden, 42 Cal.App. 505, 512, 183 P. 870. Where a court has taken jurisdiction of a suit in equity it may determine all legal as well as equitable issues in order to completely dispose of the matters in controversy. California Raisin Growers' Ass'n v. Abbott, 160 Cal. 601, 607, 117 P. 767; Walsh v. Macaire, 102 Cal.App.2d 435, 438, 227 P.2d 517. In Nelson v. Nelson, 96 Cal.App.2d 208, at page 210, 215 P.2d 47, at page 48, the court observed:

> "Since the needs of plaintiff may become greater or less and the ability of defendant to pay may not remain constant * * * the court properly exercised its discretion in reserving jurisdiction to make a fair and equitable order in the future."

See also McCaleb v. McCaleb, 177 Cal. 147, 149, 169 P. 1023; Ex parte O'Brien, 5 Cal.Unrep. 625, 48 P. 71. It was within the power of the court to reserve jurisdiction to enforce defendant's obligation to support plaintiff. A motion supported by affidavit setting forth the facts on which the movant relies is ordinarily sufficient to invoke the action of the court. 30 C.J.S., Equity, § 616, p. 1014.

[18] Furthermore, the provisions of the judgment involved here were agreed to by stipulation. A judgment rendered on a stipulation is conclusive of everything adjudicated by it, and it may not be collaterally attacked by a party thereto. 14 Cal.Jur. 878, § 13.

[19] The contention that an existing marriage is a jurisdictional prerequisite to a judgment compelling one spouse to support the other cannot be sustained where the divorce is granted on the ground of insanity. The Nevada law makes insanity existing two years a ground for divorce, and provides that "a decree granted on this ground shall not relieve the successful party from contributing to the support and maintenance of the defendant". 2 Nev. Comp.Laws (Supp.1931-41), § 9460. In Herzog v. Herzog, 69 Nev. 286, 249 P.2d 533, a husband was granted a divorce on the ground of insanity of his wife. The decree did not make any order for the husband's support of the wife. On review it was contended that the trial court's failure in that respect was error. The Supreme Court of Nevada, referring to section 9460 of Nevada Compiled Laws, said, 249 P.2d 536:

> "The quoted clause left unimpaired the legal duty of the plaintiff to support the defendant, and such duty can be enforced in her behalf by whatever procedure and in whatever forum might be available. State v. Brown, 213 Ind. 118, 11 N.E.2d 679, 113 A.L.R. 1243."[1]

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[1] All the statutes making insanity a ground for divorce appear to be hedged with appropriate restrictions for the support, maintenance, and protection of the incompetent spouse. Arkansas—Stat.1947, Ann., Title 34, ch. 12, § 34-1202, subd. 8. Colorado—Rev.Stat.1953, ch. 46, § 46-1-1, subd. 9. Connecticut—

[20] California law makes incurable insanity a ground for divorce, Civ.Code, § 92, and provides that:

> "No decree granted on this ground shall relieve the spouse granted the divorce of any obligation imposed by law as a result of the marriage for the support of the spouse against whom the divorce is granted."

Civ.Code, § 108. The power of the legislature to continue the duty of support is well established. Morganti v. Morganti, 99 Cal.App.2d 512, 515, 222 P.2d 78.

Speaking of the California statute in Dribin v. Superior Court, 37 Cal.2d 345, at page 348, 231 P.2d 809, 811, 24 A.L.R.2d 864; the court quoted with approval from Morganti v. Morganti, supra, as follows:

> "'It would seem apparent that the purposes of section 108 are (1) to provide the manner of proof where the ground for divorce is the incurable insanity of the defendant spouse, and (2) to provide a means of securing continuing financial support for the insane spouse. * * *
>
> "'Furthermore proof of financial liability as set forth in the second sentence of the second paragraph of said section becomes wholly superfluous to the attainment of the second object thereof, since by reason of the specific terms of the preceding sentence no decree granted on the ground of incurable insanity can relieve a spouse of "any obligation imposed by law as a result of the marriage for the support" of the insane spouse. (See Civ.Code, § 155, and Welf. & Inst.Code, §§ 5077, 5105.6.)'"

The court also observed, 37 Cal.2d at page 350, 231 P.2d at page 814:

> "Here the state has guarded against financial dependency of the insane spouse by providing that the divorce of an insane spouse does not relieve the other spouse of 'any obligation imposed by law as a result of the marriage for the support' of the insane spouse."

See also Wirz v. Wirz, 96 Cal.App.2d 171, 214 P.2d 839, 15 A.L.R.2d 1129.

The Indiana law contains the same provision. In State v. Brown, 213 Ind. 118, 123, 11 N.E.2d 679, 681, 113 A.L.R. 1243, 1247, the court said:

> "Clause 8 contains the provision that a decree of divorce granted on the ground of insanity shall not 'relieve the successful party from contributing to the support and maintenance of the defendant.' And appellant contends that the foregoing is incomplete and unenforceable since there is no method provided to carry into effect the provision for support and maintenance. But there is no apparent need for an enforcing provision. The effect of the 'support and maintenance' provision is to leave unimpaired the legal duty of the one securing a divorce under clause 8 to support and maintain the divorced spouse; and such duty can be enforced on behalf of the insane person

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Gen.Stat.1949, Title 60, ch. 367, §§ 7327, 7332. Delaware—1953 Del.Code Ann., Title 13, ch. 15, § 1522, subd. 10. Georgia—Code of Georgia Annotated 1932, Title 30, § 30–102, subd. 11, as amended by Act of 1951, p. 744. Idaho—Code 1947, Title 32, §§ 32–801 to 32–805. Indiana—Burns' Ind.Stat.Ann. 1933, Title 3, ch. 12, § 3–1201, subd. 8. Kansas—Gen.Stat.1949, ch. 60, art. 15, § 60–1501, subd. 11. Kentucky—Ky.Rev.Stat. 1953, ch. 403, § 403.020, subd. 5(d). Maryland—Ann.Code of Maryland 1951, art. 16, § 35. Minnesota—Stat.Ann., ch. 518, § 518.06, subd. 7, M.S.A. Mississippi—Code Ann.1942, Title 12, ch. 2, § 2735, subd. 12. Montana—Rev.Code 1947, Title 21, ch. 1, §§ 21–103, subd. 1, and 21–104. New Mexico—New Mex. Stat.1953, ch. 22, art. 7, §§ 22–7–7, 22–7–11. New York—Domestic Relations Law, § 7, subd. 5; Cons.Laws, ch. 14, art. 2. North Carolina—Gen.Stat. (Recompiled 1950), ch. 50, § 50–5, subd. 6. Oklahoma—Stat.1951, Title 12, ch. 22, § 1271, subd. 12, as amended by Laws 1953, p. 59, § 1. Oregon—Rev.Stat.1953, Title 11, ch. 107, §§ 107.030(7), 107.100(1) (c). Utah—1953 Code Ann., Title 30, ch. 3, § 30–3–1, subd. 9. Vermont—Stat.1947, Title 14, ch. 157, §§ 3205–3212. Wyoming—Comp.Stat.1945, ch. 3, art. 59, § 3–5935. See also Hawaii—Rev.Laws, Title 32, ch. 296, §§ 12210, subd. 4, 12223.

> by whatever procedure would be available prior to the granting of the divorce."

See also Sandhagen v. Vogel, 147 Kan. 570, 77 P.2d 949, which was an action against a former husband to recover a reasonable sum for the care and maintenance of a former wife from whom the husband had obtained a divorce on the ground of incurable insanity; Dodrer v. Dodrer, 183 Md. 413, 37 A.2d 919, 923; Bancroft v. Bancroft, 288 N.Y. 323, 43 N.E.2d 63, 65, 141 A.L.R. 943; State of Tennessee v. Barton, 210 Ark. 816, 198 S.W.2d 512, 516, in which it is said that one cannot accept benefits of a divorce decree granted on the ground of insanity and yet not be bound by its burdens.

[21–23] It is not the law that California will not enforce a duty to support an insane spouse created by the law of another state, as defendant asserts. We rebel at the suggestion. So long as the enforcement of a right obtained under the law of another state would not be prejudicial to recognized standards of morality and to the general interests of the citizens of this state, California will enforce the right on the basis of comity. Biewend v. Biewend, 17 Cal.2d 108, 113, 109 P.2d 701, 132 A.L.R. 1264; Smith v. Smith, 115 Cal.App.2d 92, 101–102, 251 P.2d 720; Gough v. Gough, 101 Cal. App.2d 262, 267–268, 225 P.2d 668; Tomkins v. Tomkins, 89 Cal.App.2d 243, 250, 200 P.2d 821. Cf. Oravec v. Superior Court, 115 Cal.App.2d 581, 252 P.2d 364. The enforcement by the courts of California of the right of a wife divorced on the ground of insanity to support from her former husband granted by the law of a sister state is in harmony with the public policy of California as expressed in section 108 of the Civil Code. See State of Tennessee v. Barton, 210 Ark. 816, 198 S.W.2d 512, in which Tennessee enforced the support provisions of a Utah divorce decree grounded on insanity.

One of the basic duties and fundamental obligations of mankind recognized by the law is a man's obligation to support his wife. The failure to meet that obligation is universally made a crime. The fact that the wife is insane does not relieve the husband of that obligation. While the legislatures of many of the states have widened the possibility of divorce by the enactment of statutes authorizing the granting of a divorce on the ground of incurable insanity, thus seeking to prevent a permanent union of a sane spouse with an insane one who does not offer hope of recovery, no one of such statutes relieves the husband of his obligation to support his former wife. That obligation remains the same after the divorce as it was before and may be enforced in any appropriate proceeding. 44 C.J.S., Insane Persons, § 73, p. 174; see Foy v. Foy, 23 Cal.App.2d 543, 73 P.2d 618. The plainest principles of justice require the courts of California to entertain a proceeding to enforce the duty imposed by the law of a sister state on a husband who has obtained a divorce on the ground of insanity to support his insane former wife. It is not necessary to dilate on the point.

[24] We hold that the superior court had jurisdiction to hear and determine the order to show cause.

[25] The sufficiency of the affidavit on which the order to show cause was issued is questioned. This was not a ground on which the order was dismissed. It was dismissed solely on the ground of want of jurisdiction. The affidavit must be read in connection with the allegations of the complaint. Together, they are sufficient to show the needs of the plaintiff and the ability of defendant to pay. Cf. Loeb v. Loeb, 84 Cal.App.2d 141, 143–144, 190 P.2d 246. In any event plaintiffs should be permitted to file additional affidavits, should they be so advised.

The order appealed from is reversed with directions to the superior court to hear and determine the order to show cause.

SHINN, P. J., and PARKER WOOD, J., concur.

132 Cal.App.2d 655

Matelle DUFF and S. E. Duff, husband and wife, Plaintiffs and Appellants,

v.

SCHAEFER AMBULANCE SERVICE, Inc., a corporation, Carl A. Bellanzi, Sigmund Arywitz, International Ladies' Garment Workers' Union, an unincorporated association, and Samuel Otto and John Ulene, members thereof, Defendants,

Schaefer Ambulance Service, Inc., et al., Respondents.

Civ. 20420.

District Court of Appeal, Second District, Division 2, California.

May 2, 1955.

Rehearing Denied May 17, 1955.

Hearing Denied June 29, 1955.

Action by automobile occupant against automobile driver, ambulance driver, and others for injuries sustained in intersectional collision. From adverse judgment of the Superior Court of Los Angeles County, Arthur Crum, J., the occupant appealed. The District Court of Appeal, Fox, J., held that evidence sustained implied finding that occupant was a guest in automobile at the time of the collision.

Judgment affirmed.

1. Automobiles 🔑181(2)

Status of injured occupant of vehicle either as a "guest" or a "passenger" of driver at time of accident, depends on vital factor whether occupant or some one on his behalf was "giving compensation for such ride" in sense in which that term is used in guest statute. Vehicle Code, § 403.

2. Automobiles 🔑245(24)

Whether occupant of an automobile is a passenger or a guest is a question of fact. Vehicle Code, § 403.

3. Automobiles 🔑181(2)

To constitute "compensation" within meaning of guest statute, rider need not pay for transportation solely in cash or its equivalent. Vehicle Code, § 403.

See publication Words and Phrases, for other judicial constructions and definitions of "Compensation".

4. Automobiles 🔑181(2)

Where trip is not primarily for social purposes, "compensation" for ride within meaning of guest statute is established if occupant gives such recompense for ride or confers such benefit on driver as to make it worthwhile for him to furnish the ride. Vehicle Code, § 403.

5. Automobiles 🔑181(1)

Fundamental policy underlying guest statute is to prevent recovery for ordinary negligence of driver of vehicle by occupant who has accepted the driver's hospitality. Vehicle Code, § 403.

6. Automobiles 🔑242(1)

Where wilful misconduct or intoxication on part of driver is not involved, occupant of automobile has burden of proving that he was a passenger rather than a guest. Vehicle Code, § 403.

7. Automobiles 🔑242(6)

In general, where it is established that driver of automobile was servant or agent of defendant employer and that his use of vehicle was a contemplated incident of his agency, before liability is imposed on employer, plaintiff must show that at time of injury complained of servant was engaged in performing a service for employer or some act incidental thereto. Vehicle Code, § 403.

8. Automobiles 🔑244(20)

In action by automobile occupant, who was member of local union, against international union and automobile driver, who was salaried employee of international union with expense allowance, for injuries sustained in intersectional collision which occurred when they were returning from evening television program which was of interest to labor unions, evidence sustained implied finding that occupant was a "guest" in automobile. Vehicle Code, § 403.

9. Automobiles 🔑244(36)

In action for injuries sustained by automobile occupant, who was member of local union, against international union and driver of automobile, who was salaried employee of international union with expense allowance, for injuries sustained in intersectional collision which occurred when they were returning from an evening television program they had voluntarily attended, evidence sustained implied finding that driver of automobile was not acting within scope of his employment at time of collision.

10. Evidence ⚷313

Uncorroborated testimony as to an oral declaration of a deceased person is weakest form of evidence and is open to suspicion, but where admissible it will be weighed by trier of facts same as other evidence and may be disregarded when shown to be unconvincing or insubstantial.

11. Evidence ⚷594

Uncontradicted testimony of a witness may be rejected by trier of facts provided he does not act arbitrarily, with relevant consideration being character of evidence, motives of witness, and his interest in result of case.

12. Automobiles ⚷243(12)

In action by automobile occupant, who was member of local union, against international union and automobile driver, who was salaried employee of international union with expense allowance, for injuries sustained in collision which occurred as they were returning from evening television show which was of interest to unions, it was competent for driver to testify that he attended telecast individually and not as union representative and that providing transportation for occupant was not within scope of his employment.

13. Appeal and Error ⚷971(3)
Witnesses ⚷267

Extent of cross-examination is matter resting in sound discretion of trial court and restriction of cross-examination is not basis for reversal of judgment in absence of a clear abuse of discretion.

14. Witnesses ⚷275(2)

In action by automobile occupant, who was member of local union, against international union and automobile driver who was salaried employee of international union with expense allowance, for injuries sustained in collision which occurred as they were returning from evening television show which was of interest to unions, trial court did not abuse its discretion in restricting cross-examination of driver concerning his interest in attending certain union meeting and his knowledge of occupant's interest in being present at such meeting.

15. Appeal and Error ⚷205

Where question, to which court sustained objection, did not indicate answer would be favorable to person propounding question, offer of proof was necessary in order to have matter reviewed on appeal.

16. Automobiles ⚷243(12)

In action by automobile occupant, who was member of local union, against international union and automobile driver, who was salaried employee of international union with expense allowance, for injuries sustained in collision which occurred as they were returning from evening television show which was of interest to unions, testimony concerning transportation furnished occupant prior to accident by various union members was immaterial on issue as to whether driver was acting within scope of his employment.

17. Automobiles ⚷243(12)

In action by automobile occupant, who was member of local union, against international union and automobile driver, who was salaried employee of international union with expense allowance, for injuries sustained in collision which occurred as they were returning from evening television show which was of interest to unions, testimony that driver had given occupant rides on previous occasions in connection with union activities furnished no basis for binding union in connection with such transportation and was properly excluded. West's Ann.Code Civ.Proc. § 2055.

18. Automobiles ⚷243(12)

In action by automobile occupant, who was member of local union, against international union and automobile driver, who was salaried employee of international union with expense allowance, for injuries sustained in collision as they were returning from evening telecast which was of interest to unions, evidence concerning previous rides received by occupant from another non-salaried local union member, who received an allowance from union for parking expense, was immaterial on issue as to whether driver was acting within scope of his employment.

19. Automobiles ⚿243(12)

In action by automobile occupant, who was member of local union, against international union and automobile driver, who was salaried employee of international union with expense allowance, for injuries sustained in collision which occurred as they were returning from evening telecast which was of interest to unions, testimony concerning transportation expenses of occupant on other union activities had no probative value to establish that automobile driver was providing transportation for occupant on behalf of union and was properly excluded.

20. Evidence ⚿271(18)

In action by automobile occupant, who was member of local union, against international union and automobile driver, who was salaried employee of international union with expense allowance, for injuries sustained in collision which occurred as they were returning from evening telecast which was of interest to unions, minutes of board of directors of local union council showing that union's representatives at telecast was not to be restricted to two members were prima facie evidence of facts stated therein, were not self-serving declarations and were properly admitted. West's Ann.Corp.Code, § 832.

21. Evidence ⚿317(15)

In action by automobile occupant, who was member of local union, against international union and automobile driver, who was salaried employee of international union with expense allowance, for injuries sustained in collision which occurred as they were returning from evening telecast, conversations between occupant and another person who attended telecast respecting their contemplated attendance at a dinner meeting on evening of accident were hearsay and were properly excluded.

22. Automobiles ⚿243(12)

In action by automobile occupant, who was member of local union, against international union and automobile driver, who was salaried employee of international union with expense allowance, for injuries sustained in collision which occurred as they were returning from telecast show which was of interest to unions, evidence that dinner, which occupant and another had contemplated attending after telecast, customarily was tardy in getting started and occupant's explanation of nature of affair was immaterial, on issue whether driver was acting within scope of his employment.

23. Appeal and Error ⚿1059

In action by automobile occupant, who was member of local union, against international union and automobile driver, who was salaried employee of international union with expense allowance, for injuries sustained in collision which occurred as they were returning from evening telecast which was of interest to unions, refusal to permit another occupant of automobile, who was also a plaintiff, to explain a statement signed by her and circumstances under which it was signed was not prejudicial to occupant when court instructed that such statement was not binding upon occupant.

24. Trial ⚿296(2)

In action by automobile occupant, who was member of local union, against international union and automobile driver, who was salaried employee of international union with expense allowance, for injuries sustained in automobile collision, wherein a witness stated that a man from union's insurance company took a statement signed by witness, instruction by court that jury should not consider question of insurance, "in any manner" in their deliberations was not prejudicial error when court subsequently advised jury that written statement was not binding upon occupant.

25. Automobiles ⚿246(2, 15)

In action by automobile occupant, who was member of local union, against international union and automobile driver, who was salaried employee of international union with expense allowance, for injuries sustained in automobile collision, instruction that no liability would attach to driver and international union unless jury found that compensation was paid for transportation and that in providing transportation driver was agent of union and was acting within course and scope of his employment in providing such transportation was not erroneous.

26. Automobiles ⚷246(2)

In action by automobile occupant, who was member of local union, against international union and automobile driver, who was salaried employee of international union with expense allowance, for injuries sustained in collision which occurred as they were returning from evening telecast show which was of interest to unions, instruction to effect that compensation would be present if trip served to accomplish a purpose of, or was of benefit to union, but it would be lacking if motivating influence for ride was merely intention of personal courtesy was proper.

27. Automobiles ⚷246(15)

In action by automobile occupant, who was member of local union, against international union and automobile driver, who was salaried employee of international union with expense allowance, for injuries sustained in collision, instruction that fact that driver may have been allowed car expense did not of itself prove that it was part of his job to transport occupant from one place to another was not erroneous.

28. Trial ⚷296(2)

In action by automobile occupant, who was member of local union, against international union and automobile driver, who was salaried employee of international union with expense allowance, for injuries sustained in collision which occurred as they were returning from evening telecast show which was of interest to unions and which both had voluntarily attended, instruction concerning destination of occupant at time of accident was not prejudicial when considered in light of other instructions.

29. Automobiles ⚷246(2)

In action by automobile occupant against automobile driver and others for injuries sustained in intersectional collision, instruction that guest statute was in derogation of common law and must be strictly construed against change of former law which authorized recovery prior to enactment of guest statute was misleading and confusing even if it might have been a proper subject of instruction and was properly refused. Vehicle Code, § 403.

30. Automobiles ⚷246(54)

In action by automobile occupant, who was member of local union, against international union and automobile driver, who was salaried employee of international union with expense allowance, for injuries sustained in collision which occurred as they were returning from evening telecast which was of interest to unions, requested instruction that in determining whether there was an agreement by union to provide occupant with transportation in connection with performance of union activities such agreement could be implied from circumstances and uniform course of conduct of the parties was not justified by evidence when occupant contended that there was an express agreement for transportation.

31. Trial ⚷260(1)

Denial of requested instructions on subjects covered by another instruction was not error.

32. Trial ⚷248

In action by automobile occupant, who was member of local union, against international union and automobile driver, who was salaried employee of international union with expense allowance, for injuries sustained in collision which occurred as they were returning from evening telecast show which was of interest to unions, instruction which dealt in the abstract with foundations of liability under doctrine of qui facit per alium fiat per se was properly refused.

33. Appeal and Error ⚷1064(1)

Prejudicial error does not necessarily result from giving of an instruction which, subjected to meticulous analysis, might be given a "possible construction" making it subject to criticism.

34. Trial ⚷295(1)

In reviewing instructions, reviewing court must read charge as a whole and give instructions a reasonable construction from standpoint of their probable effects upon the jury.

35. Judgment 🔑707, 735

Judgment against automobile driver in property damage action brought by ambulance owner was not res judicata on question of liability of automobile driver of international union, which employed automobile driver, to occupant of automobile, who was member of local union, when international union was not a party to previous action nor agency or scope of employment of automobile driver were in issue in that action. Vehicle Code, § 403.

36. Automobiles 🔑246(2, 60)

In action by automobile passenger against automobile driver and international union, which employed driver, for injuries sustained in collision which occurred as occupant and driver were returning from telecast show, which was of interest to unions, requested instruction embodying doctrine of res ipsa loquitur was properly refused as were requested instructions which would have accomplished no more than showing that driver was negligent. Vehicle Code, §§ 403, 510, 676.

37. Automobiles 🔑244(16)

In action by automobile occupant against ambulance driver, who was answering emergency call, for injuries sustained in intersectional collision, evidence sustained jury's implied finding that ambulance driver reasonably exercised privilege granted driver of an authorized emergency vehicle. Vehicle Code, §§ 403, 454.

38. Automobiles 🔑246(2)

In action by automobile occupant against ambulance driver, who was answering an emergency call, for injuries sustained in intersectional collision, instruction that duties of drivers of vehicles on highway and laws regulating driving of vehicles and use of highways were not applicable if ambulance driver was entitled to exemption as operator of an emergency vehicle was proper. Vehicle Code, § 454.

39. Automobiles 🔑246(2)

In action by automobile occupant against ambulance driver, who was answering an emergency call, for injuries sustained in intersectional collision, instruction relating to exemption of driver of emergency vehicle from observing certain laws generally applicable to drivers of vehicles on public streets adequately emphasized limitation upon operator of such a vehicle. Vehicle Code, § 454.

40. Automobiles 🔑175(5), 227(2)

Phrase "due regard" as used in statute exempting driver of authorized emergency vehicle from observance of certain laws generally applicable to drivers of vehicles on public streets but not relieving driver of such vehicle from duty to drive with "due regard" for safety of all persons using highway, is essentially satisfied when driver of emergency vehicle has, by suitable warning, given users of highway an opportunity to yield right of way and, if having discovered peril in which another has unknowingly or negligently become involved despite warning devices, driver reasonably exercises any last clear chance to avoid the accident. Vehicle Code, § 454.

41. New Trial 🔑159

In action by automobile occupant against driver of automobile, driver of ambulance, and others for injuries sustained in intersectional collision, record disclosed that trial court properly considered and passed on occupant's motion for new trial.

42. Appeal and Error 🔑900

Reviewing court must presume that trial court regularly performed its official duty. West's Ann.Code Civ.Proc. § 1963, subd. 15.

43. Appeal and Error 🔑1170(1)

Judgment may not be reversed by reviewing court where record contains nothing indicating a miscarriage of justice. West's Ann.Const. art. 6, § 4½.

◆

William K. Young, Los Angeles, for appellants.

Lynch & Reilly, Los Angeles, for respondent Sigmund Arywitz.

De Forrest Home, Los Angeles, for respondent Union.

Crider, Tilson & Ruppe, Los Angeles, for respondents Schaefer Ambulance Service, Inc., and Carl A. Bellanzi.

FOX, Justice.

This appeal is the aftermath of three actions for the recovery of personal injury and property damages arising out of an intersectional vehicular collision.

The accident occurred at the intersection of Hope and Temple Streets in Los Angeles on the evening of March 6, 1952, between the hours of 8:30 and 9:00 o'clock. The vehicles involved were a 1953 Ford automobile owned and driven by defendant Arywitz and an ambulance belonging to the Schaefer Ambulance Service, Inc., (hereinafter called Schaefer) which was being operated by defendant Carl A. Bellanzi. Plaintiffs Matelie Duff and Callie Williams, both of whom sustained personal injuries, were riding in the Arywitz car. It was proceeding south on Hope when it collided with the eastbound ambulance. The latter was responding to an emergency call at the time of the collision. The occupants of the Ford were bound for downtown Los Angeles after attending a television broadcast in Hollywood sponsored by the Los Angeles County Conference on Community Relations (hereinafter called the County Conference).

Mrs. Duff (hereinafter termed appellant) instituted this action on the theory of negligence for the recovery of damages from defendants Arywitz, Schaefer, Bellanzi, the International Ladies' Garment Workers Union (hereinafter designated Union), and two of its members, Samuel Otto and John Ulene. It was alleged that appellant was a passenger in the Arywitz car and that Arywitz was the agent of both the Union and the two named members and was acting within the scope of his employment when the accident occurred. Appellant's husband was joined as a co-plaintiff to recover for loss of consortium. Callie Williams likewise filed an action for damages based on the alleged negligence of the above named defendants. A third action, restricted to property damage resulting from the accident, was brought by Schaefer against Arywitz alone. Among the defenses interposed by Arywitz and the Union to appellant's complaint was the claim that appellant was a guest in the Arywitz car and that Arywitz was neither intoxicated nor guilty of wilful misconduct at the time of the impact. The answer of defendants Schaefer and Bellanzi, so far as is here material, denied negligence in Bellanzi's operation of the ambulance.

The three cases were consolidated for trial before a jury and resulted in verdicts in favor of all the defendants in the Duff and Williams personal injuries actions. Appellant Duff's motion for a new trial was denied. In the property damage action, Schaefer prevailed against Arywitz. The judgment in this latter action, and the judgment adverse to Callie Williams are now final. Mrs. Duff is the sole appellant. She assigns as prejudicial error (1) various rulings on the admissibility of evidence; (2) the giving of certain instructions and the refusal to give others requested by her; and (3) the court's misconception of its duty in ruling on the motion for new trial. Her contentions cannot be sustained.

Background Facts.

The evidence shows that appellant was a resident of South San Gabriel, a suburb of Los Angeles. She was employed as a seamstress in the garment industry. She became a member of the respondent Union in 1937. At the time of the accident, appellant was vice president of Sportswear Local 266, an affiliate of the Union, and chairman of the local's Educational and Entertainment Committee. These were honorary positions. She received no pecuniary compensation at any time from the Union for the performance of these functions, in which she engaged outside her working hours. On certain occasions when she was involved in activities authorized by the Union she was reimbursed by the Union for her meals and transportation costs. Appellant testified that her responsibilities as a non-paid functionary of the Educational and Entertainment committee included the gathering of material of educational value for presentation on the committee's informational programs for the membership.

Appellant testified that when she became committee chairman in 1943 she informed one Louis Levy, since deceased, but then an officer of the union, that she did not drive a car and would have difficulty in returning home late at night from Los Angeles. Levy, she stated, assured her that transportation would be provided either to her home or to the Pacific Electric Railway Terminal in Los Angeles when she was required to remain in, or come to Los Angeles on behalf of the Union.

Arywitz testified that he occupied the position of director of the Education and Public Relations Committee of the Union. He was employed directly by the International Union in New York City, from whom he received a salary of $85 a week. His job was to formulate and carry out a program of educational and recreational activity. This entailed the organization of classes, holding institutes, publishing a Union newspaper, and planning dances, parties and picnics. His duties brought him in contact with defendant Ulene, an officer of Local 266 and manager of the Union's Joint Sportswear Council, and with committee members of the local unions with whom he had occasion to discuss his projects. He sometimes met with officers of Local 266 to apprise them of his contemplated programs. He worked under the supervision of the Pacific Coast Regional Director of the International Union, in whose headquarters his own office was located. He was not subordinate to any official of the local unions or of any of the executive committees.

Arywitz testified that he kept fairly regular office hours—normally from about 9:30 a. m. to 6:00 p. m. He spent about 80% of his working time in the office, where he attended to the editing of the paper and his work of dictation and correspondence. Only infrequently did he program evening activities for Union members because of the poor response. He owned the Ford car which he used, in part, in connection with his job. In addition to his salary he received a $50 weekly expense allowance. This included the cost of operating his car for business purposes and charges incurred for food and drinks in the entertainment of out-of-town visitors and civic and political personalities. Arywitz testified that he was never told by any one that it was his duty, as a part of his job, to transport Union members anywhere at any time. Occasionally, he took a member who did not have transportation to a party or some other type of function, but this he did as an individual, out of friendship for and courtesy to such person. He pointed out that other Union members who were not paid employees also transported fellow members to such affairs. He testified that in 1951, at the annual meeting of the County Conference, which he attended in his individual capacity because he believed in their objectives, he gave appellant a ride in his car downtown out of friendship to enable her to board a streetcar to her home. Under examination by appellant's counsel as to purported occasions during the period 1949 to 1951 when he allegedly transported appellant in his car on Union business, Arywitz denied that he drove her to look for Union picnic sites, to purchase a gift for Union entertainments or toys for its Christmas party.

On February 27, 1952, a week before the accident, appellant and Mrs. Williams attended a meeting of delegates to the Sportswear Joint Council where defendant Ulene announced that on March 6th a dinner and lecture would be given at the Case Hotel in downtown Los Angeles by an organization known as the Religion and Labor Council. Dinner was to be served at 7:00 p. m. and the speaker's address was scheduled for 8:00 p. m. Reservations for the dinner were required by noon on March 5th. The Joint Council voted that delegates who attended would be reimbursed for the dinner charges of $2 by the Union upon submission of a voucher. Appellant made no reservation to attend. It was established that the Religion and Labor Council is an independent organization with its own headquarters and officers, and conducts meetings periodically on various subjects throughout the city. It was affiliated with the American Federation of Labor and the Union.

During a union meeting the night before the accident, which appellant did not attend, the minutes disclose that Mr. Ulene announced the receipt "of an invitation for two members to attend the last broadcast of the season of the Los Angeles County Conference on Community Relations over Station KTTV on March 6th. Volunteers were called for, and Sisters Bayer and Williams volunteered. It was suggested that Sister Billie Duff (appellant) may want to go. Sister Williams advised that she would advise Sister Duff if she wants to attend." At the conclusion of the meeting, Mrs. Williams called at appellant's home, but found she was out. She left a note for appellant telling her to "come dressed, we are going to be on TV." When appellant left home the next morning, she was unaware of the nature of the TV program referred to. In the meantime, Mrs Bayer, who was the president of Local 266, also an unpaid position, and Mrs. Williams decided to have dinner in Hollywood after the telecast.

Appellant and Mrs. Williams attended Union meetings on March 6th at the close of their working day, and, at about 7:00 p. m., they joined Mrs. Bayer for the drive to the TV studio in the latter's car. Mrs. Bayer testified that she drove to work about three days a week, and parked her car near the Union office when attending Union meetings. For about the last three years, she had received $5 a week from the Union "not as a car expense but parking expense." She testified that in connection with the allowance of this parking expense she was never told that it was to include the cost of carrying personnel in her car. She stated that the fact that she received a parking allowance from the Union did not motivate her in taking appellant and Mrs. Williams to the TV studio on March 6th. The record shows also that Mrs. Williams owned a car, but did not drive. She and her daughters lived in El Monte, and they all worked in downtown Los Angeles to which they drove daily, one of the daughters driving. They customarily parked in a parking lot between 8th and 9th Streets on Hill Street, and the car was parked there on the day of the accident. On that day Mrs. Williams planned to meet her daughters at the Olympic Theatre, on 8th Street between Hill and Broadway, at about 10.30 p. m. As appellant and Mrs. Williams and Mrs. Bayer drove to the studio, appellant was informed of, and accepted, the plan to have dinner in Hollywood following the TV broadcast before returning downtown.

After the three ladies took their seats at the TV studio, Arywitz arrived and observed them sitting up front. He conversed with them and Mrs. Bayer told him they were going to stay in Hollywood and have dinner. Arywitz was invited to join them, but declined, stating he had already eaten and that he had a date after the broadcast. Arywitz testified that he was at the County Conference meeting as a private individual and had not been requested to attend by anyone connected with the Union. He stated that his working day had ended at 6:00 p. m., earlier that evening; that he knew a few days in advance of the County Conference on Community Relations broadcast; that it concerned problems of interest to various community organizations, and that labor matters constituted only one phase of the program. The County Conference was an organization having its own officers and offices, with which were affiliated such entities as the C. I. O., the A. F. of L., the Urban League, the National Conference of Christians and Jews, and the Negro Conference. Arywitz stated that he was a member of several of the Conference's affiliated groups and he had decided to attend the broadcast as a matter of purely personal interest. He testified he had no official function to perform at the broadcast, it being no part of his job to attend a meeting of this character.

By the time the broadcast ended, a heavy rain was falling. This disrupted the ladies' prearranged plan to dine in Hollywood. Mrs. Bayer was willing to drive appellant and Mrs. Williams back to downtown Los Angeles. However, it was suggested that perhaps she might be spared the trip if another ride downtown could be arranged. Arywitz was approached by the three women and asked if he were going downtown. He replied affirmatively and agreed to give appellant and Mrs. Williams a lift. Arywitz and the two women thereupon entered his car and started off. Arywitz' destination was a parking lot adjacent to the Case Hotel at 11th and Broadway, where he had arranged a date with a lady. Enroute, a discussion was had as to where the ladies were to leave the car. It was finally decided by them that they would alight at 8th and Hill Streets, where Mrs. Williams wished to obtain refreshments. After dinner, since it would be still too early for the 10:30 p. m. appointment at the theatre with Mrs. Williams' daughters, the ladies decided they would look in at the Case Hotel meeting at the Religion and Labor Council, instead of spending the intervening time sitting in Mrs. Williams' car in the parking lot. It was while Arywitz was proceeding to the restaurant at 8th and Hill Streets, which was about four blocks from his rendezvous with his lady friend, that the accident occurred sometime between 8:30 and 9:00 p. m. A representative of the Religion and Labor Council testified that its Case Hotel dinner and lecture was over by 9:00 p. m., and all those in attendance had departed by 9:15.

Guest Statute and Scope of Employment.

Fundamental to appellant's theory of liability against Arywitz and the Union are the propositions that on the ill-fated ride of March 6, she was a passenger, rather than a guest, in Arywitz' car and that Arywitz was acting within the scope of his employment with the Union in furnishing transportation for her. We regard neither of these points as valid.

[1-4] The questions here presented are not novel. Much has been said by appellate courts and text writers on these subjects, and the guiding principles of law are reasonably clear. In cases having to do with the "guest" statute,[1] the status of an injured occupant of a vehicle either as a "guest" or a "passenger" of the driver at the time of the accident, depends on the vital factor of whether the occupant or some one on his behalf was "giving compensation for such ride" in the sense in which that term is used in section 403 of the Vehicle Code. Whitechat v. Guyette, 19 Cal.2d 428, 430, 122 P.2d 47. By giving compensation for the ride, the occupant becomes a passenger in the vehicle. Because of the infinite variety of situations under which passage in an automobile is offered and accepted, the modern concept of what amounts to "giving compensation" for the ride is an elastic one, and where conflicting inferences may be drawn from the evidence, it is a factual question as to whether a rider's status is that of a passenger or guest. Kohle v. Sinnett, 118 Cal.App.2d 126, 128, 257 P.2d 483; Gosselin v. Hawkins, 95 Cal.App.2d 857, 861, 214 P.2d 110. To constitute compensation within the statute, the rider need not pay for the transportation solely in cash or its equivalent. Malloy v. Fong, 37 Cal.2d 356, 376–378, 232 P.2d 241. Where the trip is not primarily for a social purpose, it suffices if the occupant gives such recompense for the ride or confers such benefit on the driver as makes it worthwhile for him to furnish the ride. Brandis v. Goldanski, 117 Cal.App.2d 42, 45, 255 P.2d 36; Follansbee v. Benzenberg, 122 Cal.App.2d 466, 471, 265 P.2d 183; The requisite compensation for the transportation may be provided by some one other than the driver. Thompson v. Lacey, 42 Cal.2d 443, 447, 267 P.2d 1.

[5, 6] In the Goldanski case, supra, the court, in a cogent analysis of the trend of recent decisions, points out that "even though the purpose of a trip is pleasure or social, the rider may be a passenger if the driver actually receives for the trip something intended as compensation." 117 Cal.App.2d at page 47, 255 P.2d at page 39.

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[1] Section 403 of the Vehicle Code reads: "No person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride, nor any other person, has any right of action for civil damages against the driver of such vehicle or against any other person legally liable for the conduct of such driver on account of personal injury to or the death of such guest during such ride, unless the plaintiff in any such action establishes that such injury or death proximately resulted from the intoxication or wilful misconduct of said driver."

However, it was there held, upon abundant authority, that where the ride is offered for mutual pleasure or as an act of hospitality, such mere exchange of social courtesies is not a benefit amounting to compensation so as to make a rider a passenger and not a guest. 117 Cal.App.2d at page 49, 255 P.2d 36. That conclusion, of course, comports with the fundamental policy underlying guest statutes, which is to prevent recovery for ordinary negligence by a guest in an automobile who has accepted the hospitality of the driver. Kruzie v. Sanders, 23 Cal.2d 237, 241, 143 P.2d 704. Where, as here, wilful misconduct or intoxication on the part of the driver is not involved, the occupant of the car has the burden of proving that he was a passenger rather than a guest. Kroiss v. Butler, 129 Cal.App.2d 550, 277 P.2d 873; Gosselin v. Hawkins, supra.

[7] The law relating to the question of whether at the time of the accident Arywitz was acting in the service of his employer has found expression in numerous cases considering the relationship of principal and agent, master and servant, and in cases arising under the workmen's compensation act. In general, where it is established that the driver of a car was the servant or agent of defendant employer and that his use of the vehicle was a contemplated incident of his agency, before liability is fastened on the employer the plaintiff must show that at the time of the injury complained of the servant was engaged in performing a service for the master or some act incidental thereto. Kish v. California State Auto Ass'n, 190 Cal. 246, 248–249, 212 P. 27; Clough v. Allen, 115 Cal.App. 330, 332, 1 P.2d 545; Hall v. Puente Oil Co., 47 Cal.App. 611, 614, 191 P. 39. The general rule is further refined in Lockheed Aircraft Corp. v. Industrial Acc. Comm., 28 Cal.2d 756, 758–759, 172 P.2d 1, 3, so that "where the employee is combining his own business with that of his employer, or attending to both at substantially the same time, no nice inquiry will be made as to which business he was actually engaged in at the time of injury, unless it clearly appears that neither directly or indirectly could he have been serving his employer." In Loper v. Morrison, 23 Cal.2d 600, 605–606, 145 P.2d 1, 3, the court stated: "In each case involving scope of employment all of the relevant circumstances must be considered and weighed in relation to one another [citations] * * * the factors to be considered * * * are the intent of the employee, the nature, time and place of his conduct, his actual and implied authority, the work he was hired to do, the incidental acts that the employer should reasonably have expected would be done, and the amount of freedom allowed the employee in performing his duties."

Non-Liability of Arywitz and the Union.

[8, 9] Applying the foregoing rules, it is clear that the evidence amply sustains the implied findings of the jury that appellant was a guest in Arywitz' car and that Arywitz was not acting within the scope of his employment at the time of the collision. The evidence obviously accepted by the jury shows that on the day in question Arywitz had finished his day's work and had gone home, with no further duties for the Union on his schedule. His time thereafter was his own, to use as he pleased. His presence at the KTTV program was the result of private choice, because of his interest in its sociological content and was dissociated from any duty he owed the Union arising out of his employment. He was neither expected to attend such meeting nor, being there, to engage in any functions connected with his job. Furthermore, there is no evidence to show any obligation on Arywitz' part to supply transportation to appellant to downtown Los Angeles. Arywitz' pre-arranged activities for the evening called for him to keep a date with a lady near the Case Hotel. Appellant, on the other hand, was not sent to the KTTV program as a Union representative or delegate. She had left her home on the morning of March 6th without even knowing what type of broadcast she would attend and later fell in with her friend's plans to have dinner in Hollywood after the broadcast. It was simply an unexpected mischance of the elements which

altered these plans. It was also a fortuitous occurrence that Arywitz was in the studio and that he happened to be going downtown on a social engagment. On being asked if they might accompany him, he graciously consented to convey them to the cafe where Mrs. Williams wished to dine, near his own destination.

Clearly the jury could reasonably have found that the work for the Union had no part in creating the necessity for Arywitz' trip, which he would have made in all events and which had no possible connection with the duties he owed the Union. Also, they could have found that appellant was in Arywitz' car merely as a guest accepting an act of courtesy and accommodation extended to her by a friend going her way. That no benefit tantamount to compensation passed to Arywitz nor motivated him in taking appellant on the trip he was making is fully supported by the evidence. Brandis v. Goldanski, supra, 117 Cal.App. 2d at page 49, 255 P.2d 36.

[10, 11] Appellant urges in support of her position that her uncontradicted testimony was that the late Mr. Levy assured her, almost ten years before the accident, that she would always get transportation to the Pacific Electric terminal when on union business. She emphasizes also that Arywitz was receiving an expense account for the use of his car from the Union. But neither of these factors compels the fastening of liability on those defendants. In connection with her first point, two principles should be borne in mind. The first is that uncorroborated testimony as to an oral declaration of a deceased person is the weakest form of evidence and is open to suspicion; but, where admissible, it will be weighed by the trier of facts the same as other evidence and may be disregarded where shown to be unconvincing or insubstantial. In re Estate of Emerson, 175 Cal. 724, 727, 167 P. 149. The second is that the trier of fact may reject the uncontradicted testimony of a witness provided he does not act arbitrarily. Hicks v. Reis, 21 Cal.2d 654, 659–660, 134 P.2d 788. Among the relevant considerations in this respect are the character of the evidence, the motives of the witness, and his interest in the result of the case. Hicks v. Reis, supra; Huth v. Katz, 30 Cal.2d 605, 609, 184 P.2d 521; American Trust Co. v. Fitzmaurice, 131 Cal.App.2d 382, 280 P.2d 545. The jury was not compelled to accept the testimony of appellant as to Levy's alleged promise, either because of the weakness of this type of evidence or because it was not satisfied with the veracity of appellant's testimony as an adverse party. As to the second point, the mere fact that Arywitz was receiving an expense account from the Union did not of itself make the Union liable for an injury sustained by appellant at a time when appellant was in the car as a guest and Arywitz was engaged in a mission for exclusively his own pleasure divorced from any duties he owed to his employer or to appellant. Hall v. Puente Oil Co., 47 Cal.App. 611, 614–615, 191 P. 39. As stated in Kish v. California State Automobile Ass'n, 190 Cal. 246, 251, 212 P. 27, 29: "To so hold would be to make the employers business coextensive with the employee's expense account and extend the liability of the employer for the acts of a servant as being within the scope of employment to acts having no relation whatever to the actual business of the employer and to the accomplishment of the results for which the servant was hired."

Rulings On the Evidence.

[12–15] Appellant makes multifarious attacks upon the ruling of the court in the admission and exclusion of evidence. In order properly to evaluate these rulings it is necessary to bear in mind, at least so far as the liability of defendant Arywitz and the Union is concerned, that the character of the transportation venture by which Arywitz undertook to drive appellant and Mrs. Williams from the telecast in Hollywood to downtown Los Angeles and his relation to the Union during such venture, are crucial. The person in the best position to testify on this subject was Arywitz, for he had primary knowledge of his own purpose and intention, and the extent of his agency. While his statement, of course, would not be conclusive, it was nevertheless competent, contrary to appellant's assertion, for him to testify that he attended the telecast as a private individual and not as a representative of the Union, Hirshfeld v. Dana, 193 Cal. 142, 223 P. 451, and that providing transportation downtown for appellant and Mrs. Williams was not within the scope of his employment but rather a personal matter, "as an act of friendship." Kast v. Miller & Lux, 159 Cal. 723, 727–728, 115 P. 932. It was likewise competent for him to testify that his day's work was finished at 6:00 p. m. Appellant's objections to questions which developed the above testimony were properly overruled. Appellant, however, argues that the court unduly restricted the cross-examination of Arywitz respecting his interest in attending Union activities and his knowledge of her interest in being present at such meetings. It is, of course, axiomatic that the extent of cross-examination is largely a matter resting in the sound discretion of the trial court, and that restriction thereof is not a basis for reversal of a judgment in the absence of a clear abuse of such discretion. There is obviously no such abuse here. The incident to which appellant directs special attention relates to a prior meeting at Pepperdine College of the Los Angeles County Conference on Community Relations, which was attended by her and Arywitz. He testified, in response to Mr. Young's questions, that he attended this meeting "as a private individual" because he was interested in the organization and believed in what it was doing. Objection was thereupon sustained to the later question: "What was the interest you had in being there then?" The ruling was correct for the subject matter had been sufficiently explored. Notwithstanding that, Mr. Young's next question was: "You had no other interest except that which you have related?" to which the witness replied, "None whatever." Inquiry was then made whether he knew what appellant's interest was in attending this meeting. Objection on the ground that the question called for a conclusion was properly sustained. Counsel thereupon asked Arywitz whether appellant advised him on that occasion what her reason was for being present. Upon an objection's being sustained counsel did not pursue the matter. The question called for hearsay so far as defendant Union was concerned. Furthermore, no offer of proof was made. Since the question did not indicate the answer would be favorable to appellant such an offer was necessary in order to have the matter reviewed on appeal. Newman v. Sunde, 23 Cal.App.2d 332, 335, 73 P.2d 260; Abrams v. Hubert, 10 Cal.App.2d 404, 407, 51 P.2d 884.

[16] Appellant complains that she was not permitted to testify relative to transportation furnished her prior to the accident by various Union members. The following question was propounded: "I wonder if you could tell the jury the various methods of transportation you have had in private passenger cars insofar as members of the Union are concerned?" Clearly this was immaterial to any issues here involved. Counsel, however, suggested he would establish that the persons who gave her rides were on expense accounts with the Union. This would not render such testimony material since there was no showing or offer to show that the persons who provided these rides were acting within the scope of any authorization or direction by the Union. Kish v. California State Automobile Ass'n, supra.

[17] Appellant also complains that she was not permitted to testify that "prior to the collision she was present in the automobile of Arywitz because of Union activities on numerous occasions." Here again there was no showing of any basis for binding the Union in connection with any of these isolated rides. In an apparent effort to establish such a basis, counsel for appellant examined Arywitz under section 2055, Code of Civil Procedure, relative to each of these asserted rides. Counsel was not able, however, to tie the Union into any of them. In fact, Arywitz denied having taken appellant on most of these trips. On infrequent occasions when he did give her a ride it was done solely as an act of friendship.

[18] Appellant claims to be aggrieved because the court excluded evidence of (1) previous rides in Mrs. Bayer's car; (2) a

voucher of the Union indicating payment of automobile expense to Mrs. Bayer; and (3) transportation charges of $2 assertedly paid by the Union to Mrs. Bayer for each member of the Education Committee she carried to an institute at Mar Vista. We perceive no error in the rulings on these matters. In this connection it will be recalled that although Mrs. Bayer was an official of the Union she was not a paid employee of the Union. She testified she received "no car expense" for the use of her automobile but the Union allowed her $5 a week for "parking expense." It is thus clear that under this arrangement the Union was not paying for the rides that Mrs. Bayer gave appellant. The voucher that was excluded (Plaintiff's Exhibit No. 4 for identification) was drawn in favor of Mrs. Bayer for $5 under date of August 31, 1951. There was a notation for car expense. This may well have been a receipt for one of her weekly payments for parking expense or pay for some special use of her car. In either event it was not here material. It was likewise immaterial whether Mrs. Bayer received $2 for each passenger transported to an institute at Mar Vista on some prior occasion. Special arrangements made for particular transportation could not have any bearing on the issues in this case.

Finally, the question of whether Mrs. Bayer was receiving compensation for transporting appellant and Mrs. Williams from downtown Los Angeles to the telecast in Hollywood should be set at rest completely by her own testimony: "Q. On the night of March 6, 1952, when you took Mrs. Duff (appellant) and Mrs. Williams out to KTTV did you do that because you were getting some money from the Union? * * * A. No, sir."

Evidence that appellant attended the annual convention of the Union as a delegate and as such was provided transportation was properly rejected. There is no parallel between official representation of the Union at its annual convention and attending the telecast at KTTV which was not sponsored by her Union but by another organization and which she attended voluntarily and not in any official capacity.

[19] It was not error to exclude testimony that the Union had defrayed transportation expenses of appellant on other occasions such as meetings of the Union held at Asilomar and visits to the City of Hope since such evidence had no probative value to establish that on the night in question Arywitz was providing transportation for her on behalf of the Union or that compensation was given therefor. It must be remembered that the testimony of appellant herself affirmatively established that it was only by the merest circumstance that she had ridden with Arywitz that night. In order to save Mrs. Bayer the drive downtown in the rain the ladies sought other transportation for appellant and Mrs. Williams. Arywitz was contacted and agreed to accommodate the two ladies since he was going downtown anyway to pick up his "date."

[20] It was not error, as appellant asserts, to admit in evidence the minutes of the board of directors of the Sportswear Joint Council showing that the Union's representative at the TV program was to be restricted to two members, and that she was not included. These minutes were prima facie evidence of the facts stated therein. Corp.Code, § 832. They were not self-serving declarations in any sense of the word but were routine minutes representing action taken at a time when no litigation was contemplated. Appellant, however, claims error in the exclusion of testimony by director Roberts purporting to contradict recitals in the minutes with respect to the designation of two persons to attend the telecast. There was actually no contradiction for her statement was: "I don't remember the number two ever having been mentioned. * * *" This witness sought to volunteer on two occasions that they were all invited to attend this broadcast. This statement was not in response to any question and was therefore stricken by the court as not responsive. Appellant's assertion of prejudicial error in this ruling is without substance.

[21, 22] Appellant contends that the court erred in excluding (1) conversations between her and Mrs. Williams respecting

their contemplated attendance at the dinner meeting at the Case Hotel at 7:00 o'clock on the evening of the accident; (2) evidence that such affairs were customarily tardy in getting started; and (3) her explanation of the nature of this affair. The rulings were correct. The conversations were hearsay and there was an absence of any foundation to establish authority on the part of these two ladies to bind the Union by such conversations. The practice of not getting such dinners started on schedule was not material to any issue in this case. This is made obvious by the testimony of witness Carstens, who was head of the Religion and Labor Council which put on the dinner, that it started, as scheduled, at 7:00 o'clock and was over by 9:00 p. m., which was only a few minutes from the time the accident occurred. In connection with this dinner, it should be noted that appellant received the same invitation that was extended to the entire Joint Council. She was not delegated to attend the affair. With this factual background it was not error, as appellant asserts, to strike her explanation of the nature of the dinner-meeting at the hotel.

[23] Appellant charges prejudice (1) in the admission of the contents of a signed statement by Mrs. Williams which was used to impeach the latter's testimony; (2) in the refusal to allow Mrs. Williams to explain the circumstances under which the statement was signed; and (3) in rejecting her statement that she did not understand certain expressions used therein. At the time the impeaching statement of Mrs. Williams was admitted the court did not limit it in any way to Mrs. Williams' case, since she, also, was a witness for appellant. However, the error, if such there was, in any aspect of the ruling, was cured by instruction "L" which reads as follows: "There has been offered by defendant Union and received in evidence a statement in writing signed by plaintiff Callie Williams upon the ground that the same was an admission by her against her own interest. It may therefore be considered by you as evidence in the case against plaintiff Callie Williams.

"With reference to the written statement of plaintiff Callie Williams [just] mentioned, you are instructed that the same shall not be considered by you as prejudicing the rights of plaintiffs Duff, and you are instructed that said written statement is not binding upon plaintiffs Duff."

It may have been error, insofar as Mrs. Williams' own case was concerned, not to permit her to explain her lack of understanding of certain terms used in the statement she signed and not to allow her to explain the circumstances under which she signed it but she is not appealing the decision in her case. However, such limitation on her testimony could not in any event be prejudicial to appellant's case in view of the instruction quoted above.

[24] During the course of Mrs. Williams' testimony she referred to the person who took her statement as "a man from the insurance company of the Union." Because of this reference the Union and Arywitz requested, and the court gave, an instruction that the jurors should not speculate about or discuss whether or not there was insurance in the case; that this was a subject with which they were not concerned and that it should not enter into their deliberations "in any manner." In view of Mrs. Williams' observation, it was entirely proper to advise the jury that it should not be concerned with whether there was insurance involved. Appellant, however, claims the inclusion in the instruction of the quoted phrase was prejudicial in that it took from the jury's consideration any bias or interest on the part of this man and how such matters affected him in preparing the statement. There is no merit in this argument, particularly in view of instruction "L" which advised the jury that the Williams' written statement should not be considered as prejudicing the rights of, or "binding" upon, appellant.

No Prejudicial Error In the Instructions.

[25] Appellant claims prejudice in the giving of certain instructions captioned "D", "F", "G", "H", and "I." We perceive no merit in this contention. She assigns as error in instruction "D" the state-

ment that no liability would attach to Arywitz and the Union unless the jury found "that (1) compensation was given for the transportation from KTTV to Los Angeles; (2) that in providing the transportation Mr. Arywitz was the agent of the Union in so doing; and (3) was acting within the course and scope of his employment in providing such transportation; * * *" Appellant claims that point (1) of the instruction requires her to show that she had given compensation for the ride. This is not so. It correctly requires a showing that "compensation was given" and in instruction "G" compensation is defined to include a benefit accruing to the Union. This part of the instruction is therefore unobjectionable. She further asserts that it was unnecessary for her to establish point (3) if she had established points (1) and (2) above. While points 2 and 3 when read together are somewhat redundant, both essentially relate to whether Arywitz, the Union's agent, was acting within the scope of his employment at the time of the injury. Plaintiff was not prejudiced by the addition of the words "and was acting within the course and scope of his employment." The complaint alleges and the answer denies that Arywitz was acting "within the course and scope of his employment" and the evidence on the issue was conflicting. No error appears from the tenor of the instruction as a whole. Garcia v. City of Santa Monica, 92 Cal. App.2d 53, 55, 206 P.2d 37.

[26] Appellant challenges the propriety of instructions "G" and "I." These instructions are, perhaps, not worded as felicitously as might be desired. However, an examination of the instructions shows that, in essence, they accurately stated the law that compensation would be present if the trip served to accomplish a purpose of, or was of benefit to, the Union, but that it would be lacking if the motivating influence for the ride was merely the extension of a personal courtesy or an accommodation solely for appellant's convenience. Humphreys v. San Francisco Area Council, 22 Cal.2d 436, 139 P.2d 941; Brandis v. Goldanski, supra. Basically, they left for the jury to determine whether appellant was simply a guest or whether compensation in the statutory sense was rendered or received for the journey. Gosselin v. Hawkins, 95 Cal.App.2d 857, 861, 214 P.2d 110.

[27] The court gave to the jury instruction "F" in the following language: "The fact that defendant Arywitz may have been allowed car expense as part of his compensation does not of itself prove that it was part of his job to transport the plaintiffs from one place to another. Such evidence is to be considered only as one of the facts and circumstances bearing upon the question of the nature and extent of Mr. Arywitz' employment and the scope of his duties to be performed on behalf of the Union." Appellant claims that the instruction charged upon a matter of fact. The first sentence of the instruction is a correct statement of the law. Kish v. California State Automobile Ass'n, supra. There is no undue emphasis on any testimonial facts in this brief instruction nor is there any trespass on the jury's function of evaluating and finding the facts. The instruction clearly leaves it to the jury to appraise all of the circumstances bearing on the question of scope of employment in accord with other instructions appropriately covering the general subject.

[28] Appellant attacks instruction "H" which reads as follows: "Plaintiffs Duff and Williams claim that at the time of the accident they were enroute to the Case Hotel at 11th and Broadway to attend a meeting of the Religious and Labor Council. The burden is on plaintiffs to prove this fact by a preponderance of the evidence, and unless they maintain such burden of proof your verdict must be in favor of Arywitz and I. L. G. W. U. If at the time of the accident their destination had no connection with any meeting at the Case Hotel, your verdict would be against said plaintiffs as to said defendants." This attack is unwarranted when read in relation to the charge as a whole. The jury was fully instructed on the subject of "guest" and "passenger" and the matter of "compensation" had been thoroughly defined and explained. The doctrine of *respondeat superior* had likewise been covered. However, it was appellant's contention that when the collision

occurred she was enroute to the meeting at the Case Hotel. It was respondent's contention that Arywitz' riders were going to a restaurant at or near Eighth and Hill to eat and then wait for Mrs. Williams' daughters to leave the movie theatre. The criticized instruction was not a formula instruction purporting to embody all the elements of liability but, in conjunction with other instructions, advised the jury that unless appellant's destination was the Case Hotel on the business of or at the behest of the Union she could not recover. The instruction as a whole had a natural basis in the evidence. Clearly, if appellant was going directly to a downtown eating place rather than to a Hollywood restaurant because of an unanticipated change of plans, and if Arywitz was taking her there merely as an act of courtesy, neither Arywitz nor the Union would be liable. Under other instructions given, the jury could decide whether appellant's presence at the telecast was on a Union mission, whether it wished to believe appellant's testimony that a deceased Union official promised she would always have transportation "either home or back to the P. E. Station" and whether Arywitz was transporting her in line with his Union duties or to discharge the Union's obligation. In this context, no error of a prejudicial nature appears.

[29, 30] Appellant contends that the court erred in refusing two instructions offered by her. The first one reads: "You are instructed that section 403 Vehicle Code, and commonly known as the guest law, whereby a person carried in a vehicle without reward is deprived of the right to recover damages for injuries caused by the breach of ordinary care, is in derogation of the common law and must be construed strictly against the change of the former law which authorized recovery prior to the enactment of such guest law." It will be noted that as proposed the instruction reads that section 403 of the Vehicle Code was to be "construed strictly *against* the change of the former law." (Italics added.) Assuming the proffered proposition of law to be a proper subject of instruction to the jury, its wording is of such a nature as would strongly tend to mislead and confuse the jury. As the Union points out, if section 403 is to be strictly construed, it is simply the language of said section which is to be so construed; it does not mean, in the inept language of the requested instruction, that it is to be strictly construed against any former law or "against the change of the former law." Equally without merit is the claim that the refusal to give another instruction was prejudicially erroneous. This read as follows: "In determining whether there is an agreement by defendant Union to provide plaintiff Matelie Duff with transportation in connection with the performance of her activities on behalf of defendant Union, you are instructed that said agreement may be implied from the circumstances and uniform course of conduct of the parties." While the instruction is unobjectionable as a statement of law, it is unsupported by the record in the form requested. Appellant was not relying on an implied understanding between herself and the Union. Her contention throughout the trial was that there was an express agreement that she was to have transportation to her home or to the Pacific Electric Station when on Union business. Her testimony as to other rides represented an effort to establish the existence of such an agreement. It was never appellant's theory that there was an implied agreement. In addition, the language of the instruction tells the jury categorically that there was a "uniform course of conduct by the parties." This was clearly obnoxious in the state of the record. The function of instructions is to give the jury the law which it shall apply to the facts as it finds them from the evidence. The court properly refused to introduce facts into the instruction, without any qualification, which might well lead the jury to believe that in its opinion, the existence of a uniform course of conduct among the parties had been established. See In re Estate of Keegan, 139 Cal. 123, 128, 72 P. 828.

[31, 32] Appellant next complains that two requested instructions, "I" and "J", were rejected by the court. The gist of these instructions was that the scope of Arywitz' employment need not have been expressly conferred on him, but might be

implied from the nature of his employment and the duties incident to it, in furtherance of his work; that if the act in question was calculated to result directly, indirectly or incidentally to the employer's benefit, it was within the scope of the employee's job. However, all of the proper elements in instructions "I" and "J" were incorporated in appellant's instruction 54–D [2] which was given. Appellant was not entitled to other instructions to the same effect in different language. Similarly, it was not error to refuse instruction "K" which dealt in the abstract with the foundations of liability under the doctrine of *qui facit per alium fait per se*, and was a paraphrase of language in Carr v. Wm. C. Crowell Co., 28 Cal.2d 652, 171 P.2d 5, a case dealing with an employee's tortius conduct. The language copied was not used in any instruction in the Carr case. "It does not follow because a trial court does not give an instruction in the language employed by an appellate court in reasoning out a proposition of law or elaborating upon it, that error is thus committed. The most that the trial court is required to do is to give instructions which will embody clearly the principles of law under which the jury is to apply the evidence in the case before them." Bundy v. Sierra Lumber Co., 149 Cal. 772, 781, 87 P. 622, 626. In the case at bar, the jury was properly instructed on the Union's liability for an employee's negligence.

[33, 34] Appellant also urges that instruction 54–D, Adapted, should not have been given.[3] It is possibly true that the first part of this instruction may, upon careful analysis, be subject to criticism as somewhat inaccurate, or perhaps in partial conflict with other instructions. However, as stated in Popejoy v. Hannon, 37 Cal.2d 159, 168, 231 P.2d 484, 490: "Prejudicial error does not necessarily result from the giving of an instruction which, subjected to meticulous analysis, might be given a 'possible construction' making it subject to 'criticism'. It is extremely doubtful that the jurors analyzed the instruction with such exactitude as counsel for the Hannons." We are of the opinion that when the entire instructions are reviewed and considered together, any seeming mistake in the questioned instruction does not constitute reversible error. The case at bar was one in which several actions were consolidated for trial and a great many instructions fully and correctly stating the law on the various issues were given. Pertinent here is the following language from Wells v. Lloyd, 21 Cal.2d 452, 458, 132 P.2d 471, 475. "It does not follow, however, that the giving of conflicting instructions will always mislead the jury and warrant a reversal. [Citations.] In reviewing instructions, the appellate court must read the charge as a whole and give the instructions a reasonable construction from the standpoint of their probable effect upon the jury. [Citations.] Thus, in appraising the instructions given in Loeb v. Kimmerle, 215 Cal. 143, 9 P.2d 199, this court concluded that the giving of conflicting or contradictory instructions was not ground for reversal of the judgment when the instruction containing the misstatement of law was involved and obscure as compared with the clear and explicit charge embodying the

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[2] Instruction No. 54–D reads: "It is not necessary that a specific act, or failure to act, be authorized as such by the principal to bring it within the scope of the agent's authority. It is within the scope of his authority if it is done while the agent is engaged in the transaction of business which has been assigned to him for attention by his principal, or while the agent is doing any reasonable thing which his contract of employment expressly or impliedly authorizes him to do and which may reasonably be said to have been contemplated by that contract as necessarily or probably incidental to the employment."

[3] No. 54–D, Adapted: "In determining whether or not the defendant Arywitz was acting as an agent of the Union and within the scope of his employment or authority at the time of the accident, you are instructed that it is not sufficient to say that the Union was interested in the objects or purposes of his trip. Such objects or purposes, in order to be within the scope of his authority, must be connected with the transaction or business which had been assigned to Mr. Arywitz by the Union for his attention and as a part of his job."

correct statement of law." To the same effect is Soares v. Barson, 12 Cal.App.2d 582, 587, 55 P.2d 1283.

[35] Appellant is mistaken in her assertion that the judgment against Arywitz in the property damage action brought by Schaefer is res judicata on the question of the liability of Arywitz or the Union to her. The Union was not a party to that action, nor was the agency or the scope of employment of Arywitz there in issue, on which any liability of the Union would necessarily depend. Turner v. Mellon, 41 Cal.2d 45, 46, 257 P.2d 15. Neither was the effect of the guest statute an issue in that case.

[36] Appellant assigns as error the refusal to give an instruction embodying the doctrine of res ipsa loquitur. A reading of that reported instruction shows that it assumes Arywitz was the Union's agent at the time of the accident. The court manifestly could not so instruct the jury as a matter of law. In any event, its refusal clearly was nonprejudicial since in the Schaefer case Arywitz was found to have been negligent, which is the maximum effect an instruction on res ipsa loquitur would have achieved. Similarly, without prejudice was the refusal of two requested instructions on sections 510 and 676 of the Vehicle Code in view of the finding in the Schaefer case that Arywitz was guilty of negligence, which is all appellant could have accomplished by the giving of those instructions. It is elementary that a reversal is not warranted unless it appears probable that a different result would have obtained had the refused instructions been given. Horrell v. Santa Fe Tank & Tower Co., 117 Cal.App.2d 114, 121, 254 P.2d 893.

The Schaefer-Bellanzi Judgment.

[37] By way of prelude to a consideration of appellant's assignments of error with respect to the judgment in favor of Bellanzi and Schaefer, the events leading up to the accident will be briefly recited. Bellanzi was driving the Schaefer ambulance easterly on Temple Street; the prevailing visibility enabled him to see from a point just east of the Temple-Figueroa intersection to beyond the Temple-Hope intersection, or about two city blocks; his siren was in full operation for a number of blocks before he arrived at the point of impact at the Temple-Hope intersection; the red lights on the ambulance were burning before and at the time of the collision. Bellanzi was operating the ambulance in second gear at a speed of about 15 to 20 miles an hour from the intersection of Flower and Temple, one block west of Hope, up to the time of the crash. As he passed Flower Street, he let his siren down to about the "one-half mark" and the siren again attained its highest pitch just before reaching Hope Street. An independent witness named King testified that when he was immediately east of the intersection of Temple and Hope, he heard the siren sound when the ambulance was about two blocks west of that intersection. The traffic lights on Temple were either red or changing to red as Bellanzi approached the Hope intersection. It was stipulated that the ambulance was operating as an emergency vehicle. From the foregoing, there is ample support for the jury's implied finding that Bellanzi reasonably exercised the privilege granted by section 454 of the Vehicle Code as outlined in the instructions given by the court. The case cited by appellant, Washington v. City and County of San Francisco, 123 Cal.App.2d 235, 266 P.2d 828, upheld a judgment for plaintiff on the ground that the evidence was sufficient to show that the operator of the emergency vehicle failed to take advantage of a last clear chance to avoid the accident. There, as here, a factual question was resolved by the jury, supported in each case by substantial evidence.

[38] Appellant complains of the refusal of the court to give instructions 150–B, 150–C, and 138–A. The first two of these instructions were requested not by appellant but by defendant. However, the content and substance of all three of these instructions was embraced in instruction 151(N), given at appellant's request. This instruction reads: "It is the duty of the driver of any vehicle using a public street or highway to exercise ordinary care to avoid placing himself or another person in danger; to use like care to avoid an accident from which injury might result; to be vigilant

at all times, keeping a lookout for traffic and other conditions to be reasonably anticipated; and to keep the vehicle under such control that, to avoid a collision with any person or with any other object, he can stop as quickly as might be required of him by eventualities that would be anticipated by an ordinary prudent driver in like position." Appellant argues, however, that she was deprived of the benefit of instruction 151 (N) by the giving of instruction 215–D, which read: "In connection with instructions that will follow concerning negligence, the duties of drivers of vehicles on a highway, and laws regulating the driving of vehicles and the use of highways, you will keep in mind that they have no application to the driver of the emergency vehicle involved in this case if you should find facts which, under the Court's instructions, entitled him to the exemption heretofore mentioned, and if you should further find that he was not guilty of an arbitrary exercise of the privileges included in that exemption." Such instruction was clearly necessary and was couched in proper language. The instructions given immediately after 215–D related to the standard of care enjoined on drivers of vehicles other than emergency vehicles, whose drivers are permitted to ignore certain traffic regulations if the conditions of section 454 of the Vehicle Code are complied with. It was therefore incumbent on the court to apprise the jury of the statutory exemption provided for this class of drivers, if it found Dellanzi was entitled to such exemption upon the evidence before it.

[39] Appellant further contends that the court committed error in refusing to read to the jury section 454 of the Vehicle Code. That section provides: "The driver of an authorized emergency vehicle shall be exempt from those provisions of this code herein set forth under the following conditions:

"(a) Said exemptions shall apply whenever any said vehicle is being driven in response to an emergency call or when used in the immediate pursuit of an actual or suspected violator of the law, or when responding to but not upon returning from a fire alarm.

"(b) Said exemption shall apply only when the driver of said vehicle sounds a siren as may be reasonably necessary and the vehicle displays a lighted red lamp visible from the front as a warning to others. Under the circumstances hereinabove stated, any said driver shall not be required to observe those regulations contained in Chapter 3 or in Chapter 6 to and including Chapter 13 of Division 9 of this code, but said exemptions shall not relieve the driver of any said vehicle from *the duty to drive with due regard for the safety of all persons using the highway,* nor shall the provisions of this section protect any such driver from the consequences of an arbitrary exercise of the privileges declared in this section." (Italics added.)

[40] The court gave to the jury BAJI 215–A[4] which relates to the exemption, and its limitations, accorded the driver of an emergency vehicle by section 454. That

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[4] Instruction No. 215–A reads: "One of our statutes provides that, under certain conditions, the driver of an authorized emergency vehicle shall be exempt from, and shall not be required to observe, certain laws that generally apply to the drivers or vehicles on public streets or highways. It will be sufficient at this time to state that the laws to which said exemption applies are those which regulate speed, the use of different lanes on the highway, overtaking and passing of other vehicles, rights of way, rights and duties with respect to pedestrians, streetcars, safety zones, stops, standing and parking.

"It follows that when there exist the conditions which said statute requires as a basis for said exemption, it is not negligence for the driver of such an emergency vehicle to disregard the rules from which he thus is exempted, unless he is guilty of an arbitrary exercise of the privileges embraced in that exemption.

"It is equally important to note, however, that the exemption does not apply if any one of the conditions upon which it is based is, in fact, absent, and in such a case, the driver of the emergency vehicle has no privileges over other drivers on the highway; it then is his duty to obey the laws that apply generally to the use of the highway; and he is held to the same duty of exercising ordinary care.

instruction, while it does not specifically employ the phrase italicized above, is so worded as to embody accurately the restricted significance attributed to the words "due regard" as interpreted in the context of that section. Reed v. Simpson, 32 Cal.2d 444, 449, 196 P.2d 895; Lucas v. City of Los Angeles, 10 Cal.2d 476, 483, 75 P.2d 599; Goldstein v. Rogers, 93 Cal.App.2d 201, 208, 208 P.2d 719. The cases last cited, as well as such cases as Raynor v. City of Arcata, 11 Cal.2d 113, 117, 77 P.2d 1054; Head v. Wilson, 36 Cal.App.2d 244, 247, 97 P.2d 509, and Stone v. City & County of San Francisco, 27 Cal.App.2d 34, 39, 80 P.2d 175, have firmly established the proposition that the "due regard" phrase is essentially satisfied (1) when the driver of the emergency vehicle has, by suitable warning, given the users of the highway an opportunity to yield the right of way, and (2) if, having discovered the peril in which another has unknowingly or negligently become involved despite the operation of the required warning devices, the driver reasonably exercises any last clear chance to avoid the accident.[5] Such an interpretation prevents an emasculation of the legislative intent. This is cogently pointed out in Reed v. Simpson, supra [32 Cal.2d 444, 196 P.2d 898]: "Defendants then argue that even though the trial court did commit error in its instruction embracing such improper statement of the law, that circumstance cannot avail plaintiffs because the decedent did not operate his motorcycle 'with due regard for the safety of all persons using the highway,' as required by the statute. But, as plaintiffs maintain, such duty does not impose the same quantum of care upon the driver of an emergency vehicle as upon motorists generally, for in that event the requirement would have the absurd result of practically nullifying the traffic exemptions expressly granted by the section. So pertinent is the interpretation of the phrase in Lucas v. City of Los Angeles, 10 Cal.2d 476, at page 483, 75

"The conditions heretofore mentioned as being necessary in order that said exemption may prevail are these:

"First, that the vehicle is being driven in response to an emergency call, or that it is being used in the immediate pursuit of an actual or suspected violator of the law, or that it is going to a reported fire, or to a locality where a fire was indicated to be, in response to a fire alarm.

"Second, that the driver sounds a siren in a way that is reasonably necessary to give warning of his approach to others.

"Third, if the vehicle is being driven at night that it is equipped with at least one lighted lamp displaying red light to the front.

"Even when such conditions exist, it is negligence if the driver of an emergency vehicle is guilty of an arbitrary exercise of the privileges given him by the exemption. But that term 'arbitrary exercise of the privileges,' is not one that you may interpret or apply as you wish. It has a restricted meaning under the law, and your close attention to it is urged.

"An arbitrary exercise of the privileges given by the aforesaid statute take place when, and only when, the driver of an authorized emergency vehicle does something which would constitute negligence if he did not enjoy the exemption, and when one or both of the two sets of circumstances now to be described also exist:

"One: Said vehicle is not being driven in response to an emergency call and is not being used in the immediate pursuit of an actual or suspected violator of the law and is not being used in going to a reported fire, or a locality where a fire is indicated to be, in response to a fire alarm.

"Two: After seeing that some other person has not heard or heeded the warning given, or seeing that no one is in charge of property in his path that otherwise might be moved, or seeing that there is no way in which any other person can reasonably be expected to prevent a collision, the driver of the emergency vehicle, nevertheless, having both the means and reasonable opportunity to avoid such a result, proximately causes an accident producing injury to another."

[5] Washington v. City & County of San Francisco, 123 Cal.App.2d 235, 241, 266 P.2d 828, 831, treats the failure of the driver to avail himself of the "last clear chance" as a breach of the "due regard" requirement. Such failure has also been treated as an "arbitrary exercise of the privileges" of section 454, Lucas v. City of Los Angeles, 10 Cal.2d 476, 483, 75 P.2d 599. In either event the statutory exemption is forfeited.

P.2d 599, at page 603, where it was said: 'If the driver of an emergency vehicle is at all times required to drive with due regard for the safety of the public as all other drivers are required to do, then all the provisions of these statutes relating to emergency vehicles become meaningless and no privileges are granted to them. *But if his "due regard" for the safety of others means that he should, by suitable warning, give others a reasonable opportunity to yield the right of way, the statutes become workable for the purposes intended.'* And while the statute does not 'protect [the] driver from [the consequences of] "an arbitrary exercise" of the privileges' there granted, *'an arbitrary exercise' of them 'cannot be predicated upon the elements of speed and failure to observe other rules of the road where a warning has been given.'* * * * 'In such cases speed, right of way, and all other "rules of the road" are out of the picture.'" (Emphasis added.) In Goldstein v. Rogers, supra, it was held prejudicial error to instruct on section 454 without qualifying instructions explaining the restricted meaning to be ascribed to the "due regard" language of that section. The court obviated this by giving the BAJI instruction fully encompassing the subject with scrupulous regard to the tenor of the judicial decisions defining and clarifying the "due regard" phrase. Reed v. Simpson, supra; Lucas v. City of Los Angeles, supra; Goldstein v. Rogers, supra.

[41, 42] Appellant's final argument is that "the trial judge had an erroneous understanding of his duties in passing on" her motion for a new trial. She relies on a colloquy that took place between her counsel and the court at the opening of argument on her motion. Counsel drew the court's attention to the opinion of the Chief Justice in People v. Robarge, 41 Cal.2d 628, 262 P.2d 14, relative to the trial court's duty on a motion for a new trial to independently evaluate "* * * the probative force of the evidence and satisfy itself that the evidence as a whole is sufficient to sustain the verdict." 41 Cal.2d at page 633, 262 P.2d at page 17. The trial judge stated he had read the opinion. There is nothing in the judge's comment indicating he did not understand the case, or his duty in the premises, as therein stated. In fact, the inference is quite to the contrary for he pointed out that in considering the facts on a motion for a new trial the court might arrive at a result different from that of the jury. Finally, it must be presumed "That official duty has been regularly performed". Code Civ.Proc. § 1963, subsec. 15. Appellant's position on this point is completely lacking in merit.

[43] Our examination of the record discloses that during the two weeks' trial plaintiff had a full and fair opportunity to get her evidence before the jury and that the jury was adequately and fairly instructed on the applicable legal principles. Even if a microscopic culling of the record discloses some incidental error, we are satisfied it was of an inconsequential character and could have no bearing on the ultimate result. We find nothing in the record indicating a miscarriage of justice. Under such circumstances the judgment may not be reversed. Art. VI, § 4½, Calif.Const.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

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132 Cal.App.2d Supp. 910

Morris D. SKROOPKA, Plaintiff and Respondent,

v.

ROYAL INDEMNITY COMPANY, etc., Defendant and Appellant.

C. A. 8690.

Appellate Department, Superior Court,
Los Angeles County, California.
April 26, 1955.

Action on policy insuring against loss resulting from accidental bodily injury and sickness. The Municipal Court of Los Angeles Judicial District rendered judgment for plaintiff, and defendant appealed. The Appellate Department of the Superior

Court held that where "sickness" which occasioned surgery for which recovery under policy was sought was presence of nodules in breast, a condition existing prior to effective date of policy, which required that sickness, to be compensable, have been contracted more than 30 days after effective date of policy, there could be no recovery, notwithstanding that doctor had not been prepared to advise surgery prior to issuance of policy and that purpose of surgery was determining whether cancer was present.

Reversed.

1. Insurance ⚷454

Where "sickness" which occasioned surgery for which recovery under policy was sought was presence of nodules in breast, a condition existing prior to effective date of accidental injury and sickness policy requiring that sickness, to be compensable, have been contracted more than 30 days after effective date of policy, there could be no recovery, notwithstanding that doctor had not been prepared to advise surgery prior to issuance of policy and that purpose of surgery was determining whether cancer was present.

2. Insurance ⚷146(3)

Insurance policies are to be construed liberally in favor of assured, but this rule applies only to resolve an uncertainty or ambiguity in favor of insured, and it may not be invoked to change nature of contract or to nullify an express and unequivocal agreement.

3. Insurance ⚷146(3)

Where terms of policy are plain and explicit, and meaning clear, courts indulge in no forced construction in order to cast liability upon insurer which it has not assumed.

◆

Sampson & Dryden, Los Angeles, for appellant.

Goodman & Cogen, Los Angeles, for respondent.

PER CURIAM.

Action upon an insurance policy insuring against loss resulting from accidental bodily injury and sickness, wherein plaintiff recovered judgment, from which defendant appeals.

The policy sued upon became effective September 19, 1952, and insures plaintiff and his wife "against loss resulting from * * * sickness which is contracted while this Policy is in force but after this Policy has been maintained in force for not less than thirty (30) days." It further provides that "If such injury or sickness shall require treatment * * * by a legally qualified physician or surgeon, the Company will pay to the Insured" the expense incurred for hospital and medical charges, and fees of physician and surgeon in the treatment of such injury or sickness within the limits therein specified.

[1] The loss here sought to be recovered is the expense incurred in the medical and surgical treatment of plaintiff's wife, and the sole question presented, is whether such treatment was for sickness which was contracted after thirty days from the effective date of the policy.

The evidence is to the effect that Mrs. Skroopka, who at the time of trial was 47 years of age, had suffered from pain in her breasts before menstrual periods since she was 20 years of age, since which time she was also aware of the fact that she had nodules or lumps in her breasts, which just before the menstrual period would swell and become painful. In November, 1951, she underwent a hysterectomy, following which she experienced little, if any, pain in her breasts, but at times felt some tenderness during the period of the normal menstrual cycle. From time to time she consulted physicians, in the course of which her breasts were examined, but at no time was it suggested or was she advised that any medical cure or treatment was required for her breasts. In May, 1952 she consulted Dr. Sperling, a surgeon. In the course of his examination Dr. Sperling examined her breasts and recorded that they "seem cystic and have palpable marble-like masses which are very firm in both outer quadrants." The doctor noted that at that time it was his impression that this was "probably Schimmelbusch's disease, which means chronic cystic mastitis." The doctor further stated that he did not then feel that this condition required any medical care, treatment or surgery. The doctor further stated that the condition of the breasts was not uncommon—"many women have that."

Mrs. Skroopka again visited Dr. Sperling on September 2, 1952, who made an examination of her breasts which involved "multiple cystic areas with two rather firm areas in the outer upper quadrant of the right breast and a similar area in the left." He then noted on his records, "to watch these areas very carefully for question of excision," although he did not mention this to the patient. The doctor stated that he was concerned about the condition of the breasts because a week earlier he had operated upon Mrs. Skroopka's sister for cancer of the breast and of the incidence of cancer in members of the same family. He did not, however, recommend any medical or surgical treatment of the breasts at that time. Dr. Sperling again examined Mrs. Skroopka on November 10, 1952, when he noted that the examination was the same as before, cystic areas of both breasts with some tenderness in the right and some increase in size, no real alarm, and no treatment recommended.

Dr. Sperling next examined Mrs. Skroopka on December 26, 1952, and then determined, "because of difficulty in detecting an early lesion here in the outer upper quadrant of both breasts" and the family history, "to excise the upper outer quadrant of both breasts to be sure about it." Accordingly, some two weeks later, Mrs. Skroopka was hospitalized and the upper outer quadrants of the breasts were excised and subjected to a pathological examination which revealed that there was no malignancy, and the breasts were repaired and sewed up; the ultimate diagnosis being adenosis fibrosis.

The defendant contends that the condition for which Mrs. Skroopka was operated upon, and for the expenses incident to which plaintiff was awarded judgment, preexisted the effective date of the policy, and hence is not insured against thereby. Plaintiff, on the contrary, argues that the surgery was not for the purpose of removing the lumps or nodules, but for the purpose of ascertaining whether or not cancer was present. As he construes the question presented, it is this: "if a qualified surgeon recommends surgery for a condition or illness which he in good faith believes to exist, does the fact that such ailment is ruled out by surgery bar an insured from recovering under a policy of insurance such as the one now before the court?" Plaintiff further states, "A more serious question may have been presented if the surgery had resulted in a finding that cancer did exist but the fact remains that no cancerous condition was present."

The question as presented by plaintiff and the statement last quoted, however, make plain the weakness of his position. If the "sickness" was not that manifested by the presence or the nodules or lumps in the breasts (ultimately ascertained to be adenosis fibrosis)—which motivated the doctor to resort to surgery—what was it? If the surgery had disclosed that the patient was suffering from cancer and that this condition existed prior to the expiration of thirty days after the effective date of the policy, there could be but little question that plaintiff would not be entitled to recover. It seems unescapable, therefore, that the "sickness"—if such it may be called—which occasioned the hospitalization and surgery—was a condition of the breasts (adenosis fibrosis) that existed prior to the effective date of the policy without regard to whether or not surgery ultimately disclosed a benign or malignant condition.

Nor is it an answer to say, as does plaintiff, that the condition of Mrs. Skroopka prior to the issuance of the policy does not constitute "sickness," for if this be true, the same condition prevailed immediately preceding the surgery. The fact that Dr. Sperling was not prepared to advise surgery following his examinations in May and September preceding the issuance of the policy, in no wise alters the situation. This was a matter of judgment upon his part, but the same condition, although perhaps aggravated by reason of an increase in the size of the mass between September and December, was what prompted him to resort to surgery for the purpose of determining, as he says, whether cancer was present.

Plaintiff quotes the following from Fohl v. Metropolitan Life Ins. Co., 1942, 54 Cal. App.2d 368, 378–379, 129 P.2d 24, 29:

"As was said in Reiser v. Metropolitan Life Insurance Co., 262 App.Div. 171, 28 N.Y.S.2d 283, 286, 'A disease does not occur or originate within the meaning of the policy until it becomes a disease in the general acceptation of that term.' In other words, the beginning of the insured's disability dates from the time when the disabling disease first manifested itself or became acute, and not from the time when the medical cause of the disease may have originated or begun."

The language quoted is not apposite, for the situation here is not that presented where a disease, though attributable to a preexisting condition, does not manifest itself until after the effective date of the policy. Thus in the case cited, the disability for which recovery was permitted was insanity which occurred during the time the policy was in force, and it was held immaterial that the pathological cause of the insured's brain lesion or insanity may have been syphilis from which he suffered prior to the issuance of the policy. Unlike the cited case, here the "sickness" which occasioned the surgery was, as noted, the presence of the nodules in the breasts (adenosis fibrosis)—a condition existing prior to the effective date of the policy.

[2, 3] While it is undoubtedly the rule that "Insurance policies are to be construed liberally in favor of the assured," Brubaker v. Beneficial Standard Life Ins. Co., 1955, 130 Cal.App.2d 340, 278 P.2d 966, 969, this rule applies only to resolve an uncertainty or ambiguity in favor of the insured; it may not be invoked to change the nature of the contract or to nullify an express and unequivocal agreement. Brickell v. Atlas Assurance Co., Ltd., 1909, 10 Cal.App. 17, 28, 101 P. 16. Where, as here, the terms of the policy are plain and explicit, and the meaning clear, courts indulge in no forced construction in order to cast a liability upon the insurer which it has not assumed. First National Bank of Monrovia v. Maryland Cas. Co., 1912, 162 Cal. 61, 69–70, 121 P. 321. To paraphrase the language of the case last cited, the policy here was not a general policy to pay the cost of surgical operations or medical treatment, but only for such expenditures when incurred as a result of injury or "sickness which is contracted while this policy is in force but after this Policy has been maintained in force for not less than thirty (30) days."

The judgment is reversed.

44 Cal.2d 549

SOUTHWEST EXPLORATION COMPANY, a California corporation, Plaintiff and Appellant,

v.

COUNTY OF ORANGE and City of Huntington Beach, Defendants and Respondents.

SIGNAL OIL & GAS CO., a corporation, Plaintiff and Appellant,

v.

COUNTY OF ORANGE and City of Huntington Beach, Defendants and Respondents.

L. A. 23480, 23481.

Supreme Court of California.
In Bank.
May 10, 1955.

Rehearing Denied June 8, 1955.

Actions to recover city taxes levied on plaintiffs' leasehold interests in tide and submerged lands purportedly annexed by city. The Superior Court, Orange County, Raymond Thompson, J., dismissed actions, and plaintiffs appealed. The Supreme Court, Schauer, J., held, inter alia, that where city, which had purportedly annexed tide and submerged lands, failed to file a statement of change and a map or plat, tax assessment effected by county assessor was void, and owners of leasehold interests on land in question were entitled to recover taxes paid.

Judgments reversed with directions.

Opinion, 277 P.2d 63, vacated.

1. Statutes ⚷212.1

Legislature, in re-enacting statutes requiring that the filing of a statement and map is prerequisite to making change in city or district boundaries effective for assessment or taxation purpose, was presumed cognizant of construction placed on statutes by Attorney General. Government Code, §§ 54900–54903.

2. Municipal Corporations ⚷977

Where city, which had purportedly annexed tide and submerged lands, failed to file a statement of change and a map or plat, tax assessment effected by county assessor was void, and owners of leasehold interests on land in question were entitled to recover taxes paid. Government Code, §§ 35300–35326, 51330–51335, 51540–51561, 54900–54903; Revenue and Taxation Code, §§ 24, 5103, 5138.

3. Municipal Corporations ⚷977

Where quo warranto proceeding, brought, in part, on relation of a plaintiff in instant case, to test validity of city's annexation of land, was pending, determination of plaintiffs' claim, in action to recover city taxes, that annexation had neither de jure nor de facto existence, would be left to await outcome of quo warranto action. Government Code, § 35302.

4. Municipal Corporations ⚷977

That part of taxpayer's action to recover city taxes on purportedly annexed land which was based upon city's failure to file statement and map of annexed area, and which did not contest validity of annexation proceeding, was not subject to statute limiting actions challenging annexation proceedings to three months after completion of proceedings. West's Ann.Code Civ.Proc. § 349½.

5. Municipal Corporations ⚷977

Where city had elected to have all city property taxes assessed, equalized and collected by county assessor, actions for recovery of city taxes could be maintained against county as well as against city. Government Code, §§ 51330, 51334, 51541, 51542; Revenue and Taxation Code, §§ 5103, 5138.

C. LaV. Larzelere, H. F. Clary, Paul S. Ottoson, A. E. Stebbings, Sheppard, Mullin, Richter & Balthis, James C. Sheppard and Cameron W. Cecil, Los Angeles, for appellants.

Joel E. Ogle, County Counsel, Stephen K. Tamura, Deputy County Counsel, Santa Ana, and C. A. Bauer, City Atty., Huntington Beach, for respondents.

SCHAUER, Justice.

These two actions, consolidated for trial, were brought by plaintiffs against the County of Orange and the City of Huntington Beach to recover 1951–1952 city taxes levied on plaintiffs' leasehold interests in state-owned tide and submerged lands sought to be annexed by the city in 1950. Judgments of dismissal were entered upon the sustaining, without leave to amend, of demurrers to the complaints, and plaintiffs appeal. We have concluded that plaintiffs have stated a cause of action for recovery under one of their theories of attack on validity of the tax levy, that determination of their other theory, if it becomes necessary to adjudicate it, should await final disposition of pending quo warranto proceedings attacking the attempted annexation, that a limitations statute relied upon by defendants does not bar plaintiffs' actions, that the county is a proper party defendant, and that the judgments should be reversed.

Each complaint is framed in two causes of action, one for refund of taxes paid after rejection of a claim for refund under section 5103 of the Revenue and Taxation Code, and the other for recovery of taxes paid under protest under the provisions of section 5138 of the same code. The controversy revolves around proceedings by which defendant city purported to annex some nine square miles of ocean area lying northwest of the city boundaries, and the validity of tax assessments by the city upon plaintiffs' leasehold interests. According to the allegations of the complaints, the annexation proceedings were initiated by the city council on its own motion, were conducted under the provisions of the Annexation of Uninhabited Territory Act of 1939 as amended (Gov.Code, §§ 35300–35326), and were purportedly completed on April 5, 1950. On July 3, 1950, an action in the nature of quo warranto, brought in the name of the People and prosecuted by the attorney general and by attorneys for the relator (one of the plaintiffs herein), was filed to test the validity of the annexation. These two tax actions were filed in May, 1952. Trial of the quo warranto action was had in February, 1953, and on February 27 the court rendered judgment for defendant city. On the same day the same court sustained the demurrers of defendants city and county in these tax actions, without leave to amend, and judgments of dismissal followed. Plaintiffs filed notices of appeal. Thereafter an order granting a new trial in the quo warranto matter was entered, and was affirmed on appeal[1] (People ex rel. Southwest Exploration Co. v. City of Huntington Beach (1954), 128 Cal.App.2d 452, 275 P.2d 601), and counsel agree that such action is still pending.

Plaintiffs' Theories of Recovery

Plaintiffs first attack validity of the taxes upon the ground that the city failed to file with the Orange County assessor the statement of the change of boundaries, together with map or plat showing the change, on or before February 1, 1951, under provisions of sections 54900 to 54903 of the Government Code.[2] In this connection it appears from the complaints that the taxes in question in these actions are the first taxes sought to be assessed by defendant city on the property involved, and that the assessments were made sometime between the first Monday in March and the first Monday in

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[1] On technical grounds, not material to attack on validity of the annexation proceedings.

[2] At the time of the tax levy those sections provided:

Section 54900: "When there is a change in boundaries of a city or district authorized to levy and collect property taxes or assessments according to the value assessed by the county or city assessor or State Board of Equalization and whose tax levy is carried on the regular county assessment roll or when any such city or district is created, the tax or assessment levying authority of the city or district shall file or cause to be filed a statement of such creation or change."

Section 54901: "The statement shall set forth the legal description of the boundaries of the city or district created or changed and a map or plat indicating the boundaries."

Section 54902: "On or before February 1st of the year in which the assessments or taxes are to be levied, the statement and map or plat shall be filed with each assessor whose roll is used for the levy and with the State Board of Equalization."

Section 54903: "The creation of any city or district or the change in its boundaries is not effective for assessment or taxation purposes unless the statement and map or plat is filed pursuant to this article."

July, 1951—some eight to twelve months after the quo warranto action was filed and approximately one year after completion (in April, 1950) of the annexation proceedings. The assessments were made by defendant County of Orange on behalf of defendant city under the provisions of an ordinance whereby the city elected to have all city property taxes assessed, equalized, and collected by the county assessor (see Gov.Code, §§ 51330, 51334, 51541, 51542), and the Orange County assessor's roll was the roll used for the assessment and levy here in question. Plaintiffs allege on information and belief that no statement or map or plat showing the change in lines purportedly effected by the annexation was filed with the Orange County assessor on or before February 1, 1951, although thereafter certain copies of the annexation ordinance were mailed to such assessor and certain maps of the boundary change were mailed to him on February 28, 1951, and on May 10, 1951; the first of the maps was lost and neither the copy of the ordinance nor the statement and map contemplated by sections 54900 to 54903 of the Government Code, was ever filed with the county assessor.

The provisions of sections 54900 to 54903 were formerly found in section 3720 of the Political Code. The attorney general of this State has repeatedly and consistently ruled that "a strict compliance with Section 3720 * * * [is] required as a condition precedent to the formation or change of boundaries of a local district or city" (5 Ops.Atty. Gen. 259, 260, June, 1945), and that "the provisions of Section 3720 of the Political Code must be complied with on or before the first day of February if taxes are to be levied and assessed for the ensuing fiscal year." (8 Ops.Atty.Gen. 341, 343, Dec., 1946; see also 5 Ops.Atty.Gen. 243, 244–245, May, 1945.) Defendants argue, nevertheless, that no provision of the Annexation of Uninhabited Territory Act of 1939 (Gov. Code, §§ 35300–35326) requires the filing of the statement or map mentioned in sections 54900 to 54903, nor is such a filing required by sections 51330 to 51335, or sections 51540 to 51561, of the Government Code (relating to the collection of city taxes by the county for chartered cities), or by any provision of the city charter. Without attempting to analyze the cited sections in detail, it appears that no provision therein, or elsewhere, exempts defendant city from the duty of filing the statement and map specified in the sections relied upon by plaintiffs, and no reason appears why such an exemption should be implied. Indeed, the Legislature has in section 54904 expressly exempted certain sanitary districts, and it may be presumed that if other exemptions were intended they would have likewise been named.

[1] Defendants also rely upon the provision of section 24 of the Revenue and Taxation Code, that "No act in all the proceedings for raising revenue by taxation is illegal on account of informality or because not completed within the required time." (See also Buswell v. Board of Supervisors of Alameda County (1897), 116 Cal. 351, 48 P. 226.) However, the allegations of the complaints are that the statement and map were never filed at all, although as already stated long held by the attorney general to be a condition precedent to the assessment and levy of taxes. Nor would the principle expressed in Steele v. County of San Luis Obispo (1908), 152 Cal. 785, 787, 93 P. 1020, and First Trust & Savings Bank of Pasadena v. Los Angeles County (1929), 206 Cal. 240, 242, 273 P. 1066 (see also H. & W. Pierce, Inc., v. Santa Barbara County (1919), 40 Cal.App. 302, 306, 180 P. 641), that taxes paid are not recoverable on account of technical defects in the tax proceedings, appear to benefit defendants. It does not appear that the courts were there dealing with a complete failure to take a step specifically declared by statute to be essential to the effectiveness of a tax assessment. Moreover, since the statute upon which plaintiffs rely was reenacted and transferred to the Government Code in 1949, as well as amended in 1951, it may be presumed that the Legislature was cognizant of the construction which had been placed thereon by the attorney general in his 1945 and 1946 opinions cited hereinabove. This is a factor which may be considered in applying the statute. (See Coca-Cola Co. v. State Board of Equalization (1945), 25

Cal.2d 918, 922, 156 P.2d 1; Richfield Oil Corp. v. Crawford (1952), 39 Cal.2d 729, 736, 249 P.2d 600; Nelson v. Dean (1946), 27 Cal.2d 873, 880, 168 P.2d 16, 168 A.L.R. 467; Wotton v. Bush (1953), 41 Cal.2d 460, 468, 261 P.2d 256.)

[2] We hold that plaintiffs have set forth facts in their complaints which prima facie show that the tax assessment they attack was void for failure to file the statement and map or plat and which do state a cause of action for recovery of the taxes paid.

As a second theory of recovery plaintiffs contend that although the general rule is that an annexation may be attacked only by an action in the nature of quo warranto (see American Distilling Co. v. City Council of City of Sausalito (1950), 34 Cal.2d 660, 667, 213 P.2d 704, 18 A.L.R.2d 1247; Crowl v. Board of Trustees (1930), 109 Cal.App. 214, 216, 292 P. 985; Coe v. City of Los Angeles (1918), 42 Cal.App. 479, 482, 183 P. 822), nevertheless that rule applies only to annexations having at least a *de facto* existence (see Hamilton v. County of San Diego (1895), 108 Cal. 273, 282, 41 P. 305; Keech v. Joplin (1909), 157 Cal. 1, 14, 106 P. 222; Westlake Park Inv. Co. v. Jordan (1926), 198 Cal. 609, 618, 246 P. 807); that they have pleaded facts showing that the attempted annexation here involved is completely void and never had even *de facto* existence; and that therefore it may be attacked by this tax recovery or refund suit. In support of this contention it is urged that the complaints show that the purportedly annexed territory is not contiguous (except at a pinpoint corner) to present city uplands and so violates the Annexation of Uninhabited Territory Act of 1939 under which the annexation proceedings were had;[3] that the annexation violated the so-called "ocean boundaries" rule (see Fraser's, etc., Pier Co. v. Ocean Park P. Co. (1921), 185 Cal. 464, 472–473, 197 P. 328, 198 P. 212); that is was had solely for the purpose of obtaining additional tax revenue without extending any municipal benefits or services to the area annexed; and that it was "a fraud on the law" and, therefore, was not effected in "good faith." Such showing establishes the void character of the annexation, say plaintiffs.

[3] Inasmuch as the quo warranto action testing validity of the annexation is still pending for decision, it appears unnecessary and inappropriate to decide in these tax actions the sufficiency of the pleading to present an issue as to *de facto* existence. Even if such matter of pleading were resolved in plaintiffs' favor, the question of whether the annexation was valid and so exists *de jure* would remain as the point at issue in the quo warranto suit. We conclude, therefore, that determination of the right to recover the taxes under plaintiffs' second theory—i. e., their asserted right to here, in effect, attack the *de jure* status of the annexation proceedings, based upon their claim of lack of *de facto* existence—must await the outcome of the quo warranto action.

In McPhee v. Reclamation District (1911), 161 Cal. 566, 570, 119 P. 1077, it was stated that if the only remedy of a landowner "against an attempt to burden her land with assessments levied by unauthorized persons assuming without right to act as a reclamation district, is by *quo warranto,* and she is proceeding as diligently as may be to assert this remedy, she is entitled in the *interim* to the protection of a court of equity." In that case it was noted that defendant district conceded a jurisdictional defect in its organization, which was fatal to its *de jure* existence, and, also, this court further pointed out that in prior litigation between the same parties (Reclamation District No. 765 v. McPhee (1910), 13 Cal.App. 382, 109 P. 1106) it had been finally adjudicated both that the district, although not validly organized, was a *de facto* corporation, and that for that reason the landowner could not collaterally question its *de jure* existence in a proceeding (to enforce its assessments) brought by the district prior to the institution of quo warranto proceedings. By contrast, in the present situation the validity of the annexation proceedings was attacked in a quo warranto action, brought on the relation of one of plaintiffs in these tax actions, eight to twelve months prior to assessment of the taxes, and the question of such validity, rather than being already conceded or adjudicated, remains for decision in the quo warranto action.

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[3] The act provides (Gov.Code, § 35302): "The boundaries of a city may be altered and contiguous uninhabited territory annexed to, and incorporated within it, pursuant to this article."

To summarize, we conclude: (1) Plaintiffs have stated a cause of action for recovery of the involved taxes, based upon failure to file the statement and map required by sections 54900 to 54903 of the Government Code, and the judgments must be reversed on that ground; and (2) any decision as to their asserted alternative right to recover the same taxes, based upon their claim that the annexation has had neither a *de facto* nor *de jure* existence, must (if it need ever be adjudicated) await final determination of the quo warranto action.

Statute of Limitations

[4] Defendant contends that in any event the judgments should be affirmed because the complaints show on their faces that these actions are barred by the limitations statute found in section 349½ of the Code of Civil Procedure. That section provides that "The validity of any proceedings for the annexation of territory to a municipal corporation * * * shall not be contested in any action unless such action shall have been brought within three months after the completion of such proceedings * * *." There is no merit in this contention. Plaintiffs' theory of recovery based upon failure to file the statement and map does not contest validity of the annexation proceedings, and so does not fall within the quoted code section; and the quo warranto action, in which the questions as to validity of the annexation are to be determined, was filed within the statutory period.

Propriety of Naming the County as a Defendant

[5] Defendant County of Orange demurred to plaintiffs' complaints on the further ground that, by virtue of the provisions of sections 5103 and 5138 of the Revenue and Taxation Code, these actions for recovery of city taxes could not be maintained against the County of Orange. The county now contends that the judgments dismissing the actions as against the county should be affirmed on this ground alone.

Section 5138 provides: "Within six months after the payment, an action may be brought against a county or a city in the superior court to recover the taxes paid under protest.

"If all or any portion of the taxes paid under protest and sought to be recovered were collected by officers of the county for a city, an action must be brought against the city for the recovery of such taxes and judgment must be sought against the city. Where actions are brought against both a county and a city such actions may be joined in one complaint.

"Any city for which county officers collect taxes may provide for the defense by counsel for the county of actions brought against the city under this article, in which event it shall be the duty of such counsel to defend such actions, or the city may provide that such actions shall be defended by its own counsel."

Section 5103 (added in 1941) provides, in substantially the same language, a remedy in the form of a suit to recover taxes paid, after a refund claim therefor his been rejected.

Defendant county's position is that the legislative history of section 5138 demonstrates the intention of the Legislature that the county no longer be named as a defendant where only city taxes are involved, even though collected by the county on the city's behalf. It is conceded, however, that this court has held that prior to 1937 and under the statutory predecessor of section 5138 (Pol.Code, § 3819) a suit to recover city taxes collected by the county could be brought against the county alone, without the necessity of naming the city as a party defendant. (County of Los Angeles v. Superior Court (1941), 17 Cal.2d 707, 711, 718, 112 P.2d 10.) In 1937 section 3819 of the Political Code was amended to require that the city "must be made a party to such suit." In 1939 the quoted phrase from section 3819 was reenacted in substantially the same language in the second paragraph of section 5138 of the Revenue and Taxation Code. In February, 1941, that paragraph was amended to further provide "and judgment shall be sought against the city." A later 1941 amendment to section 5138 added "or a city" after "against a county" in the first paragraph, changed the second paragraph to read as quoted in full hereinabove (i. e., to read that "an action must be brought against the city for the recovery of such taxes and judgment must be sought against the city"), and added the third paragraph—also hereinabove quoted in full—concerning the defense by either city or county counsel of suits to recover the city taxes.

It thus seems apparent that, as plaintiffs urge, the objective of the various statutory changes was to assure that where city taxes are involved, suits for recovery or refund will be brought against the city as well as the county and judgment will be sought against the city also rather than against the county alone, and that it was not intended to forbid naming the county as a party defendant. In Douglas Aircraft Co. v. Byram (1943), 57 Cal.App.2d 311, 317–318, 134 P.2d 15, in which plaintiff sued both the county and the city to recover both county taxes and city taxes collected by the county for the city, judgment for the entire amount in dispute was affirmed as against the county but reversed as to the city, with the statement that "The inclusion of the city * * * as a party defendant was authorized by section 5138 of the Revenue and Taxation Code, as a part of the tax collected by the county had been levied by the city, but a judgment against the city for the whole sum collected was not thereby warranted." Likewise, it appears clear that where only city taxes are involved, the county as well as the city may properly be sued where collection was made by the county.

For the reasons above stated the judgments are reversed, with directions that the demurrers be overruled and defendants permitted to answer if they be so advised.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concur.

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132 Cal.App.2d 859

Ervin S. BEST and Charles Baer, Plaintiffs and Respondents,

v.

Marble E. BURCH, Defendant and Appellant.

Marble E. BURCH, Cross-Complainant,

v.

Ervin S. BEST and Charles Baer, Cross-Defendants.

Civ. 16301.

District Court of Appeal, First District, Division 2, California.

May 13, 1955.

Action for recovery of balance due on a promissory note given for legal services rendered. From adverse judgment of the Superior Court, City and County of San Francisco, H. A. van der Zee, J., the defendant appealed. The District Court of Appeal, Kaufman, J., held that where allegations in plaintiffs' affidavit in support of motion for summary judgment would support a judgment in favor of plaintiffs if proved, and defendant did not controvert allegations by counter affidavit, no triable issue of fact was presented and summary judgment was properly granted.

Judgment affirmed.

1. Appeal and Error ⚷106

Order of Superior Court denying a change of venue is appealable. West's Ann. Code Civ.Proc. § 963, subd. 2.

2. Appeal and Error ⚷870(3)

Order of Superior Court denying a change of venue is not reviewable on appeal solely from summary judgment. West's Ann.Code Civ.Proc. § 956.

3. Appeal and Error ⚷863

Contention that court erred in striking certain paragraphs of answer, counterclaim, and cross-complaint as amended were not reviewable on appeal from summary judgment

4. Appeal and Error ⚷863

Any question regarding sufficiency of pleadings cannot be reviewed on appeal from a summary judgment.

5. Judgment ⚷185.2(4)

An answer may be stricken out although it states a perfect defense if defendant does not by its affidavits in opposition to motion for summary judgment show facts to substantiate such defense. West's Ann. Code Civ.Proc. § 437c.

6. Judgment ⚷185.2(3)

Party filing motion for summary judgment is not required in affidavit filed in support of motion to negative a possible matter of defense. West's Ann.Code Civ.Proc. § 437c.

7. Judgment ⚷185.2(9)

Where allegations in plaintiffs' affidavit in support of motion for summary judgment would support a judgment in favor of plaintiffs if proved, and defendant did not controvert allegations by counter affidavit, no triable issue of fact was presented and summary judgment was properly granted. West's Ann.Code Civ.Proc. § 437c.

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Cresswell & Davis, Oakland, for appellant.

Ervin S. Best, Charles Baer, San Francisco, respondents in pro. per.

KAUFMAN, Justice.

This is an appeal from a summary judgment entered in favor of plaintiffs and respondents on March 5, 1951, decreeing that plaintiffs recover from defendant the sum of $985.05 and costs.

Plaintiffs and respondents Ervin S. Best and Charles Baer, attorneys, instituted suit in the Municipal Court against Marble E. Burch for recovery of the balance due on a promissory note which had been executed in payment for legal services rendered to appellant by respondents. Defendant by his verified answer admitted execution and delivery of the note.

Appellant filed an answer, counterclaims and cross-complaint seeking recovery of sums in excess of the jurisdiction of the Municipal Court, which resulted in the transfer of the case to the Superior Court.

A hearing was held on respondents' demurrer to the answer and cross-complaint, and on December 9, 1953, a minute order was made granting the motion to strike as to certain paragraphs of the answer, sustaining the demurrer to the third defense with 10 days to amend, to the fourth defense without leave to amend. The demurrer to the cross-complaint was overruled. On December 21, 1953, appellant filed a motion for a change of venue asking that the case be transferred to the Superior Court of Trinity County, which motion was denied on December 29, 1953. To the first amended answer, counterclaim and cross-complaint respondents filed a motion to strike and a demurrer. On January 25, 1954, the court granted the motion to strike out certain paragraphs of the first amended answer and the entire cross-complaint. Demurrer to the third answer and counterclaim was sustained with 10 days to amend. Appellant failed to amend his third answer.

On February 17, 1954, respondents filed their notice of motion for summary judgment supported by affidavit. Appellant filed no affidavit in opposition to said motion and made no appearance in connection therewith. The motion was therefore granted after a hearing at which respondents argued in propria persona.

[1, 2] Appellant contends on this appeal that the court erred in refusing to grant his motion for change of venue. The appeal herein is solely from the summary judgment. No appeal was taken from the order denying a change of venue. Section 963(2), Code of Civil Procedure, makes this an appealable order. Such order is therefore not reviewable on an appeal from the judgment. Code of Civ.Proc., § 956; Chard v. O'Connell, 48 Cal.App.2d 475, 476, 120 P.2d 125.

[3–5] The remainder of appellant's brief is devoted to arguments that the court committed error in striking certain paragraphs of the second answer and defense and the first amended answer, counterclaims and cross-complaint, as well as in sustaining the general demurrer to appellant's third answer in the first amended answer. These questions likewise, are not reviewable on this appeal. It is well settled in this state that any question regarding the sufficiency of the pleadings cannot be reviewed on an appeal from a summary judgment. It is said in Kelly v. Liddicoat, 35 Cal.App.2d 559, 96 P.2d 186, 187, a case in which this subject is exhaustively considered, that "Ordinarily the only question presented upon an appeal from a summary judgment under section 437c is whether or not the trial court abused its discretion." In that case appellants, as here, attacked the judgment on the ground that the trial court erred in sustaining a demurrer to their third amended answer. The court points out that the purpose of section 437c is to eliminate all issues which have no basis in fact irrespective of how well they may be pleaded. Therefore an answer may be stricken out although it states a perfect defense if defendant does not by his affidavits show facts to substantiate such defense.

In Coyne v. Krempels, 36 Cal.2d 257, 223 P.2d 244, 246, it is said that a summary judgment for a plaintiff is "proper only if the affidavits in support of his motion state facts that, if proved would be sufficient to sustain judgment in his favor, and defendant does not 'by affidavit or affidavits * * show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact.'"

The statutory affidavit in support of the motion for summary judgment in the case herein is made by Ervin S. Best, one of the respondents, who states that he is one of the plaintiffs in the action and that all the facts set forth in this affidavit are within his personal knowledge, and that if sworn as a witness he can testify competently thereto. He then relates "That on the 2nd day of November, 1951, the defendant, Marble E. Burch, made, executed and delivered to plaintiffs his promissory note in the principal sum of $1400.00, which said note was given in lieu of a balance due plaintiffs for professional services rendered and which said note is set out in full in plaintiff's complaint as follows." (Here follows the text of the promissory note signed by Burch.) "That there has been credited upon said note the sum of Four Hundred Fourteen and 95/100 ($414.95) Dollars, leaving an unpaid balance of Nine Hundred Eighty-five and 05/100 ($985.05) Dollars which is now due, owing and unpaid thereon.". The affidavit then discusses defendant's pleadings, and asserts that there is no triable issue of fact and that the answer is frivolous and sham.

[6] Appellant claims that the note sued on was presumptively invalid. If this be true, it would be a matter of defense to the motion for summary judgment which appellant should have set forth in a counter affidavit. Respondents in their affidavit were not required to negative a possible matter of defense. Patterson v. Davis, 121 Cal.App.2d 152, 159, 262 P.2d 601; In re Estate of Mallory, 99 Cal.App. 96, 102, 278 P. 488; Donze v. Donze, 88 Cal.App. 769, 774, 264 P. 294.

[7] The affidavit in support of the motion states a cause of action for the balance due on the promissory note which is still due, owing and unpaid. These allegations if proved would support a judgment in favor of respondents. Here, as in Coyne v. Krempels, supra, "since defendant did not controvert them by counter affidavit, no triable issue of fact was presented and the summary judgment was proper."

In view of the foregoing the judgment finds ample support in the record before us and accordingly it must be affirmed.

Judgment affirmed.

NOURSE, P. J., and DRAPER, Judge pro tem., concur.

Anthony ROGERS, Plaintiff and Respondent,

v.

LOS ANGELES TRANSIT LINES and Langendorf United Bakeries, Inc., Defendants and Appellants.

Civ. 20640.

District Court of Appeal, Second District, Division 1, California.

May 11, 1955.

Rehearing Denied June 9, 1955.

Hearing Granted July 6, 1955. *

Action against bakery company and against bus company for injury sustained by bus passenger when his elbow, which was protruding from bus window, struck open door of parked bakery truck. The Superior Court, Los Angeles County, Wallace L. Ware, J., rendered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Doran, J., held, inter alia, that statute prohibiting leaving a door open on side of vehicle available to moving traffic for a period of time longer than necessary to load or unload applies only to side doors and truck driver's action in opening end doors on parked bakery truck was not negligence as a matter of law.

Judgment against bakery company reversed; judgment against bus company affirmed.

1. Automobiles 🔑173(1), 245(17)

Statute prohibiting leaving a door open on side of vehicle available to moving traffic for a period of time longer than necessary to load or unload applies only to side doors and truck driver's action in opening end doors on parked bakery truck was not negligence as a matter of law in respect to accident which occurred when protruding elbow of bus passenger struck door. Vehicle Code § 596.6.

2. Negligence 🔑105

Assumption of risk requires a showing that plaintiff had knowledge of condition creating the hazard.

3. Carriers 🔑321(1), 348(5)

In action against bus company for injuries sustained by passenger whose elbow, which was protruding from bus window, struck opened rear door of bakery truck, instructions adequately covered subjects of assumption of risk, negligence and contributory negligence.

4. Carriers 🔑318(4), 346(2)

In action against bus company for injuries sustained by passenger whose elbow, which was protruding from bus window, struck open door of parked bakery truck, evidence was sufficient to sustain finding that bus driver had been negligent in driving too close to truck and that passenger had not been contributorily negligent.

Melvin L. R. Harris, David S. Smith, Los Angeles, for Los Angeles Transit Lines, and E. E. Feb.

Parker, Stanbury, Reese & McGee; Wm. C. Wetherbee, Los Angeles, for Langendorf United Bakeries, Inc., and Ben B. Harmell.

F. Murray Keslar, Los Angeles, for respondent.

DORAN, Justice.

This is an action for damages for personal injuries resulting from an accident.

Following a jury trial which resulted in a verdict for plaintiff, defendant Langendorf Bakeries appeals from the judgment. Defendant L. A. Transit Lines appeals from the judgment.

As recited in L. A. Transit Lines opening brief, "Plaintiff was a passenger on a bus of the Los Angeles Transit Lines, sometimes hereinafter referred to as LATL, driven by its operator, E. E. Feb, sometimes hereinafter referred to as Bus Driver. As the bus was moving in a westerly direction on its usual route along Beverly Boulevard, plaintiff, a regular passenger on this route, put and kept his elbow outside the bus window. The bus passed but did not touch a Langendorf Bakery (truck), sometimes hereinafter referred to as Langendorf Truck, then in the care of its driver,

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* Opinion vacated 289 P.2d 226.

Ben B. Harmell, sometimes hereinafter referred to as Truck Driver. The Langendorf truck was parked near the curb. Plaintiff's elbow, protruding outside the window sill, struck an open door of the Langendorf truck; this door was at the back of the truck and on the side of passing traffic. The contact between this door and plaintiff's elbow caused injuries to plaintiff.

* * * * * *

"Culled from the record of the lower Court are the following facts most favorable to plaintiff:

"1. The bus here involved had a width of eight feet, nine and one-quarter inches (8′ 9¼″). The lane of traffic in which it was proceeding at the time of the accident was nine (9′) feet wide.

"2. Considering only the body of the Langendorf truck, its left fender, and left door when open, the measurement was 77¼ inches across: The body is 66 inches across, the left fender extends 7¼ inches beyond the body, and the left door when open extends 4 inches beyond the left fender.

"3. Plaintiff was seated on the right hand side of the bus in the seat next to the rear.

"4. The bus was proceeding in a westerly direction on Beverly Boulevard in the inside lane, left this lane to go to the second lane, and then proceeded straight out Beverly in the latter lane. The bus was going due west before the accident.

"5. The bus moved to the second lane when it was about 40 feet from the Langendorf Truck. For the first time, plaintiff then saw the Langendorf Truck. Plaintiff further testified that at that time, only the right door of the truck was open. Plaintiff further testified that the left door of the Langendorf Truck was closed when the bus was 40 feet away. However, plaintiff testified that the Truck Driver was at that same time standing at the rear of the Langendorf Truck where the doors of the truck were located.

"6. While the left door had been closed, as hereinbefore shown, when the bus was only 40 feet away, after the front of the bus passed the truck, the left door 'flashed' open, and plaintiff's elbow then was hit by the then open left door of the truck. Plaintiff testified that his elbow was three inches outside the bus, and also two inches.

"7. Plaintiff further testified that at the time the bus passed the truck, the bus was a foot distant from the truck.

"8. Plaintiff's most favorable testimony disclosed that there was ample clearance between the truck and the bus, but that it was the suddenly opened ('flashed') left door which struck his protruded right elbow and caused his injury. As a matter of fact, the Truck Driver corroborated the testimony of plaintiff to the effect that plaintiff's elbow struck the left door, and that the bus did not come into contact with the truck. The Bus Driver also corroborated the fact that the bus did not touch the truck and was unmarked. It was uncontroverted and no one claimed that the bus and truck contacted one another."

As recited in Langendorf Bakeries opening brief, "The accident occurred on a clear morning while the bakery truck of Langendorf Bakeries was parked against the curb and was in the curb lane of travel on Beverly Boulevard in front of the Lucky Food Mart. Ben B. Harmell, the driver of the truck, had thrown both rear doors of the bakery truck open in the course of withdrawing bakery products from the rear of the truck to service the Lucky Food Mart. At the time of the accident he was standing at the back of his truck writing his bills and the doors had been opened and stationary for at least four or five minutes. The left rear door extended out four inches beyond the fender of the truck but not beyond the marked area of the parking lane.

"Beverly Boulevard curves rather sharply to the left about 160 feet east of where the bakery truck was parked. As the bus rounded the curb it swerved into the curb lane of travel and continued in this lane until it was about 40 feet from the bakery truck. At this point it cut back into the middle lane of traffic and as the bus passed the bakery truck the truck driver heard a tick at the edge of his left rear door. This tick proved to be the sound of plaintiff's elbow contacting the edge of the left rear door of the bakery truck."

It is argued by the baking company that, "the lower court made it impossible for the jury to find in favor of these defendants. This was done, in effect, by so rewriting Section 596.6 of the Vehicle Code as to tell the jury that these defendants were negligent as a matter of law if the rear doors of the truck were left open regardless of whether a reasonably prudent person would have foreseen danger to others, and even though no danger were created. This prejudicial error constitutes the basis for the appeal of these defendants."

The court instructed the jury as follows:

"You are instructed that Section 596.6 of the Vehicle Code of the State of California provides as follows:

" '§ 596.6. Opening and Closing Vehicle Doors.

" 'No person shall open the door of a motor vehicle on the side available to moving traffic unless and until it is reasonably safe to do so, nor shall any person leave a door open upon the side of a vehicle available to moving traffic for a period of time longer than necessary to load or unload'.

"Conduct which is in violation of Section 596.6 of the Vehicle Code just read to you constitutes negligence *per se*. This means that if the evidence supports a finding, and you do find, that a person did so conduct himself, it requires a presumption that he was negligent. However, such presumption is not conclusive. It may be overcome by other evidence showing that under all the circumstances surrounding the event, the conduct in question was excusable, justifiable and such as might reasonably have been expected from a person of ordinary prudence. In this connection, you may assume that a person of ordinary prudence will reasonably endeavor to obey the law and will do so unless causes, not of his own intended making, induce him, without moral fault, to do otherwise.

"If you should find from the evidence that a party to this (action) conducted himself in violation of Sec. 596.6 of the Vehicle Code, just read to you, you are instructed that such conduct constituted negligence as a matter of law."

[1] The foregoing instruction was prejudicial error. Obviously the court is without power to amend or modify the law. But the incident is unimportant. Section 596.6 has no application whatever to the issue involved. The section obviously applies to the *side* doors only, whether passenger cars or trucks. By no process of reasoning, construction or interpretation can the section be held to include *end* doors. The doors of the bakery truck were *end* doors and not *side* doors. The truck of course had side doors for entrance to the driver's seat, but the side door was not open. The section is clear and unambiguous, therefore, to read the word *end* into the section would clearly violate basic rules of construction. Moreover there is no evidence whatever of negligence on the part of the driver of the bakery truck. The judgment against the bakery company must therefore be reversed.

The L. A. Transit Lines case presents a different situation, both as to the law and the evidence.

The L. A. Transit Company argues that "appellants were not insurers of plaintiff's safety. Only a high degree of care was required of them, and the record fails to disclose absence of such care." It is also argued that the doctrine of "assumption of risk" is involved and that the court failed to instruct the jury on this subject.

[2] There are many cases on the subject and quoting from some of them it appears well settled, as stated by respondent, that,

" 'Before it can be said that one has "assumed the risk" of a specified hazard, it must be shown that he had knowledge of the condition creating the hazard, since one does not assume the risks of danger which he has no reason to anticipate.' DeGraf v. Anglo Cal. Nat. Bank, 14 Cal.2d 87, 92 P.2d 899.

"In California, the doctrine of assumption of risk is merely one phase of the

Doctrine of Contributory Negligence. Bunch v. Eason, 95 Cal.App.2d 845, 214 P.2d 28.

"Doctrine of Assumption of Risk presupposes existence of a dangerous situation or condition known to, or which should reasonably have been known to the injured party, who, nevertheless, chooses to enter upon or remain within the area of risk. Smythe v. Schacht, 93 Cal.App.2d 315, 209 P.2d 114.

"One does not assume risk so as to bar recovery in an action in tort when he has no knowledge of peril involved. Moran v. Zenith Oil Co., 92 Cal.App.2d 236, 206 P.2d 679.

"A person does not assume the risk of danger which he has no reason to anticipate. Owen v. Rheem Mfg. Co., 83 Cal. App.2d 42, 187 P.2d 785.

"The doctrine of 'assumption of risk' presupposes existence of a dangerous situation or condition known to plaintiff who nevertheless chooses to enter upon or remain within area of risk. Ziesemer v. McCarty, 71 Cal.App.2d 378, 162 P.2d 857.

"The doctrine of 'assumption of risk' and the Doctrine of Contributory Negligence are closely related but they are nevertheless separate and distinct Doctrines. Dingman v. A. F. Mattock Co., 15 Cal.2d 622, 104 P.2d 26, also prior Cal.App., 96 P.2d 821.

"The applicability of the Doctrine of Assumption of Risk is based on the knowledge and appreciation of a danger, and the voluntary occupation of a position of danger in disregard of the use of the ordinary care, and the time, place, person and relationship of the parties must be considered. Weaver v. Shell Co., 34 Cal.App.2d 713, 94 P.2d 364; Ring v. Los Angeles Ry. Corp., 116 Cal.App. 93, 2 P.2d 404; Commonwealth Bond & Cas. Co. v. Pacific Electric Ry., 42 Cal.App. 573, 184 P. 29.

"Negligence becomes a question of law only in the exceptional case, being generally a mixed question of law and fact. Elizalde v. Murphy, 11 Cal.App. 32, 103 P. 904."

In this connection the court instructed the jury that,

"The requirement that the carrier exercise the utmost care for the passenger's safety does not relieve the passenger of the duty to exercise ordinary care for his own safety. This responsibility rests upon the passenger at all times and if he fails in it, and that failure contributes in any degree as a proximate cause of injury to himself, he may not recover from the carrier for such injury.

"So long as a passenger does exercise ordinary care for his own safety, and in the absence of appearances that caution him, or would caution a reasonably prudent person in like position, to the contrary, he has a right to assume that the carrier will perform all the duties required of it, as stated to you in these instructions, and a right to rely on that assumption."

[3] In effect, the foregoing instruction covers the subject of assumption of risk. The instructions also fully covered the subjects of negligence and contributory negligence.

[4] The issue presented a question of fact for the jury. Although somewhat conflicting nevertheless, the evidence is sufficient to support the verdict. The jury might well have assumed from the evidence that the bus was driven too close to the bakery truck and that, in the circumstances, such an act amounted to negligence. Also, that plaintiff was not contributorily negligent. Therefore, in the L. A. Transit Lines case, the judgment must be affirmed.

For the foregoing reasons the judgment in the Langendorf United Bakeries, Inc. case is reversed and the judgment in the Los Angeles Transit Lines case is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

133 Cal.App.2d 11

Harry MELIKIAN, Plaintiff and Appellant,

v.

TRUCK INSURANCE EXCHANGE and Inter-Insurance Exchange, corporations, Allan Noble, Chester D. Wynn, First Doe, Second Doe and Third Doe, Defendants and Respondents.

Civ. 16300.

District Court of Appeal, First District, Division 2, California.

May 18, 1955.

Hearing Denied July 13, 1955.

Action to enforce an offer of settlement for injuries incurred in a motor vehicle accident. The Superior Court, County of Santa Clara, Edwin J. Owens, J., sustained defendant's demurrer to amended complaint and plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that where plaintiff had alleged in his amended complaint that on May 5, 1953, insurance company had made oral offer of settlement, that acceptance was made on May 14, 1953, and that trial was commenced on May 11, 1953, and ran for four days and that jury returned verdict for defendants, but complaint did not allege time of acceptance with respect to progress of trial of action, it would be presumed that allegation would have been fatal and hence that there was no acceptance made within proper time upon which plaintiff could rely.

Judgment affirmed.

1. Appeal and Error ⟐714(4, 5)

On demurrer to complaint and on appeal from judgment sustaining demurrer, both trial court and District Court of Appeal were bound by allegations in verified complaint and could not consider outré-judicial statements of counsel or additional facts found in briefs.

2. Pleading ⟐36(2)

Pleader is bound by allegations contained in verified complaint.

3. Compromise and Settlement ⟐6(1)

Plaintiff's acceptance of offer of settlement for personal injuries after jury had been summoned and after defendants had been put to expense of trial would be of no value because at that time the consideration for offer had failed and was not capable of performance.

4. Pleading ⟐37

Where, in action to enforce offer of settlement for injuries incurred in motor vehicle accident, amended complaint alleged that on May 5, 1953, insurance company had made oral offer of settlement, that acceptance was made by plaintiff's attorney on May 14, that trial was commenced on May 11, and ran for four days and that jury returned verdict for defendants, but amended complaint did not allege time of acceptance in respect to progress of trial, it would be presumed that allegation would have been fatal and hence that there was no acceptance made within proper time upon which plaintiff could rely.

5. Pleading ⟐37

If fact necessary to pleader's cause of action is not alleged, it must be taken as having no existence, since it is presumed that a pleader will state his cause as favorably as possible to himself, and all such presumptions are always against pleader and all doubts are to be resolved against him.

6. Compromise and Settlement ⟐22

In action to enforce an offer of settlement for injuries incurred in a motor vehicle accident, plaintiff's allegation in his amended complaint that offer was accepted by plaintiff's attorney on or about the fourteenth day of May, 1953, was an idle plea since it was not alleged whether at that time the jury trial, which would have made the offer valueless, had begun.

7. Pleading ⟐225(3)

Plaintiff, who did not appear to defend against demurrer to amended complaint, and who had not shown to trial court or on appeal how he could amend to plead a triable issue, was not entitled to time to amend complaint further.

◆

Johnson, Thorne, Speed & Bamford, Harry V. Bamford, San Jose, for appellants.

Campbell, Custer, Warburton & Britton, San Jose, Walter E. Rankin, San Jose, of counsel, for respondents.

NOURSE, Presiding Justice.

Plaintiff sued to enforce an offer of settlement for injuries incurred in a motor vehicle accident. A demurrer to his amended complaint was sustained after argument by counsel for defendants, the plaintiff failing to appear for argument in support of his complaint.

[1–6] The controlling issue on the appeal from the adverse judgment is whether the complaint alleges an acceptance of the offer within time. In approaching that issue we are bound, just as the trial court was bound, by the allegations in the verified complaint and cannot consider the outré-judicial statements of counsel nor the additional facts found in the briefs. The complaint is in plain and simple language and the pleader is bound by the allegations contained therein. The complaint herein alleges that the complaint for injuries was filed on June 27, 1951; that while the suit was pending, and on May 5, 1953, an agent of the insurance carrier made an oral offer to the plaintiff to pay the sum of $6,000 in full settlement; that the offer was accepted by plaintiff's counsel on May 14, 1953; that they proceeded with the trial before a jury which commenced on the 11th day of May, 1953 and ran for four days; that the jury returned a verdict in favor of the defendants. Significantly the complaint fails to allege when the verdict was returned, or whether the evidence, or some portion of it, was presented to the jury before or after the purported acceptance. Also, whether this verdict preceded the alleged acceptance of the offer does not appear from the allegations of the complaint. These were pertinent matters of fact highly essential to plaintiff's case and fully within his own knowledge. If this acceptance had taken place after the adverse verdict it would have been of no value whatever. If it had been made after the jury was summoned and after the defendants had been put to the expense of trial it was of no value because at that time the consideration for the offer had failed and was not capable of performance. From his failure to allege the time of acceptance we must presume that such an allegation would have been fatal to his case, and, hence, that there was no acceptance within proper time upon which he could now reply. Smith v. Buttner, 90 Cal. 95, 100, 27 P. 29; Curci v. Palo Verde Irr. Dist., 69 Cal.App.2d 583, 585, 159 P.2d 674. This rule is succinctly stated in Feldesman v. McGovern, 44 Cal. App.2d 566, 571, 112 P.2d 645, 648, where the court said "* * * the presumptions are always against the pleader, and all doubts are to be resolved against him, for it is to be presumed that he stated his case as favorably as possible to himself (citations); if a fact necessary to the pleader's cause of action is not alleged it must be taken as having no existence. Hildreth v. Montecito Creek Water Co., 139 Cal. 22, 72 P. 395; Callahan v. Loughran, 102 Cal. 476, 36 P. 835." For these reasons we must assume, on the demurrer, that the alleged acceptance was not made within time. It appears therefore that plaintiff did not intend to accept the offer until he learned that the verdict had been, or would be, adverse to him. The allegation that the offer was accepted by plaintiff's attorney "on or about the 14th day of May, 1953" is an idle plea since it is not alleged whether at that time the jury trial had begun.

Manifestly the purpose of the offer of compromise was in part to avoid the jury trial with its consequent court costs, fees and other legal expenses. No one would assume that the defendants would have made the offer after they had knowledge of the jury's verdict. But the allegations of the complaint herein assume that that was just what did occur.

[7] The appellant argues that he should have been given leave to amend further. The argument is not persuasive since he did not appear to defend against the demurrer and has not shown, either to the trial court or on this appeal, how he could amend to plead a triable cause of action. See Ruinello v. Murray, 36 Cal.2d 687, 690, 227 P.2d 251.

A case in point is Thompson v. Municipal Bond Company, 23 Cal.App.2d 402, 411, 73 P.2d 274, where the court held on almost identical facts that when the plaintiff continued to prosecute his case, after an offer of compromise had been made and accepted, there was an effective mutual abandonment of the compromise agreement.

Judgment affirmed.

KAUFMAN, J., and DRAPER, J. pro tem., concur.

Hearing denied; CARTER, J., dissenting.

133 Cal.App.2d 43

In the Matter of the ESTATE of Betty Jo MacDONALD, Deceased.

Glenn Malcolm MacDonald and Jack Edward MacDonald, Appellants,

Bank of America National Trust and Savings Association, Executor of the Estate of Betty Jo MacDonald, Deceased, Respondent.

No. 16445.

District Court of Appeal, First District, Division 2, California.

May 17, 1955.

Proceeding in the matter of a decedent's estate, wherein the Superior Court, San Mateo County, A. R. Cotton, J., distributed the proceeds of an automobile insurance policy to testatrix' mother, who had been bequeathed an automobile by her daughter's will, and the residuary legatees and devisees appealed. The District Court of Appeal, Kaufman, J., finding no California case directly in point, held that where automobile which was subject to specific bequest was wrecked in accident which resulted in death of testatrix, and collision insurer elected to pay to executor value of automobile at time of accident rather than to repair or replace automobile, legatee was entitled to receive sum paid to executor by insurer.

Affirmed.

1. Wills 🔑767

When property has been converted into different form by operation of law, there is no ademption of legacy. Probate Code, § 77.

2. Wills 🔑768

Where automobile which was subject to specific bequest was wrecked in accident which resulted in death of testatrix, and collision insurer elected to pay to executor value of automobile at time of accident rather than to repair or replace automobile, legatee was entitled to receive sum paid to executor by insurer. Probate Code, § 77.

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Price, Macdonald & Knox, Paul J. tenDoesschate, Oakland, for appellants.

Wagstaffe & Daba, Redwood City, for respondent.

KAUFMAN, Justice.

This is an appeal by the residuary legatees and devisees from an order of the Superior Court of San Mateo County granting a petition for partial distribution in the estate of Betty Jo MacDonald, deceased. The court distributed the proceeds of an automobile insurance policy to the mother of testatrix who had been bequeathed an automobile by her daughter's will, but which vehicle had been demolished in the accident which caused the death of testatrix.

The fourth paragraph of decedent's will provided as follows: "I hereby give, devise and bequeath unto my mother Ruth Van Herwynen, whatever car I may own at the time of my death."

On October 20, 1953, Betty Jo MacDonald died as a result of an automobile accident in which she suffered a skull fracture. The court found that the death of decedent occurred "at a time not specifically known with relation to the damage to the automobile she was driving, but at a time no later than a few minutes after the actual accident."

The automobile which decedent was driving was insured by a policy owned by her under which the insurer agreed to pay the insured for damage caused by collision or upset. The insurer's liability was not to exceed the actual cash value of the automobile. The insurance contract gave to the insurer the right, at its option, to "take all or such part of the automobile at the agreed or appraised value." The company could either pay for the loss in money or might repair or replace the automobile. The policy provided that in event of the death of the insured, the policy would continue to insure and protect the legal representative of the deceased.

The court found that the insurer secured an estimate of repairs to the damaged automobile in the sum of $2,914.51; that the actual book value of the car undamaged was $2,900; that the insurer at its option elected to pay the sum of $2,900 less $50 deductible or $2,850, to the executor; that the insurance company thereafter realized a salvage value of $300 from said automobile. It was found also that it was necessary under the insurance contract that possession and title to the damaged vehicle be given to the insurance company.

The court found that Ruth Van Herwynen was enitled to have distributed to her the sum of $2,850 in lieu of the automobile owned by decedent at the time of her death, and made its order accordingly.

Appellants contend that the finding that death occurred within a few minues after the accident does not support the court's legal conclusion that the legatee of the car is entitled to the insurance proceeds in lieu thereof. Although there is no California case directly in point, appellants cite an Oklahoma case, In re Estate of Barry, 208 Okl. 8, 252 P.2d 437, 35 A.L.R. 2d 1052, which is very similar on its facts, holding that in such a situation the legatee of the automobile is not entitled to the insurance proceeds. In the cited case the owner of a Chrysler automobile which had been bequeathed to appellant, was wrecked in an accident which caused such serious injuries to the owner that she died eight hours after the accident. The insurance policy covering the car gave the insurer the option of repairing the car or taking possession of the same and paying the insured the agreed value The insurer exercised the option, as did the insurer herein, to pay the value of $2,600, and sold the wrecked automobile for $350, the salvage value thereof. The court noted that no decision of a court of last resort had been found which had passed on this question, but followed the decision in In re Hilpert's Estate, 165 Misc. 430, 300 N.Y.S. 886, a case in which a library, the subject of a bequest in testator's will, had been damaged by a fire which destroyed some of the books and damaged others. It was decided that as to the books totally destroyed the bequest had been to that extent adeemed, and that the remaining books were delivered in their damaged condition. The insurance policy was said to be a "totally different asset of the decedent", a simple contract to pay the insured a fixed and ascertainable sum of money upon the happening of a specified event, and that it was a chose in action of decedent which passed to his personal representative. Apparently the insurance contract did not involve an option clause. The Oklahoma court, following this case, decided that the total insurance proceeds did not go to the legatee of the automobile, but only the automobile in its damaged condition. As the insurance company by exercising its option had made it impossible to deliver the damaged car to the legatee, the value thereof or $350 was to be paid to the legatee.

Respondent argues that these decisions are not controlling in this state where there is no law on the subject. Furthermore, she contends that an ademption of a bequest implies that the testator, with knowledge of the damage or destruction of the subject matter of the bequest, and with an opportunity to change his will, by failing to do so much have intended that the bequest be adeemed. In re Estate of Cline, 67 Cal. App.2d 800, 805, 155 P.2d 390. Clearly, here it cannot be said that it was the intent of the daughter to leave her mother the salvage value of an automobile instead of an automobile in operating condition. In this case the testator perished in the accident, and had no knowledge of the damage to the car, nor any opportunity to exercise an intent that the mother should receive the salvage instead of a vehicle that was still functioning as such. There is nothing herein from which an intent that the legacy should fail, can be presumed. See, In re Estate of Sorensen, 46 Cal.App.2d 35, 115 P.2d 241.

Appellants in their reply brief contend that respondent had misconceived their argument, that they are not arguing that the bequest has been adeemed, but rather the question of whether the court can distribute instead of the damaged car which is in existence, a different asset of the estate, the insurance proceeds, in lieu of said car. The Hilpert and Barry cases discussed above are authority that this cannot be done. Appellants note that in Alexander v. Security-First National Bank, 7 Cal.2d 718, 722, 62 P.2d 735, 737, it is said that insurance is *not* "in the absence of special contract a substitute for the property" and that the insurance policy does not pass with the title to the property, that the property itself is not really insured, but the insurance contract is a " 'special agreement of indemnity with the person insuring against such loss or damage as he may sustain.' " And, see, Corder v. McDougall, 216 Cal. 773, 774, 16 P.2d 740. Appellants do not point out in what manner the estate of the insured was damaged or sustained loss herein, for it was only the insurance company, not the estate, which had a contractual obligation to restore the car to its original condition or substitute the value therefor. If there was no such contract, clearly the executor could turn over the car to respondent in the condition it was in after the accident. If anyone can be said to have sustained a loss herein, it was the legatee of the automobile.

It is interesting to note that in a New York case, In re Mullins' Estate, 121 Misc. 867, 202 N.Y.S. 758, wherein a barn on certain property which had been willed to testator's granddaughter burned down five days before testator's death, but while he was too ill to be notified of the loss, and the barn was insured by a policy which gave the insurer the option to rebuild the barn or pay the value, and it chose to pay the value instead of rebuilding, the court said that the proceeds of the policy should go to the devisee, reasoning that had the company chose to rebuild the barn, unquestionably it would have become the property of the granddaughter. The court therein cited an earlier New York case, Wyman v. Wyman, 26 N.Y. 253, 258, which was parallel on the facts, in which the court said that "it is a strong implication from the existence of such a feature in the contract that its benefits must, in any event, and in either form of performance, inure to those who would in case of its literal performance, reap its fruits. My opinion is that in such a case as this the executor or administrator is a trustee for the heir, who alone has been damnified, who has sustained the loss, and who is entitled to the indemnity." Although these cases involved real property, the principle would seem just as applicable to personal property, for as argued by respondent herein, if the insurance company exercised its option to repair the car, the benefit would inure to the legatee. Hence, if appellants' theory is accepted, it places within the province of a third party—the insurer—the decision of whether or not the terms of decedent's will shall be carried out.

Appellants contend that the legatee, however, was entitled only to $300, the salvage value, should the insurance company exercise its option to purchase. But the insurance contract has nothing to do with the salvage value. The insurance company buys the car at its full value, paying the proceeds to the executor, in preference to restoring the car to its full value. The salvage value realized after performance of the insurance contract is of no concern to anyone but the insurance company. It had the right under its contract with the insured decedent to purchase the car and it did so. Otherwise it must deliver to the executor of the legatee, the fully restored car. The deceased had guaranteed this result by making this type of contract.

[1, 2] Probate Code, sec. 77 provides that an agreement made by a testator for the sale or transfer of property disposed of by will previously made, does not revoke such disposal; but the property passes by the will, subject to the same remedies on the testator's agreement, for a specific performance or otherwise, against the devisees or legatees, as might be had against the testator's successors, if the same had passed by succession. In Re Estate of White, 84 Cal.App.2d 409, 190 P.2d 968, it was held that a bequest of an unpublished manuscript in regard to which the testator had contracted for publication, gave to the legatee the rights to the royalties when published, that the specific bequest of the manuscript passed the rights in said manuscript to the legatee by virtue of Probate Code, sections 77 and 78, subject to whatever rights the publisher had against the author by reason of the contract. In the instant case, therefore, the insurance company had the right to exercise its option as against the new owner of the car, respondent, just as it could have done in regard to the original owner, had she survived the accident. The insured could therefore substitute the proceeds for a fully restored automobile. In view of the contract made by decedent, the legatee could not prevent the purchase of the car by the insurer. When property has been converted into a different form by operation of law, there is no ademption of the legacy. In re Estate of McLaughlin, 97 Cal.App. 485, 488, 275 P. 875; 3 Woerner's Law of Administration 1523, sec. 446.

In view of the circumstances under which testatrix died, there are no facts from which an intent can be inferred that she intended to leave to her mother $300 worth of wreckage instead of a valuable means of transportation, which she had guaranteed to her by the insurance contract, as noted above. Had testatrix recovered from the accident and allowed the automobile to remain in the wrecked condition, then it could be argued that the damaged vehicle was all that she intended her mother to inherit. Appellants in reply cite Gardner v. Snow, 119 Cal.App.2d 546, 549, 259 P.2d 95, to the effect that it is not what a testator wanted to do, but what he actually did as expressed in the words of the will, which governs in determining his intent in the absence of other evidence. Here, however, we have in evidence the insurance policy containing the option provision. In view of Probate Code, sec. 77, we hold that testatrix, having made such a contract in reference to the bequest, intended that the performance of such contract would guarantee the fulfillment of the legacy.

It is our view that the Probate Court correctly applied the law to the facts and accordingly the order for partial distribution must be affirmed.

Order affirmed.

NOURSE, P. J., and DRAPER, J. pro tem., concur.

132 Cal.App.2d 830

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Perry L. DUNNAVANT, Defendant and Appellant.

Cr. 5313.

District Court of Appeal, Second District, Division 3, California.

May 11, 1955.

Defendant was convicted of grand theft. The Superior Court, Los Angeles County, Kurtz Kauffman, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Shinn, P. J., held that instruction that necessary element of crime was existence in mind of perpetrator of specific intent to "permanently deprive the owner (to wit) the corporation of the property described in the information," was error requiring reversal, where characterization of corporation as owner of property went to very heart of case and effect of thus naming corporation as owner was to substantially remove from consideration of jury only disputed issue, namely, whether property belonged to corporation or partnership which preceded it.

Judgment reversed.

Criminal Law ⇐761(2), 1172(3)

In prosecution for grand theft, instruction that necessary element of crime was existence in mind of perpetrator of specific intent to "permanently deprive the owner (to wit) the corporation of the property described in the information," was error requiring reversal, where characterization of corporation as owner of property went to very heart of case and effect of thus naming corporation as owner was to substantially remove from consideration of jury only disputed issue, namely, whether property belonged to corporation or partnership which preceded it.

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Robert Wanamaker, Pasadena, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Defendant Perry L. Dunnavant was charged by information with two offenses of grand theft, namely, the theft of $825 and the sum of $296 in money, the property of Paradise Pools, a corporation. In a jury trial he was convicted of the theft of $296 under Count II; the jury disagreed as to Count I and the same was dismissed on motion. Defendant was sentenced to 6 months in the County Jail and he appeals.

In the early part of April 1953, defendant Dunnavant, Lee Paul Haight and Richard Pritchard formed a partnership to engage in the business of installing swimming pools. Defendant was to be manager of the business. Each party was to draw $100 per month and was to receive in addition one-third of the profits of the business. Haight was to advance $5,000 which was to be repaid before any profits were divided. He opened a bank account in his own name by a deposit of $2,962 and he alone was authorized to draw checks on the account. Admittedly this money was advanced to the partnership for use in the business. Checks were drawn on the account and on April 29, 1953, the balance had been reduced to $2,736.84. Between April 17, 1953 and July 1, 1953, the operations showed a net profit of $4,817.30 and the obligation to Haight had been reduced to $2,016.23. Haight had followed a practice of signing checks in blank which were filled in and used in the business as needed. A Miss Hammack kept the books and records of the business. August 3, defendant procured a check from Miss Hammack for $825 and with it procured a cashier's check for $818. He told Miss Hammack that he intended to use the amount to pay off a mortgage on his home. August 6 Miss Hammack made out a check payable to George Myers for $296 in payment for work done on a swimming pool which defendant was having constructed at his home. Defendant testified that he had Haight's permission to withdraw the $825, which Haight denied. The disagreement of the jury with respect to Count I which involved the $825 check would indicate that at least some of the jurors were of the belief that Haight had authorized defendant to withdraw and use that sum. It is conceded that the jury was instructed to the effect that if the sums involved in the charges were money of the partnership defendant's use thereof would not have amounted to theft. Upon the other hand, if it was found that the money belonged to the corporation there was ample evidence to sustain the charges with respect to both checks since Haight had testified that he did not authorize the withdrawal of either sum. The evidence as to the ownership of the funds was subject to different inferences. It is not questioned that a partnership existed in the beginning and the sum first deposited in the account by Haight had been loaned and belonged to the partnership. He had deposited the money subject to withdrawal upon his own checks. April 29, pursuant to previous arrangement, the partners caused to be filed articles of incorporation of Paradise Pools, Inc. On the same date Haight signed a new bank signature card under the name "Paradise Pools, Inc." with himself as the only person authorized to sign checks. Thereafter business income was deposited in the account to the extent of $67,000. The operating expenses of the business had been paid from the account.

The People contended at the trial that the bank account was transferred to the corporation by means of the signature card signed by Haight on April 29. In support of that contention the People point to evidence that there was an understanding among the partners shortly after the formation of the partnership that the business would be operated through a corporation, and they contend further that upon the organization of the corporation by the partnership, title to the assets of the partnership automatically passed to the corporation. They say further that the corporation did engage in business under its corporate name and that from the time its articles were filed it enjoyed corporate existence. Defendant contended, as we say, that the corporation never did supplant the partnership and further that his withdrawals from the business were made in good faith and in anticipation that in any event the same would be covered by his share of the profits. Although there was a disagreement of the jury as to the first count, the verdict on the second count amounted to a rejection of the contentions of the defendant. The question of the ownership of the funds was a vital one. It affected not only the defendant's claim of his right to use the funds but also his claim that he acted in good faith in withdrawing funds which he expected would be charged to his account. As previously stated, it was the understanding that defendant would be the manager of the business, leaving Haight free to conduct a separate business in which he was then engaged.

In support of his claim that the partnership funds were never transferred to the corporation and that the corporation did not function as such defendant calls attention to the following facts. The corporation did not on or before April 29 authorize Haight to open a bank account in its name; on May 27 a resolution was adopted authorizing the opening of a bank account upon which checks could be drawn signed by Haight and the defendant unless and until other authorization was given. Copy of this resolution was not furnished to the bank. May 29 application was made to the Division of Corporations for a permit to issue 200 shares of stock to Haight and defendant, or either or both of them, at par for cash. Haight signed the application as president and defendant signed as secretary-treasurer. The application read in part "Applicant at present has no assets or liabilities other than organization expenses and has conducted no business; therefore, no financial statement can be prepared or submitted at this time." The corporation was not licensed as a contractor until August 17. The associates had been doing business under the name of Paradise Pools through an employee, Herbert J. Meier who was a licensed contractor. This being illegal, the company was cited for violation of law and business thereafter was conducted under the name of Paradise Pools but under Meier's license. Apparently there had been some use of the name Paradise Pools, Inc., in the conduct of the business. Some time prior to August defendant commenced construction of a swimming pool at his home. Office personnel had knowledge of this but Haight did not. Myers worked on the pool, applying concrete and billed the company for $296 for his work. Defendant testified that Miss Hammack had set up a cost sheet for the construction of his swimming pool to have entered thereon all items of cost. This cost sheet was not produced at the trial. Haight learned of the construction work on the swimming pool about September 10 and at that time purported to discharge the defendant. The corporation brought a civil action against defendant, alleging an indebtedness in the sum of $1,471, but upon learning that a judgment might not be collectible dismissed the action, which released an attachment that had been issued. In October Haight made a purported sale of the business to one Jack Arnold for $3,962. To the time defendant's connection with the business terminated, some 35 swimming pool constructions had been undertaken upon which some $67,000 had been received. Considerable detail was in evidence as to these business transactions but the same would add nothing to the facts which we have related.

We think it is clear from the facts we have stated that the question of defendant's guilt was not an easy one for the jury to decide. The disagreement as to Count I indicates as much. It would not have been unreasonable for the jury to conclude that the corporation never functioned as such and never acquired title to the bank account. Or the jury could reasonably have determined that if in its embryo stages the corporation did function without the issuance of any stock, and incidentally in violation of the state licensing law, it did so as a mere agency of the partnership. However, we are not prepared to say that its implied findings of ownership of the funds by the corporation was wholly without support in the evidence.

We now come to the point toward which we have been progressing. The court gave an instruction reading as follows: "In the case of certain crimes it is necessary that in addition to the intended act which characterizes the offense, the act must be accompanied by a specific or particular intent without which such a crime may not be committed. Thus in the crime of *Grand Theft,* a necessary element is the existence in the mind of the perpetrator of the specific intent to *permanently deprive the owner (to wit) the corporation of the property described in the information,* and unless such intent so exists that crime is not committed." The instruction as prepared contained a blank space in which the court wrote the words "permanently deprive the owner (to wit) the corporation of the property described in the information." This characterization of the corporation as the owner of the property went to the very heart of the case. Defendant says that it amounted to a statement that the corporation was the owner of the property and that it would have been so understood by the jury. We cannot disagree with this contention. There was no instruction that in order to find the defendant guilty it would be necessary to determine beyond a reasonable doubt that the money belonged to the corporation and not the partnership. According to the dictionaries "to wit" means "that is to say; namely; scilicet;—used esp. in legal language, to call attention to a more particular specification of what has preceded." We think the effect of thus naming the corporation as the owner of the property was to substantially remove from the consideration of the jury the only disputed issue in the case, namely, whether the property belonged to the corporation or the partnership. The evidence that the corporation was represented to the Commissioner of Corporations to have no assets or liabilities and that it had not engaged in business; the fact that it was not licensed as a contractor until after the check transactions in question; the fact that there was no plan for financing the corporation nor any plan under which the interests of the partners would differ from those interests in the partnership, indicated that the corporation was only a medium or agency through which the partnership would operate. This was not a conclusion which the jury was required to reach but it would have been a reasonable conclusion under the evidence and it is one which we think would very likely have been reached but for the erroneous instruction. Although the question was one for the jury it cannot be doubted that the contention of the defendant that the business belonged to the partnership had strong support in the evidence, and if it did the controversy was one for the civil courts, where it no doubt would have remained had not Haight been in doubt as to the collectibility of a judgment.

The judgment and order are reversed.

PARKER WOOD and VALLÉE, JJ., concur.

132 Cal.App.2d 825

ANDERSEN-CARLSON MANUFACTURING COMPANY, a California corporation, Plaintiff and Respondent,

v.

FRANCHISE TAX BOARD, Defendant and Appellant.

Civ. 20559.

District Court of Appeal, Second District, Division 3, California.

May 11, 1955.

Hearing Denied July 6, 1955.

Action for refund of corporation taxes. The Superior Court, Los Angeles County, Clarence M. Hanson, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Parker Wood, J., held that where only relation between plaintiff corporation and foreign corporation had been that of debtor and creditor and foreign corporation exercised option under contract to purchase plaintiff corporation's assets in return for distribution to plaintiff corporation's stockholders of less than seven per cent of foreign corporation's stock, which gave plaintiff corporation's stockholders no control of foreign corporation, and plaintiff corporation went through dissolution, there was no reorganization, consolidation or merger within statute providing that corporation is liable for corporation tax only for months of taxable year preceding dissolution, except in case of reorganization, consolidation or merger.

Judgment affirmed.

Taxation ⟹470, 535

Where only relation between plaintiff corporation and foreign corporation had been that of debtor and creditor and foreign corporation exercised option under contract to purchase plaintiff corporation's assets in return for distribution to plaintiff corporation's stockholders of less than seven per cent of foreign corporation's stock, which gave plaintiff corporation's stockholders no control of foreign corporation, and plaintiff corporation went through dissolution, there was no reorganization, consolidation or merger within statute providing that corporation is liable for corporation tax only for months of taxable year preceding dissolution, but that there shall be no abatement or refund because of cessation of business due to reorganization, consolidation or merger. St.1949, pp. 891, 892, § 13(k)(1).

Edmund G. Brown, Atty. Gen., James E. Sabine, Asst. Atty. Gen., and Edward Sumner, Deputy Atty. Gen., for appellant.

Danielson & St. Clair, Los Angeles, for respondent.

PARKER WOOD, Justice.

In this action for a refund of taxes, defendant appeals from a judgment in favor of plaintiff.

Plaintiff corporation paid corporation taxes, under protest, for the year 1950. Plaintiff asserts that, during the first part of 1950, it sold its assets and effected a dissolution of the corporation, and therefore it is not liable for taxes except for the portion of the year prior to the dissolution. Defendant asserts that the cessation of business or corporate existence was not pursuant to a sale but was pursuant to a reorganization, consolidation or merger within the meaning of section 13(k)(1) of the Bank and Corporation Franchise Tax Act, Chapter 513, Stats.1949, pp. 891–892; effective June 4, 1949, and therefore plaintiff is liable for taxes for the whole year.

The action was tried upon a written stipulation of facts. Plaintiff, if entitled to a refund, is entitled to judgment in the sum of $4,421.13 with interest. In July, 1948, plaintiff entered into a contract with Rome Cable Corporation (referred to as "Rome"), a New York corporation qualified to do business in California. Prior to execution of the contract the stockholders of plaintiff corporation authorized its officers to execute the contract, and the commissioner of corporations issued a permit authorizing execution of the contract.

The contract, a copy of which is attached to the stipulation, recited in substance: that Rome had made a loan of $25,000 to plaintiff and agreed to advance an additional sum of $175,000 to plaintiff; when $200,000 had been advanced, plaintiff would execute its promissory note for that amount to be paid April 15, 1950; plaintiff made certain representations regarding the status of plaintiff as a California corporation, its financial condition, and title to its properties; the contract was made upon certain conditions, including ratification by the board of directors and the stockholders of plaintiff, approval by the commissioner of corporations, and an audit of the books of plaintiff; plaintiff gave Rome an option to purchase all the assets of plaintiff on or before January 15, 1950, except the sum of $2,500 (which would be retained to pay expenses of dissolution); the purchase price would be the agreement by Rome to assume and pay all liabilities of plaintiff appearing on its books, and to issue and deliver to plaintiff a certain number of shares of stock of Rome; the number of shares to be delivered by Rome would be 25,000 if the book value of plaintiff's stock, as of the date of exercise of the option, did not exceed $10 per share—but if plaintiff had a satisfactory earning capacity prior to March 31, 1949, and the option had not been exercised before that date, the number of shares would be 27,500; if the book value of plaintiff's stock, as of the date of the exercise of the option, exceeded $10 per share then the number of shares of Rome stock would be determined by the ratio between the then respective book values of the stock of Rome and of plaintiff as set forth in a table in the contract; plaintiff had the right after January 3, 1949, to repay said amounts with interest; Rome had the right, within 100 days after it received notice from plaintiff of its intention to repay the loan, to exercise the option to purchase the assets of plaintiff; plaintiff agreed that so long as any portion of the loan was unpaid, it would furnish Rome with monthly balance sheets and operating statements, and it would permit Rome's representatives to inspect its properties and books.

The stipulation of facts also stated: In September, 1949, Rome adopted a resolution requesting that plaintiff call a meeting of plaintiff's stockholders for the purpose of amending the contract to give Rome the alternative right to acquire all the stock of plaintiff (in lieu of purchasing the assets). Plaintiff rejected the request. In a letter to plaintiff, dated October 6, 1949, Rome gave notice that it elected to exercise its option to purchase the assets of plaintiff. On January 3, 1950, plaintiff transferred to Rome all its assets, except $2,500, by executing and delivering to it a grant deed conveying its real property, a bill of sale of its tangible personal property, and an assignment of all its other assets (except $2,500). On said January 3, Rome delivered to plaintiff 27,500 shares of its stock, and it executed an agreement assuming and agreeing to pay the liabilities appearing on plaintiff's books on that date. At the time of delivery of the 27,500 shares of stock, Rome had 407,975½ shares of stock outstanding which had a market value of $9.87½ per share. Plaintiff had 50,000 shares of stock outstanding which were held by 68 stockholders or groups of stockholders, and no single stockholder had more than 5½ per cent of the total outstanding shares. Plaintiff distributed pro rata the 27,500 shares (received from Rome) to the holders of its 50,000 shares. From the date of the transfer, January 3, 1950, Rome operated the plant it acquired from plaintiff. There was no basic change in personnel, and the president of plaintiff was employed by Rome as general manager in charge of operations of the plant. On March 15, 1950, plaintiff filed with the secretary of state a certificate of winding up and dissolution of plaintiff corporation.

Section 13(k)(1) of the Bank and Corporation Franchise Tax Act, Chapter 513, Stats.1949, pp. 891–892, provides that: "Any bank or corporation which is dissolved * * * during any taxable year shall pay a tax hereunder only for the months of such taxable year which precede the effective date of such dissolution * * * provided further, that the taxes levied under this act shall not be subject to abatement or refund because of the cessation of business or corporate existence of any bank or corporation pursuant to a reorganization, consolidation, or merger. * * *"

Appellant contends, as above stated, that the transaction herein was a reorganization, consolidation, or merger within the meaning of said section 13(k)(1). It argues, in effect, that there was no substantial change in the business operations and interests, since the plant was operated under the management of the former president of plaintiff, with no basic change in personnel. It argues further that the stockholders of plaintiff and Rome retained their respective interests in the combined assets of the two corporations in the same proportions as existed prior to the dissolution of plaintiff. Appellant relies upon the case of San Joaquin Ginning Co. v. McColgan, 20 Cal. 2d 254, 125 P.2d 36, wherein it was held that plaintiff was not entitled to a refund of taxes for the portion of the year after the dissolution. The facts therein are distinguishable from the facts in the present case. In that case the plaintiff corporation was a subsidiary of another corporation which owned all the stock of that plaintiff; the parent corporation elected to dissolve the plaintiff corporation pursuant to an agreed plan of liquidation; plaintiff therein filed a certificate of dissolution and, after payment of its debts, delivered its property and assets to the parent corporation, and the stock of plaintiff corporation was cancelled; thereafter the parent corporation used the property, received from plaintiff, in conducting the same business operations formerly conducted by plaintiff. It was stated therein, 20 Cal.2d at page 263, 125 P.2d at page 41: "The same interests were represented in fact, if not in form, by the same stockholders before and after the transfer. Before the transfer and dissolution the stockholders of the parent corporation owned their interest in the subsidiary through the parent's holding of all the stock of the subsidiary. After the transfer their interest continued in the same measure as before through the direct ownership by the parent of the subsidiary's properties. No change of interest can be said to have occurred to warrant the conclusion that a reorganization within the language of the definition had not taken place." In the present case, plaintiff was not a subsidiary of Rome. It does not appear that Rome owned any of plaintiff's stock or that plaintiff owned any of Rome's stock. The relationship of debtor and creditor existed between plaintiff and Rome. In 1948, about one and one-half years before the dissolution, plaintiff corporation and Rome entered into a contract regarding loans of money by Rome to plaintiff, and the contract included a provision that plaintiff corporation thereby gave Rome an option to purchase all the assets of plaintiff. The agreement provided that the purchase price would be the agreement by Rome to pay the liabilities of plaintiff and to deliver a certain number of shares of Rome stock to plaintiff. When Rome exercised the option to purchase, about one and one-fourth years after the contract was made, plaintiff became legally bound to sell and transfer the assets to Rome as provided in the contract. The assets were transferred to Rome, and Rome delivered 27,500 shares of its stock to plaintiff. After dissolution, Rome owned all the assets formerly owned by plaintiff; and the 68 stockholders or groups of stockholders who formerly owned all of plaintiff's 50,000 shares of stock became owners of 27,500 shares of Rome's 407,975½ shares of stock, or less than 7 per cent of Rome's stock. It thus appears that the stockholders who formerly had full control of the assets of plaintiff corporation did not have any control of the assets after dissolution, except insofar as their votes as owners of approximately 7 per cent of Rome's stock might indirectly affect such assets. After the dissolution, Rome operated the plant it acquired from plaintiff, with no basic change in personnel. Although the former president of plaintiff was employed by Rome as general manager of operations of that plant, it does not appear that he had any authority with respect to policy-making matters, or that he had any authority other than an employee. It thus appears that the facts in the present case are quite different from the facts in the San Joaquin case upon which appellant relies. There is nothing in the stipulated facts herein which would justify a conclusion that the contract made between the two corporations, more than a year before the dissolution, was not a bona fide contract providing for the outright sale of plaintiff's assets. As a result of the transfer of assets and the dissolution, there was a substantial change in the business operations and the interests involved. As above shown, Rome controlled and operated the business; and the former stockholders of plaintiff, who formerly had full control of plaintiff's business, had only a 7 per cent interest in the Rome business and in practical effect had no control of the business. Under the facts here, the implied conclusion of the trial judge that there was no reorganization or consolidation or merger, within the meaning of said section 13(k)(1), was correct.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

Hearing denied; TRAYNOR, J., dissenting.

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132 Cal.App.2d 871

Herbert JOHNSON and Elphania Johnson, Plaintiffs and Appellants,

v.

James R. FASSETT and William Wong, Defendants and Respondents.

No. 16277.

District Court of Appeal, First District, Division 2, California.

May 16, 1955.

Malpractice action. The Superior Court, Monterey County, H. G. Jorgenson, J., entered judgment for defendants and plaintiffs appealed. The District Court of Appeal, Kaufman, J., held that action of trial court in failing to grant plaintiffs' motion for continuance on ground of unavailability of its only expert medical witness, was not abuse of discretion, where there was nothing in record to show that such witness would have been qualified as expert, that such witness had agreed to testify in case, or that his testimony, if offered, would be either relevant or material to issues involved.

Judgment affirmed.

1. Continuance 🔑46(4)

Party seeking continuance must make showing of what he expects to prove by virtue of obtaining such continuance. West's Ann.Code Civ.Proc. § 595.

2. Appeal and Error 🔑966(1)

Continuance 🔑7

Application for continuance is addressed to sound discretion of trial court, and its decision will not be reversed unless abuse of discretion is clearly shown. West's Ann.Code Civ.Proc. § 595.

3. Continuance 🔑48

In malpractice action, action of trial court in failing to grant plaintiffs' motion for continuance on ground of unavailability of its only expert medical witness was not abuse of discretion, where there was nothing in record to show that such witness would have been qualified as expert, that such witness had agreed to testify in case, or that his testimony, if offered, would be either relevant or material to issues involved. West's Ann.Code Civ.Proc. § 595.

Hugh Wesley Goodwin, Fresno, for appellant.

Lucas, Wyckoff & Miller, Santa Cruz, for respondent James R. Fassett.

Noland, Lawson & Hamerly, Salinas, for respondent William Wong.

KAUFMAN, Justice.

This is an appeal from a judgment in favor of defendants Dr. James R. Fassett and Dr. William Wong in a malpractice suit brought by Herbert and Elphania Johnson, husband and wife.

The sole ground of the appeal is an alleged abuse of discretion by the trial court in failing to grant appellants' motion for a continuance on Monday, January 25, 1954, the date set for the trial of the case without a jury.

When the case was called, appellants' attorney, Mr. Van Pinney, stated to the court that he had been called into the case on the preceding Saturday, that he went over the file and noticed that plaintiffs' attorneys of record had corresponded with and supplied certain information to a Dr.

Erwin John Hund of Reno, Nevada. Counsel said that he attempted to reach him at his home and office in Reno over the weekend to inform him that the case had been set for trial on Monday, but was unsuccessful. He had finally contacted the doctor's wife at 7:00 a. m. the morning of the trial, and she advised him that the doctor was confined in the hospital for surgery, and that it would be a matter of 2 or 3 weeks before he could testify. Counsel stated that it would be difficult to proceed to trial in the doctor's absence, as there was a strong possibility that expert testimony would be required; that Dr. Hund was the only expert witness known to counsel who could and would appear in a trial of this nature.

Counsel for respondent then advised the court that another motion for continuance had been heard in another department of that court on the previous Friday on the ground that Elphania Johnson, one of the plaintiffs, was too ill to attend court and would have to be in the hospital on Monday. The motion was opposed on the ground that it was not made in good faith. Counsel at that time made a showing to the court that they had received calls from Mr. Belli's office earlier in the week requesting a continuance on the ground that Mr. Belli would be engaged in another trial on Monday. That motion was denied. Counsel also called the court's attention to the fact that the action had been pending for two years, and had been filed only a few days before the Statute of Limitations had run.

It appears from the record that plaintiff Elphania Johnson was in court and proceeded to testify immediately after the denial of the motion for a continuance.

No affidavit was offered by appellants' counsel, and no showing was even made that Dr. Hund had agreed to testify in this case. Although in their brief appellants state that Dr. Hund was to be their expert medical witness and their only medical witness, and that it was through him that they were going to establish their allegations of malpractice, the record does not substantiate these statements. Counsel at no time stated to the court that this doctor had consented to appear in the case, nor did he produce any written communication from the doctor, although the case had been pending two years.

[1] Appellant says that although the trial court heard arguments on the motion, the record shows no contention to the effect that the testimony of Dr. Hund was either irrelevant or immaterial. There was no need for respondents to argue this point, since appellants' counsel made no showing of what he expected to prove. This is necessary under all of the authorities. Connor v. Jackson, 94 Cal.App.2d 462, 210 P.2d 897.

Appellants admit due diligence must be exercised to secure the presence of necessary witnesses, but say that the facts indicate that Dr. Hund planned to attend the trial and was prevented from doing so because of his illness which could not be reasonably anticipated. However, the record, as noted above, does not show that Dr. Hund planned to attend the trial. There is nothing in the record to show that this doctor would have been qualified as an expert medical witness as there was no showing that he was acquainted with the standard of practice of other physicians in the area involved.

Appellants admit that the courts generally apply a strict rule that such motions must be supported by affidavits, but that in certain situations this rule may be relaxed, citing Winkie v. Turlock Irr. Dist., 24 Cal. App.2d 1, 6, 74 P.2d 302; Bassi v. Walden, 64 Cal.App. 764, 222 P. 866. In the first case it was held that the trial court did not abuse its discretion in granting a continuance when no affidavits were filed in support of the motion, and in the second case, that the court did not err in refusing a continuance. In the latter case it was said, quoting Civil Code of Proc. § 595, that "A motion to postpone a trial on the ground of the absence of evidence can only be made upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it." And, see Connor v. Jackson, supra; Jacks v. Buell, 47 Cal. 162.

[2, 3] An application for a continuance is addressed to the sound discretion of the

trial court, and its decision will not be reversed unless an abuse of discretion is clearly shown. Slaughter v. Zimman, 105 Cal.App.2d 623, 234 P.2d 94. It cannot be seriously contended that the court abused its discretion under the circumstances shown herein.

In view of the foregoing the judgment must be affirmed.

Judgment affirmed.

NOURSE, P. J., and DRAPER, J. pro tem., concur.

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132 Cal.App.2d 794

Ruth CROFOOT, Plaintiff and Appellant,
v.
E. J. CROFOOT, Defendant and Respondent.
Civ. 8561.

District Court of Appeal, Third District,
California.
May 9, 1955.

Action by wife against husband for separate maintenance, for decree setting aside property settlement, and for money loaned. The Superior Court, Sacramento County, John Quincy Brown, J., entered judgment adverse to wife, and wife appealed. The District Court of Appeal, Schottky, J., held that, where court tried special defense, which did not constitute bar to third or fourth cause of action, and decision on such special defense was in favor of defendant, judgment rendered upon such decision was premature.

Appeal dismissed with directions.

1. Appeal and Error 🔑337(2)

Where judgment, which was based upon trial court's legal conclusion that plaintiff was barred from prosecuting separate maintenance action in view of fact that she had obtained Mexican divorce decree, was premature, the District Court of Appeal would not consider whether Mexican divorce decree was invalid under the Uniform Divorce Recognition Law of 1949. West's Ann.Civ.Code, §§ 150.1–150.4.

2. Judgment 🔑203, 217

There can be but one final judgment in an action, and such "final judgment" is one which, in effect, ends the action in court in which it was entered and finally determines rights of parties in relation to the matter in controversy. West's Ann. Code Civ.Proc. § 597.

See publication Words and Phrases, for other judicial constructions and definitions of "Final Judgment".

3. Judgment 🔑11

Only when decision on special defense is that entire action is barred by a prior judgment or estoppel is court empowered to render judgment for defendant who has pleaded the special defense. West's Ann. Code Civ.Proc. § 597.

4. Appeal and Error 🔑337(2)
Judgment 🔑210
Trial 🔑388(1)

Where court tried special defense, which did not constitute bar to third or fourth cause of action, and decision on such special defense was in favor of defendant, judgment rendered upon such decision was premature, and appeal therefrom would be dismissed, and proper procedure would have been to enter minute order to effect of decision, proceed to trial on the third and fourth causes of action, make findings of fact and conclusions of law on all issues, and render judgment accordingly. West's Ann.Code Civ.Proc. § 597.

5. Appeal and Error 🔑21
Judgment 🔑203

Parties litigant cannot confer appellate jurisdiction on an appellate tribunal, and rule that there can be but one final judgment in a case cannot be disregarded.

Pierce & Brown, Sacramento, Kenny & Morris, Los Angeles, for appellant.

Devlin, Diepenbrock & Wulff, Sacramento, for respondent.

SCHOTTKY, Justice.

Plaintiff commenced an action against defendant, alleging four causes of action. The first alleged extreme cruelty; the second, adultery; the third, fraud in procuring a property settlement agreement; and the fourth, that the sum of $39,922.05 was loaned by plaintiff to defendant. Plaintiff prayed for separate maintenance, for a decree setting aside the property settlement, and for judgment for the amount of money loaned.

In his answer defendant admitted that he and plaintiff were married on September 19, 1947, but alleged that this marriage was dissolved on November 2, 1950, by a decree of divorce granted by a court in Juarez, Mexico, in a proceeding initiated therein on the same day by the plaintiff. Defendant also alleged that on the said day plaintiff telegraphed him as follows: "Congratulations. You are now a free man including your name," signing it Ruth Mayborn, her name previous to her marriage to defendant. Defendant also alleged that in reliance upon the Juarez decree and the telegram he married another woman on November 4, 1950, two days later. The allegations of cruelty and adultery were denied as were those of fraud in procurement of the property settlement agreement and the lending of money.

At the outset of the trial, by agreement of the parties, the court proceeded to consider the special defense of the bar raised by the Juarez decree. Evidence was received relative to that issue only and after the taking of such evidence had been concluded the record shows the following:

"Mr. Diepenbrock: Then I think perhaps we should argue the legal phases of the case as presented by the evidence now in.

"The Court: There is no further evidence or testimony to be taken on this single issue?

"Mr. Kenny: On the issue of existing matrimonial status—that's correct.

"Mr. Diepenbrock: It stands rested on that phase?

"Mr. Kenny: That's right. Mr. Pierce is suggesting that out of an excess of caution, that we have a second defense to fall back to, a second trench; that is to the defense—that is the question of fraud in the procurement of the Mexican divorce. But that, I think, is not what we are working on now. We are now going on the naked legal question of whether a Mexican divorce obtained at a time when both parties were domiciled within the State of California can be recognized by the courts of this state for any purpose. Mr. Pierce's suggestion, that comes under—We are dealing now with one (a) and that would be—

"The Court: That would be one (b).

"Mr. Pierce: We don't want to stipulate away our claim of the fraudulent inducement.

"The Court: The court will understand, as Mr. Kenny states, this is really issue one (a), and the (b) part would be the second trench, as he calls it, if you have to be driven out of the front lines."

Thereafter, the court, without any further testimony being received relative to the two remaining causes of action which would not be determined by the ruling as to the validity of the Juarez divorce decree, and without any disposition of those two causes of action, made findings that plaintiff and defendant were husband and wife prior to November 2, 1950, and that they had separated prior to that date; that defendant is now a resident of Sacramento, California, and has been since September, 1949; that plaintiff lived in an apartment in Los Angeles, California, for a period of thirteen months prior to November 2, 1950; that she had previously lived in Santa Monica, California, and before that in Texas, and that she stayed in Florida for a month or two on occasions, and before coming to California she lived in Washington, D. C., where she had an apartment which she maintained until November, 1951; that on November 2, 1950, plaintiff went from Los Angeles, California, to Mexico where she remained for about thirty minutes, following which she returned to Los Angeles, California; and that while in Mexico plaintiff became party plaintiff in a suit for absolute divorce against defendant E. J. Crofoot. In its conclusions of law the court stated that it was unnecessary to adjudicate the validity of the Mexican divorce decree because as between plaintiff and defendant it had no lesser effect than would flow from a completely valid decree; and that plaintiff is barred from prosecuting the separate maintenance action and all other rights which flow from the marital status because the Mexican divorce decree has the same force and effect as though it were completely valid.

Judgment in the action was entered in accordance with said findings and conclusions, and plaintiff has appealed from said judgment.

[1] In her briefs appellant argues that the Mexican divorce decree was invalid under the Uniform Divorce Recognition Law of 1949, Civ.Code, §§ 150.1–150.4, and that the trial court erred in holding the appellant was estopped from contesting the validity of said divorce decree. Respondent in reply argues that the judgment is supported both by the evidence and the law. Because, for the reasons hereinafter set forth, we have concluded that the judgment was premature and that the appeal must be dismissed, we shall not discuss the arguments set forth in the briefs.

[2] The rule has long been well settled that there can be but one final judgment in an action. As was said in de Vally v. Kendall de Vally Operalogue Co., Ltd., 220 Cal. 742, at page 745, 32 P.2d 638, at page 639:

"Although the matter is not mentioned by counsel for either side, it appears that the court should not have given a judgment herein until the final disposition of the entire cause. The law contemplates but one final judgment in a cause. As stated in the case of Nolan v. Smith, 137 Cal. 360, 361, 70 P. 166, quoting from Stockton, etc., Works v. Glen's Falls Ins. Co., 98 Cal. [557] 577, 33 P. 633: 'There can be but one final judgment in an action, and that is one which, in effect, ends the suit in the court in which it was entered, and finally determines the rights of the parties in relation to the matter in controversy. (Citing authority.)' See, also, Doudell v. Shoo, 159 Cal. 448, 114 P. 579; Middleton v. Finney, 214 Cal. 523, 6 P.2d 938 [78 A.L.R. 1104], and Potvin v. Pacific Greyhound Lines, Inc., 130 Cal.App. 510, 512, 20 P.2d 129.

"The judgment being premature, the appeal must be dismissed, and it is so ordered."

After the briefs had been filed in the instant appeal and the cause had been argued orally before us, we ordered further oral argument on the finality and appealability of the judgment appealed from. Upon said argument counsel for both appellant and respondent appeared to be of the opinion that said judgment was an appealable judgment by reason of section 597 of the Code of Civil Procedure, which, so far as here applicable, reads as follows:

"When the answer pleads that the action is barred by the statute of limitations, or by a prior judgment, or that another action is pending upon the same cause of action, or sets up any other defense not involving the merits of the plaintiff's cause of action but constituting a bar or ground of abatement to the prosecution thereof, the court may, upon the motion of either party, proceed to the trial of such special defense or defenses before the trial of any other issue in the case, and if the decision of the court, or the verdict of the jury, upon any special defense so tried (other than the defense of another action pending) is in favor of the defendant pleading the same, judgment for such defendant shall thereupon be entered and no trial of other issues in the action shall be had unless such judgment shall be reversed on appeal or otherwise set aside or vacated".

[3–5] We think it is clear from the language of the section that it is only when the decision on the special defense is that the entire action is barred by a prior judgment or by estoppel that the court is empowered to render judgment for the defendant who has pleaded the special defense.

Where, as in the instant case, the court proceeded to try the special defense, which did not constitute a bar to the third cause of action, which was one to set aside a property settlement agreement, or to the fourth cause of action, which was for money loaned, and the decision on such special defense was in favor of defendant, the proper procedure was to enter a minute order to that effect, proceed to trial on the third and fourth causes of action, make findings of fact and conclusions of law on all issues and render judgment accordingly. There would then be a final judgment disposing of the entire cause, and the decision of the trial court on the special defense and all other rulings could be reviewed on appeal from the judgment.

In the very recent case of Kennedy v. Kennedy, 130 Cal.App.2d 785, 279 P.2d 759, 760, plaintiff's complaint contained two causes of action, one for annulment of marriage and one for divorce. The default of defendant was entered and plaintiff proceeded to trial on the count for annulment. At the conclusion of the testimony the court ruled that the evidence was insufficient for a decree of annulment and stated that plaintiff could proceed on the cause of action for divorce. The plaintiff did not desire to do so and judgment was entered denying an annulment, and plaintiff appealed from said judgment. The District Court of Appeal, in dismissing the appeal, stated:

"Plaintiff's second cause of action was not dismissed or abandoned. The action is still pending. Entry of judgment on the first cause of action was premature. There can be but one final judgment in a case. A final judgment rendered while the action is still pending and undetermined is void.

"The appeal, having been taken before entry of final judgment, is premature. de Vally v. Kendall de Vally Operalogue Co., Ltd., 220 Cal. 742, 32 P.2d 638; Provident Land Corp. v. Bartlett, 53 Cal.App.2d 383, 127 P.2d 928.

"The appeal is dismissed."

Even though both appellant and respondent appear to be desirous of having this court rule upon the correctness of the trial court's ruling on the special defense, we cannot do so. Parties litigant cannot confer appellate jurisdiction upon an appellate tribunal, and the rule that there can be but one final judgment in a case cannot be disregarded. Such final judgment must be one "'which, in effect, ends the suit in the court in which it was entered, and finally determines the rights of the parties in relation to the matter in controversy.'" de Vally v. Kendall de Vally Operalogue Co., Ltd., supra. Even though the ruling of the trial court as to the special defense to the first and second causes of action should be sustained, the third and fourth causes must still be disposed of before the rights of the parties to the action would be finally determined. Section 597 of the Code of Civil Procedure was not designed to, and cannot be construed to, permit an appeal such as the one in the instant case. Said section merely expressed what had long been the practice of our courts that where a special defense is pleaded which, if sustained, is determinative of the entire controversy, the court may enter judgment for the defendant if upon the trial of such special defense it is decided in his favor.

In view of the foregoing we conclude that the judgment entered was premature and that the appeal must be dismissed.

The appeal is dismissed with directions to the trial court to proceed in accordance with the views herein expressed.

VAN DYKE, P. J., and PEEK, J., concur.

132 Cal.App.2d 838

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Llewellyn J. DELEANEY, Defendant and Appellant.

Cr. 5268.

District Court of Appeal, Second District, Division 2, California.

May 12, 1955.

Hearing Denied June 8, 1955.

Defendant was convicted of issuing a check without sufficient funds with intent to cheat and defraud. The Superior Court, Los Angeles County, Ralph K. Pierson, J., rendered judgment, and defendant appealed. The District Court of Appeal, McComb, J., held that document which convicted defendant filed in Superior Court and which stated that defendant declared his intention to file an appeal for a new trial, rehearing or modification but which failed to state that defendant appealed or to specify any judgment or particular part thereof from which he appealed did not constitute a "notice of appeal".

Appeal dismissed.

1. Criminal Law ⟹1081

Document which convicted defendant filed in superior court and which stated that defendant declared his intention to file an appeal for a new trial, rehearing or modification but which failed to state that defendant appealed or to specify any judgment or particular part thereof from which he appealed did not constitute a "notice of appeal". Rules on Appeal, rule 1(a).

See publication Words and Phrases, for other judicial constructions and definitions of "Notice of Appeal".

2. Criminal Law ⟹1081

Where no notice of appeal from judgment of conviction had been filed, reviewing court was without jurisdiction.

◆

Robert A. Neeb, Jr., Beverly Hills, for appellant.

Edmund G. Brown, Att'y. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

Defendant entered a plea of guilty to issuing a check in the amount of $46.58 on February 20, 1954, without sufficient funds, with intent to cheat and defraud Phil Englander, Todd's Clothiers and the Bank of America National Trust & Savings Association.

After his pleas for probation and a modification of sentence were denied, he filed in the Superior Court a document, the material parts of which are as follows:

> "To the Superior Court of the State of California in and for the County of Los Angeles. Honorable Judge; Ralph K. Pierson: Department 46. In Re: People vs. Llewellyn J. Delaney. Case No. 162965.
>
> "On this date, having received a certified copy of an order denying a petition for a modification. Petitioner hereby makes known his intentions to file an appeal for a new trial, rehearing or modification upon the grounds that his constitutional rights have been abused, violated and disregarded to wit:"

This is the sole question for us to decide:

Did the foregoing document constitute a notice of appeal?

[1] *No.* An appeal from a judgment of a superior court or from a particular part thereof is taken by filing with the clerk of that court a notice of appeal therefrom. The notice shall be filed by the appellant or by his attorney and shall be sufficient if it states in substance that the appellant appeals from a specified judgment or a particular part thereof. (Rule 1(a), Rules on Appeal, 36 Cal.2d 1.) In the present case defendant has failed to meet the requirements of the foregoing rule.

The document filed in the superior court does not state that defendant appeals nor does it specify any judgment or particular part thereof from which he appeals. All that the document does is state that defendant intends to file an appeal for a *new trial,* *rehearing or modification* on the grounds that his constitutional rights have been abused, violated and disregarded.

[2] Since no notice of appeal from the judgment of guilty has been filed, this court has no jurisdiction to pass upon any matters urged as grounds for reversal. (People v. Phillips, 45 Cal. 44, 45; People v. Brown, 148 Cal. 743, 744, 84 P. 204.

The appeal is dismissed.

MOORE, P. J., and FOX, J., concur.

132 Cal.App.2d 816

Irene BALANCE, Plaintiff and Respondent,

v.

Peter J. PARLATO, Defendant and Appellant.

Civ. 16267.

District Court of Appeal, First District, Division 2, California.

May 11, 1955.

Suit by purchaser for specific performance of contract to sell realty. From adverse judgment of the Superior Court, County of Santa Clara, John D. Foley and Edwin K. Owens, Judges, the defendant appealed. The District Court of Appeal, Nourse, P. J., held that where defendant was given both written and oral notice of time of entry of order overruling his demurrer to complaint and he failed to answer, and notice was also given that on a future day his default would be taken, but he nevertheless failed to reply, his default was properly taken and resulting judgment was not open to attack on appeal.

Judgment affirmed.

1. Specific Performance 🔑114(2)

Complaint alleging that $6,500 was the "fair and reasonable value" of the property and seeking specific performance of contract to sell such property was sufficient to disclose that contract was just and reasonable.

2. Judgment 🔑106(7)

Where defendant was given both written and oral notice of time of entry of order overruling his demurrer to complaint and he failed to answer, and notice was also given that on a future day his default would be taken, but he nevertheless failed to reply, his default was properly taken and resulting judgment was not open to attack on appeal.

Robert R. Cimino, San Jose, for appellant.

Erskine, Erskine & Tulley, San Francisco, for respondent.

NOURSE, Presiding Justice.

[1] Plaintiff sued for the specific performance of a written contract whereby plaintiff agreed to purchase and defendant agreed to sell described real property for the agreed purchase price of $6,500. This sum was alleged to be the fair and reasonable value of the property. The sum was duly deposited in accordance with the contract, but defendant refused to transfer—making a demand for an increased purchase price. His demurrer to the complaint was overruled, and failing to answer, his default was taken and judgment entered as prayed.

His appeal is from the judgment, and therein he attacks the order overruling his demurrer, the order denying his motion for relief from the default and the judgment as a whole.

His criticism of the complaint is that the allegation that the consideration named in the contract is the "fair and reasonable value of the property" does not meet the rule of those cases holding that it must appear that "the contract was just and reasonable" citing, among other cases, Gomes v. Borba, 99 Cal.App.2d 38, 41, 221 P.2d 124, 126. In that case the court used the expression "just and reasonable". In others the words are "adequate and reasonable". The whole argument is based upon a play upon words. To be "fair" is to be "just";

to be "reasonable" is to be "adequate"; to be "adequate" is to be "fair" and "just". The demurrer was properly overruled.

[2] Appellant's assigned error in the denial of his motion to vacate his default is without merit. The record discloses that he was given notice—both written and oral—of the time of entry of the order overruling his demurrer. He failed to answer and notice was given that on a future day his default would be taken. He nevertheless failed to reply. His default was properly taken. The resulting judgment is not open to attack on this appeal.

Judgment affirmed.

KAUFMAN, J., and DRAPER, J., pro tem., concur.

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133 Cal.App.2d 40

Grace E. O'BRIEN and Louis J. O'Brien, Plaintiffs and Respondents,

v.

Charles E. APPLING, Defendant and Appellant.

Civ. 20618.

District Court of Appeal, Second District, Division 3, California.

May 16, 1955.

Proceeding on judgment debtor's motion to cancel and discharge judgment. The Superior Court, Los Angeles County, Ellsworth Meyer, J., denied motion, and movant appealed. The District Court of Appeal, Shinn, P. J., held that where complaint in action alleged that plaintiffs had been induced to turn over money to defendant by representations of facts and promises which defendant did not intend to keep, and defendant permitted default to be entered, the judgment entered thereon was within Bankruptcy Act provision excepting from discharge liabilities for obtaining money or property by false pretenses or false representations or provable debts created by fraud, embezzlement, misappropriation or defalcation.

Order affirmed.

1. Judgment ⇨112

Defendant, by permitting default to be entered, confessed truth of all material allegations in complaint.

2. Judgment ⇨652

Judgment by default is just as conclusive upon issues tendered by complaint as if rendered after answer filed and trial on allegations denied by answer.

3. Bankruptcy ⇨433(7)

Where complaint in action alleged that plaintiffs had been induced to turn over money to defendant by representations of fact and promises which defendant did not intend to keep, and defendant permitted default to be entered, judgment entered thereon was within Bankruptcy Act provision excepting from discharge liabilities for obtaining money or property by false pretenses or false representations. Bankr. Act, § 17, sub. a(2, 4), 11 U.S.C.A. § 35, sub. a(2, 4); West's Ann.Code Civ.Proc. § 675b.

◆

Owen J. Brady, Los Angeles, for appellant.

Edward Mosk, Hollywood, for respondents.

SHINN, Presiding Justice.

Grace E. O'Brien and Louis J. O'Brien, plaintiffs and respondents, obtained a default judgment against defendant Charles E. Appling in fraud. Subsequently, defendant was adjudged bankrupt and was discharged from his provable debts. Defendant then made a motion to cancel and discharge of record the judgment, based upon section 675b, Code of Civil Procedure, which motion was denied. Defendant appeals from the order denying the motion to discharge on the ground that the judgment was dischargeable by the subsequent bankruptcy.

The first cause of action of the complaint was for money had and received by defendant in the amount of $3,517.17. This cause of action was dismissed by plaintiffs. Judgment was rendered on the second cause of action in which it was alleged that the plaintiffs owned certain property and contracted with the defendant, a building contractor, to build a house thereon; plaintiffs agreed to turn over certain moneys to defendant and the latter agreed to pay all bills for labor and material promptly; the plaintiffs turned over to the defendant the sum of $3,517.17, solely in reliance upon the representations and promises of the defendant that it would be used for a particular purpose, i. e., for the "sole and exclusive purpose of paying * * * artisans and building supply organizations * * * supplying materials and labor" in the construction of the home, that defendant made such representations and promises with no intention of keeping same; the money was used for defendant's own purposes and defendant refused to use it to pay any of said bills for labor or material. It was further alleged that the plaintiffs had to satisfy mechanics liens against the property in the alleged amount, due to defendant's failure to discharge said obligations.

Appellant contends that this debt and judgment therefor do not come within the exceptions of Bankruptcy Act, § 17, sub. a (2, 4), 11 U.S.C.A. § 35, sub. a(2, 4), which provide that "(2) * * * liabilities for obtaining money or property by false pretenses or false representations * * *" or provable debts "(4) * * * created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity * * *." are not dischargeable by subsequent bankruptcy.

[1-3] The questions are whether the default judgment implies a finding that the former judgment was for a debt incurred by defendant's obtaining money from plaintiffs by false pretenses or representations and whether the allegations of the complaint were sufficient to charge that the money was so obtained. It was sufficiently alleged that the plaintiffs were induced to turn money over to the defendant by representations of facts and promises which he did not intend to keep. The allegations were not as specific as they might have been but no objection was raised and defects of form did not impair the essential substance of the allegations. Appellant, by permitting his default to be entered, confessed the truth of all the material allegations in the complaint, and the judgment by default is just as conclusive upon the issues tendered by the complaint as if rendered after answer filed and trial on allegations denied by the answer. Fitzgerald v. Herzer, 78 Cal.App.2d 127, 131, 177 P.2d 364; Wilshire Mortgage Corp. v. O. A. Graybeal Co., 41 Cal. App.2d 1, 5, 105 P.2d 996; Maddux v. County Bank, 129 Cal. 665, 667, 668, 62 P. 264; Harlan v. Smith, 6 Cal. 173, 174; Rowe v. Table Mountain Water Co., 10 Cal. 441, 444; Title Insurance & Trust Co. v. King Land & Improvement Co., 162 Cal. 44, 46, 120 P. 1066. The implied finding that defendant obtained the money by false representations and promises which he did not intend to keep brings the case within the above exception of the Bankruptcy Act with respect to liability for money obtained by such representations. This exception has been applied where money has been obtained in reliance on false representations. Crespi & Co. v. Giffen, 132 Cal. App. 526, 530, 23 P.2d 47; Wilson v. Walters, 19 Cal.2d 111, 120, 119 P.2d 340; Mathewson v. Naylor, 18 Cal.App.2d 741, 64 P.2d 979.

The cases of Young v. Clark, 7 Cal.App. 194, 93 P. 1056; Royal Indemnity Co. v. Sherman, 124 Cal.App.2d 512, 269 P.2d 123, and other cases cited by appellant, are not in point. They dealt with a separate provision of the Act relating to embezzlement, misappropriation, etc., by one acting in a fiduciary capacity.

Inasmuch as we must presume, in support of the court's order, that the trial court construed the judgment in the case as one based upon an implied finding that defendant obtained the money by false representation, no cause exists for reversing the order. We cannot see that the court could properly have granted appellant's motion.

The order is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

133 Cal.App.2d 123

Elsie C. FRANK, Plaintiff and Appellant,

v.

J. C. PENNEY COMPANY, Inc., Defendant and Respondent.

Civ. 8553.

District Court of Appeal, Third District, California.

May 18, 1955.

Action by woman shopper for injuries sustained in a fall in defendant's store. From a judgment of nonsuit by Superior Court, Siskiyou County, Claude E. Gillis, J., plaintiff appealed. The District Court of Appeal, Van Dyke, P. J., held that evidence did not establish that defendant had caused defective condition on floor or had actual or constructive knowledge of dangerous condition, arising from presence of oil on floor, which caused plaintiff's injuries for sufficient length of time to make repairs.

Judgment affirmed.

1. Negligence ⇨32(1)

The owner or occupier of business premises owes duty to exercise reasonable care in keeping premises reasonably safe for invitees.

2. Negligence ⇨48

To impose liability for injuries suffered by an invitee due to defective condition of business premises, owner or occupier must have had either actual or constructive knowledge of, or been able, by exercise of ordinary care, to discover such condition, which, if known to him, he should have realized involved unreasonable risk to invitees on premises.

3. Negligence ⇨134(2)

While invitee, suing for injuries caused by defective condition on business premises, must prove the condition existed long enough for owner or occupier of premises to have discovered and remedied it, by using reasonable care before accident, such fact may be proved by circumstantial, as well as direct, evidence.

4. Negligence ⇨134(5, 7)

In action for injuries to shopper falling in defendant's store as result of dangerous condition arising from presence of oil on floor, evidence did not establish that defendant had caused such condition or had actual or constructive knowledge of the condition for sufficient length of time to make repairs.

Barr & Hammond, Yreka, for appellant.

Tebbe & Correia, Yreka, for respondent.

VAN DYKE, Presiding Justice.

Plaintiff-appellant brought this action to recover damages based upon allegations that defendant-respondent had been negligent in the care of the floor in its store in Yreka and that as a result appellant slipped thereon, fell, and was injured. The trial court granted nonsuit.

Appellant as a business invitee had gone to respondent's store. After she had finished her shopping and was about to leave the store she crossed an open area to a point where, as she stepped on her right foot, the foot slipped forward. She was wearing an oxford type shoe with a military heel. Her description of the incident indicates that the slippage was sudden and that her foot as it came to the floor found no traction to hold it. The summary of her testimony is as follows: My right foot slipped and I fell completely down on my right side; the slip was away from me and I struck on my right side, my hip and right shoulder; in the immediate vicinity of where I fell I noted oil over an area of floor about the size of a large plate; the floor appeared to be wet over that area and the floor appeared to be worn over an area about 3 or 4 feet in diameter, the wet spot being on the edge of the worn area; I do not know how deep the worn area was compared with the unworn surface of the floor. It was more than the thickness of folded paper, but I do not know how much it was worn; it was worn lower than the surrounding area. Appellant's husband, Francis L. Frank, testified that there was a slight depression in the floor and that the depressed area was somewhat darker than the general floor surface.

[1-3] This Court had occasion recently to discuss the rule of law governing the duty of an invitor toward his business invitees in the case of Hale v. Safeway Stores, Inc., 129 Cal.App.2d 124, 276 P.2d 118, 121:

> "'"* * * the owner or occupier of business premises owes to invitees a duty to exercise reasonable care in keeping the premises reasonably safe for such invitees. Tuttle v. Crawford, 8 Cal.2d 126, 63 P.2d 1128; * * *. To impose liability for injuries suffered by an invitee due to the defective condition of the premises, the owner or occupier 'must have either actual or constructive knowledge of the dangerous condition or have been able by the exercise of ordinary care to discover the condition, which if known to him, he should realize as involving an unreasonable risk to invitees on his premises. His negligence in such cases is founded upon his failure to exercise ordinary care in remedying the defect after he has discovered it.' Hatfield v. Levy Brothers, 18 Cal.2d 798, 806, 117 P.2d 841, 845."'
>
> "In Louie v. Hagstrom's Food Stores, Inc., 81 Cal.App.2d 601, at page 607, 184 P.2d 708, at page 712, the court stated:
>
> "'The true rule is that, while plaintiff must prove that the defective condition existed long enough so that by the use of reasonable care it should have been discovered and remedied, that fact, like other facts, may be proved by circumstantial as well as by direct evidence. It is generally a question of fact for the jury as to whether, under all the circumstances, the defective condition existed long enough so that a reasonable man exercising reasonable care would have discovered it.'"

In Girvetz v. Boys' Market, Inc., 91 Cal.App.2d 827, 206 P.2d 6, 9, the facts closely approximated those here testified to. In that case the plaintiff had slipped on a banana peel in a vegetable store and the only evidence as to how long the peel had been there was the testimony that some one had seen it there a minute and a half before the plaintiff fell. A directed verdict was granted and in affirming the judgment the appellate court said:

> "Viewing the case, as we must, in the light most favorable to plaintiff, it appears that her fall was the result of a dangerous condition existing on the floor of defendant's market with approximately fifteen employees within a radius of fifteen feet from the scene of the accident, but that the circumstances are such as to afford no basis for an inference that the condition was created by the proprietor or his employees. The question is whether, in the circumstances, it can be inferred that the dangerous condition had existed for such a length of time as to justify charging the defendant with lack of ordinary care in failing to discover and remedy it before the plaintiff was injured."

[4] In this case we think the proof was sufficient as to there being a dangerous and defective condition of the floor of respondent's store and that appellant slipped and fell and was injured by reason of that defective condition. Appellant's testimony that she suddenly and violently slipped when her right foot, as she walked, touched the floor; that

in the immediate vicinity of where this slip occurred she saw oil on the floor, and in a slightly depressed area of the floor, is sufficient proof of the defective condition of the floor and the causal connection of that condition with appellant's injury. But we are unable from the evidence to find any support for the further and necessary inference that this condition was caused by an act of respondent, or that respondent had actual or constructive knowledge of it for a sufficient length of time to make repairs. Appellant in her brief evaluates the testimony as follows: "It may reasonably and logically be inferred from the evidence that an indentation existed in the floor of Respondent's premises, caused by constant wear; that Respondent allowed oil or other wet substances to accumulate therein; that this condition existed for such a period of time that by the use of reasonable care on the part of Respondent it could and should have been discovered and remedied, and that these acts and failure to act constituted negligence on the part of Respondent." We are unable to agree with appellant that the evidence showed an accumulation in the depression, of oil or other wet substances, in the sense of passage of time or slow aggregation in the depression of such substances. The evidence will not support such inferences. There is no such description of the oil seen by appellant as would indicate that it had accumulated in the depression over a long period of time and there is nothing in the nature of the slight depression she described which would afford support for an inference that it had been collecting oil for any period of time. Indeed, there was no proof that oil had ever been used on the floor in any way by respondent or its employee. The same may be said of "wet substances", whatever they were, which she saw and which she did not describe. There is nothing to show that oil or any wet substance had been on the floor for any length of time at all. We are not permitted under the rules to indulge in pure speculation on such matters. It was for plaintiff to prove her case. Giving to the nonsuit rule as so frequently stated its full scope, Blumberg v. M. & T. Incorporated, 34 Cal.2d 226, 209 P.2d 1, we are constrained to hold that nonsuit was proper.

The judgment is affirmed.

PEEK and SCHOTTKY, JJ., concur.

132 Cal.App.2d 850

In the Matter of the ESTATE of Laura S. PHELPS, deceased.

COMBS & HOOSE, Petitioners-Appellants,

and

W. Erland Phelps, Heir-at-Law-Appellant,

v.

SECURITY–FIRST NATIONAL BANK OF LOS ANGELES,

and

Harrison S. Phelps, Contestants-Respondents.

Civ. 20555.

District Court of Appeal, Second District, Division 3, California.

May 12, 1955.

Attorneys for testamentary trust beneficiary petitioned for allowance of fees for obtaining partial distribution of estate to trustee. The Superior Court, Los Angeles County, Stanley Mosk, J., denied request and attorneys and beneficiary appealed. The District Court of Appeal, Shinn, P. J., held that where the partial distribution did not benefit and enhance corpus of estate, attorneys were not entitled to compensation from estate.

Order affirmed.

1. Executors and Administrators 🔑456(2)

Doctrine which permits decedent's estate to be charged with expenses of litigation should be applied with caution and its operation limited to those cases in which services performed have not only been distinctly beneficial to estate, but became necessary either by reason of laches, negligence, or fraud of legal representatives of estate.

2. Executors and Administrators ⚷314(13)

Where attorneys for trust beneficiary of estate petitioned and obtained order of partial distribution of estate to trustee, which order was opposed by representatives, and where there was no showing that such action thereby benefited and enhanced corpus of estate, attorneys were not entitled to compensation from estate. Probate Code, §§ 911, 1000.

3. Courts ⚷104

Where an appellant has failed to show that trial court was wrong, it is not incumbent upon reviewing court to engage in a dissertation upon the law for purpose of demonstrating that court was right

* * *

Combs & Hoose, Beverly Hills, for appellants.

Youngman & Leopold, A. Frederic Leopold, Los Angeles, for respondents.

SHINN, Presiding Justice.

The appellants Lee Combs and Harned Pettus Hoose are attorneys at law and W. Erland Phelps is a beneficiary of a trust set up in the will of his mother, Laura S. Phelps, which gives him a life estate in one-half the estate of the testatrix. The attorneys filed on behalf of Mr. Phelps a "Petition for allowance of income from estate prior to distribution to trustee, or in the absence of the allowance of said petition for partial distribution to the trustee." It was alleged that Mr. Phelps had been receiving from his mother during her lifetime $500 per month and $200 additional for services, and, inferentially, that he had received nothing from the estate between January, 1953, when his mother died, and, October 1953 when he filed a petition captioned as above. It was not alleged that the executors were neglecting their duties in the administration of the estate. Opposition to the petition was filed and after a hearing the court distributed $20,000 to a brother of the petitioner and $20,000 to the trust. Thereafter appellants filed a petition for an allowance of $2,000 as attorneys' fees for services in connection with the above-mentioned petition on behalf of Mr. Phelps. The request for attorneys' fees was denied and this appeal follows.

The appellants say in their brief: "The issues to be determined on this appeal are as follows:

"(a) When a will duly admitted to probate provides for the withholding of one-half of the estate in a trust to maintain one of two beneficiaries thereof; when the executors refuse to distribute said estate although the estate is in condition to be distributed and they are able to do so; and when the estate is ready and able to set up the trust and commence the maintenance provisions: is the attorney for the trust beneficiary entitled to compensation from the estate under the provisions of Section 911 of the Probate Code and under the law, where he by petition duly prepared and heard in court compels the executors to make the distribution to the trustees in order to carry out the maintenance provisions of the trust over their objection and against their will, and where that attorney prepares and obtains the signature of court upon the order of partial distribution to accomplish that purpose and thereby benefits the estate and enhances the corpus?

"(b) Is that attorney entitled to such compensation from the estate as a matter of law where the facts in relation to the matter are uncontradicted and not in issue?"

If it follows from the described services that the attorney "thereby benefits the estate and enhances the corpus" and that his services were made necessary by reason of gross neglect of duty on the part of the executors, we would be inclined to give an affirmative answer to the questions. If the services were rendered at the instance of the trust beneficiary and he alone is benefited the answer should be a negative. Therefore, the question is whether upon the stated facts the services of the attorneys did benefit the estate and enhance the corpus. Admittedly there was no preservation or recovery of assets; the value of the estate of Laura S. Phelps was not enhanced. Appellants in their briefs do not make clear to us in what respect they claim the estate was benefited. They say "Obviously this is a service rendered for the benefit of the estate and we don't believe citation of authority from outside jurisdictions or anywhere else, is necessary to establish this point." We doubt that any such cases can be found. Appellants cite cases from other jurisdictions in support of the rule that where the services of the attorney employed by some of the heirs or legatees are beneficial to the estate as a whole, the court may, if the facts justify it, allow out of the estate a reasonable fee for such services. They might have cited In re Estate of Reade, 31 Cal.2d 669, 191 P.2d 745, 746, in which it was said in sustaining an allowance for attorney's fees: "Compensation for the services of an attorney must be paid by the person employing him, in the absence of a special agreement, special statutory provision, or exceptional circumstances. The latter exist in certain actions in equity. For example, a plaintiff who has succeeded in protecting, preserving or increasing a fund for the benefit of himself and others may be awarded compensation from the fund for the services of his attorney. This is to compel those for whose benefit the action or proceeding was taken to bear their share of the expenses of the litigation; and this rule is equitable and just. Winslow v. Harold G. Ferguson Corp., 25 Cal.2d 274, 153 P.2d 714; In re Estate of Marre, 18 Cal.2d 191, 114 P.2d 591; Farmers & Merchants National Bank v. Peterson, 5 Cal.2d 601, 607, 55 P.2d 867; Miller v. Kehoe, 107 Cal. 340, 40 P. 485; 14 Am. Jur. 47; see, also, notes 49 A.L.R. 1149, 107 A.L.R. 749."

[1] We agree with the statement of the Supreme Court of Michigan in Becht v. Miller, 279 Mich. 629, 273 N.W. 294, 298: "A doctrine which permits a decedent's estate to be so charged, should, however, in our opinion, be applied with caution and its operation limited to those cases in which the services performed have not only been distinctly beneficial to the estate, but became necessary either by reason of laches, negligence, or fraud of the legal representative of the estate." So even if the services of appellants had been of some benefit to the estate their uninvited intervention for the sole purpose of speeding up the administration would not have entitled them to be compensated from estate funds. Interested parties may petition for a partial distribution, § 1000, Probate Code, and an executor or administrator who is carrying on the administration in a normal course is not guilty of neglect of duty in failing to petition promptly for partial distribution to every interested person who may be entitled to it. And, of course, where such person petitions solely in his own interest he must pay his own attorneys. Compensation from estate funds is allowed for necessary services in preserving or enhancing assets of an estate, not for taking money out of it.

[2, 3] Appellants, of course, have the burden of showing that the order appealed from was erroneous. They have failed to bring themselves within any rule which would have justified the trial court in granting their petition. Where an appellant has failed to show that the trial court was wrong it is not incumbent upon a reviewing court to engage in a dissertation upon the law for the purpose of demonstrating that the court was right. However, anyone wishing to read law on the subject will find support for the action of the trial court in In re Estate of Marre, 18 Cal.2d 191, 114 P.2d 591, In re Stuttmeister, 75 Cal. 346, 17 P. 223, In re Estate of Feldman, 78 Cal.App.2d 778, 178 P.2d 498, and in annotations found in 79 A.L.R. 521 and 142 A.R.L. 1459. These authorities are cited by the respondent but are ignored in the reply brief of the appellants. See, also, In re Estate of Witting, 130 Cal.App. 2d 521, 279 P.2d 180.

Appellants claim to find in section 911 of the Probate Code[1] authority for the allowance of attorney's fees under the equitable rule stated in In re Estate of Reade, supra. They are mistaken. The section relates only to procedure for the payment of compensation already earned for services rendered to an executor or administrator.

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[1] "Any attorney who has rendered services to an executor or administrator, at any time after six months from the issuance of letters testamentary or of ad-

The order is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

132 Cal.App.2d 818

Dennis FARRELL, a minor, by A. J. Farrell, his guardian ad litem, and A. J. Farrell, individually, Plaintiffs and Appellants,

v.

CITY OF LONG BEACH, a municipal corporation, Harold Fairly, Doe I, Doe II, and Doe III, Defendants.

City of Long Beach, a municipal corporation, Respondent.

Civ. 20627.

District Court of Appeal, Second District, Division 2, California.

May 11, 1955.

Action against city for injuries sustained when plaintiff, at direction of public playground attendant, was riding on handle bars of another boy's bicycle. The Superior Court, Los Angeles County, Beach Vasey, J., gave judgment for the city, and plaintiff appealed. The District Court of Appeal, Moore, P. J., held that city was not liable for negligence of employee.

Judgment affirmed.

1. Municipal Corporations 🔑734

Maintenance of children's playgrounds and recreational centers for general use of children of city is referable solely to duty of maintaining public health which is one of delegated functions of sovereignty and does not partake of nature of ordinary business enterprise.

2. Municipal Corporations 🔑724

Fostering and safeguarding of public health is governmental function, although providing mere amusement or entertainment is not.

3. Municipal Corporations 🔑851

A child injured accidentally on public playground cannot recover for his injuries in absence of proof that he was injured as result of dangerous or defective condition of playground. Government Code, § 53051.

4. Municipal Corporations 🔑857

Complaint alleging city playground director told plaintiff to ride on handle bars of another's bicycle over to another public playground, and plaintiff's body caught in wheel, thereby throwing him to ground and injuring him, did not allege cause of action against city.

5. Municipal Corporations 🔑745

Municipality is not liable for negligence of its employees unless made so by statute.

6. Municipal Corporations 🔑747(2)

Even if city playground director negligently directed twelve year old boy to ride on handle bars of another's bicycle from one public playground to another and the rider's body caught in wheel of bicycle, city could not be held liable for resulting injuries. Government Code, § 53051.

Ball, Hunt & Hart, Long Beach, for appellants.

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ministration, and upon such notice to the executor or administrator and to the persons interested in the estate as the court or judge thereof shall require, may apply to the court for an allowance upon his fees; and on the hearing the court shall make an order requiring the executor or administrator to pay such attorney out of the estate such compensation, on account of services rendered up to that time, as the court shall deem proper, and such payment shall be made forthwith."

Dryden, Harrington, Horgan & Swartz, Los Angeles, for respondent.

MOORE, Presiding Justice.

The question here posed is whether the complaint can be so amended as to state a cause of action based upon the negligence of the municipality.

Plaintiff alleges that he is a youth twelve years of age; that the city maintains the Somerset Playground on Carson Street and another on Cherry Avenue for children's recreational purposes; that while he was at Somerset for the purpose of participating in children's recreational activities the City's agent, Harold Fairly, negligently directed plaintiff "to proceed from said Somerset Playground to said playground located at 45th Street and Cherry Avenue to participate in said children's recreational activities and negligently instructed * * plaintiff to ride upon the handle bars of the bicycle of another boy in proceeding to said playground and negligently * * * directed said plaintiff that he, Harold Fairly, would ride upon the bicycle of plaintiff to said playground, and carelessly * * * proceeded to said playground upon plaintiff's bicycle; that plaintiff * * * proceeded to said playground upon the handle bars of the bicycle of said other boy and, while plaintiff was so riding, his body became caught in the wheel of said bicycle and he was thrown to the ground. As a proximate result of said negligence * * plaintiff suffered personal injuries and was made sick, sore and lame and was generally damaged in the sum of $25,000."

Appellant contends that the court was in error in holding (1) that the operation of the playground was a governmental activity and (2) in denying plaintiff the right to amend the complaint. Such contention is contrary to law.

[1-4] The maintenance of children's playgrounds and recreational centers for the general use of the children of the city are referable solely to the duty of maintaining public health which is one of the delegated functions of sovereignty. They do not in any sense partake of the nature of an ordinary business enterprise. Kellar v. City of Los Angeles, 179 Cal. 605, 608–609, 178 P. 505. The fostering and safeguarding of public health is a governmental function, although providing mere amusement or entertainment is not. Plaza v. City of San Mateo, 123 Cal.App.2d 103, 111, 266 P.2d 523. A child injured accidentally on a public playground cannot recover for his injuries in the absence of proof that he was injured as a result of the dangerous or defective condition of the playground. Government Code, § 53051;[1] Schmidt v. City of Vallejo, 122 Cal.App. 5, 7, 9, 10 P.2d 107. It follows that not only is no cause of action stated in the complaint, but it is not possible to allege a valid cause of action for the reason that the playground itself was not directly responsible for plaintiff's injuries.

[5] In his brief, appellant alleges "That the negligence complained of was the negligent transportation of minor children, under the negligent direction of the playground director." The statute, section 53051, supra, is destitute of any reference to the negligence of the director of any public property. Inasmuch as a municipality is not liable for the negligence of its employees in the exercise of governmental functions unless made so by statute, Perry v. City of Santa Monica, 130 Cal.App.2d 370, 279 P.2d 92; Stang v. City of Mill Valley, 38 Cal.2d 486, 488, 240 P.2d 980; Miller v. City of Palo Alto, 208 Cal. 74, 75, 280 P. 108, no fact appears to be available to appellant that would enable him to declare a cause of action.

The authorities cited by appellant, Bauman v. City and County of San Francisco, 42 Cal.App.2d 144, 108 P.2d 989; Plaza v. City of San Mateo, 123 Cal.App.2d

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[1] Section 53051(a) reads:

"When local agency liable for injuries resulting from dangerous or defective condition of public property. A local agency is liable for injuries to persons and property resulting from the dangerous or defective condition of public property if the legislative body, board, or person authorized to remedy the condition:

"(a) Had knowledge or notice of the defective or dangerous condition."

103, 266 P.2d 523, do not avail him. The first arose out of a playground so inefficiently designed as to make its condition dangerous and defective; the second involved the operation of a golf course which was a proprietary activity by the city of San Mateo.

[6] In the instant action no property was involved but that of plaintiff's playmate. The only negligence alleged was that of the director who asked Dennis to ride along a public street on the handle bars of his friend. Neither nor both can constitute a basis for the city's liability. Therefore, no valid amendment is available.

Judgment affirmed.

McCOMB and FOX, JJ., concur.

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133 Cal.App.2d 1

In the Matter of the ESTATE of Manie C. PERRYMAN, Deceased.

J. M. PERRYMAN et al., Appellants,

v.

Helen H. TONKIN, Executrix of the Estate of Grace K. Perryman, Deceased, Respondent.

Civ. 16394.

District Court of Appeal, First District, Division 2, California.

May 16, 1955.

Probate proceeding, wherein heirs of deceased husband and executrix of estate of husband's widow asserted claims to husband's interest in fund under Civil Service Retirement Act. The Superior Court, County of Alameda, Marvin Sherwin, J., rendered judgment in favor of executrix, and heirs appealed. The District Court of Appeal, Draper, J. pro tem., held that deceased husband's interest in retirement fund was community property, and executrix of widow's estate was entitled to distribution of the entirety of such interest remaining at wife's death, where widow had been annuitant.

Decree affirmed.

1. Descent and Distribution ⇨8

Civil Service Retirement Act provision relating to payment of balance of deceased employee's retirement fund contributions remaining at death of annuitant does not restrict distribution of funds by administrator to whom it is paid, and does not preclude distribution under state law of succession. Civil Service Retirement Act of 1920, § 11(e) (2), (g) (3) as amended 5 U.S.C.A. § 724(e) (2), (g) (3).

2. Husband and Wife ⇨259, 273(1)

Deceased husband's interest in Retirement Fund under Civil Service Retirement Act was community property, and executrix of widow's estate was entitled to distribution of the entirety of such interest remaining at wife's death, where widow had been annuitant. Civil Service Retirement Act of 1920, § 11(e) (2), (g) (3) as amended 5 U.S.C.A. § 724(e) (2), (g) (3).

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Thomas B. Richardson, Donald O. May, Oakland, for appellants.

Edwin S. Pillsbury, David C. Dunlap, San Francisco, for respondents.

DRAPER, Justice pro tem.

Decedent was a federal employee subject to the Civil Service Retirement Act, 5 U.S.C.A. § 691 et seq. After marriage, he contributed to the retirement fund provided for by that act. Upon his death, monthly payments from the fund were made to his widow. At her death, this annuity had not exhausted the contributions made to the fund by decedent during his lifetime, and the amount remaining was paid by the United States to the administrator of the husband's estate. There are no other assets of the estate. The husband was not survived by children or parents.

Respondent, executrix of the widow's will, asserts that the fund is community property and claims all under Probate Code sec. 201. Appellants are brothers and sister of decedent. They contend that the fund is separate property of decedent, and, under Probate Code sec. 223, should be distributed half to them and half to respondent.

The probate court determined that the whole fund should go to respondent.

Appellants rely upon Wissner v. Wissner, 338 U.S. 655, 70 St.Ct. 398, 94 L.Ed. 424, which holds that the proceeds of a National Service Life Insurance policy should be distributed to the named beneficiary thereof, as provided in the act of Congress establishing such insurance, despite the conflicting claims of the surviving widow under the community property law of California. To the same effect is Carballo v. McFann, 101 Cal.App.2d 93, 224 P.2d 902.

The rule of these cases is that the act of Congress prevails over conflicting state law in a field properly within the jurisdiction of the United States and to the extent that this field is occupied by the federal law. There the federal act specifically provided that payment of federal funds should be made to particular persons, and the cited decisions hold only that state statutes cannot contravene these clear directions.

Appellants also cite Davies v. Beach, 74 Cal.App.2d 304, 168 P.2d 452 and Conrad v. Conrad, 66 Cal.App.2d 280, 152 P.2d 221. These cases hold that claims of the estate of the deceased owner of a United States savings bond cannot prevail over the rights of one named in the bond as co-owner or designated on its face to receive its proceeds upon the death of the owner. There the federal statute authorizing issuance of the bonds provided for payment only to the owner or named beneficiary. Those decisions are not in point here. Certainly they afford no support for any contention that our law of community property cannot apply to funds derived from federal agencies. In no view do they hold more than that specific federal statutes in a wholly federal field prevail over state law.

In the present case, there is no conflict between state and federal law. Provision is made in 5 U.S.C.A. § 724(g) (3) and (e) (2) for payment of the balance of the deceased employee's retirement fund contributions remaining at the date of death of the annuitant (in this case the widow of decedent). The statute provides for payment of this sum:

"First, to the beneficiary * * * designated by a writing * * *;

"Second, if there be no such beneficiary, to the widow * * * of such * * * employee;

"Third, if none of the above, to the child or children of such * * * employee * * *;

"Fourth, if none of the above, to the parents of such * * * employee or the survivor of them;

"Fifth, if none of the above, to the duly appointed executor or administrator of the estate of such * * * employee."

Here there was no survivor qualified to take under any of the first four subdivisions of the section, and the money was paid to the administrator of the estate of the deceased employee.

[1] Nothing in the act indicates any intent of Congress to restrict distribution of the fund by the administrator to whom it is paid. Lacking such provision, there is no room for application of the decisions cited by appellants, and no reason against distribution under the state law of succession.

[2] Under California law, decedent's interest in the retirement fund is community property. Crossan v. Crossan, 35 Cal.App. 2d 39, 94 P.2d 609. Thus respondent executrix is entitled to distribution of the whole estate.

Decree of distribution affirmed.

NOURSE, P. J., and KAUFMAN, J., concur.

132 Cal.App.2d 869

John Doe KILCREASE by his Guardian ad litem, Artie Graves, and Artie Graves, Plaintiffs and Appellants,

v.

Harry KILCREASE, Defendant and Respondent.

Civ. 16123.

District Court of Appeal, First District, Division 2, California.

May 16, 1955.

Hearing Denied July 13, 1955.

Paternity suit. The Superior Court, City and County of San Francisco, Theresa Meikle, J., denied plaintiff's request for support pendente lite, and plaintiff appealed. The District Court of Appeal, Draper, J. pro tem., held that under evidence as to earning capacity of mother and of defendant, and in view of uncertainty as to ultimate determination of paternity, Superior Court did not abuse its discretion in denying request.

Order affirmed.

1. Bastards ⚿73

A trial court in a paternity suit is allowed broad discretion in determining amount to be awarded for child support, but, upon final judgment establishing paternity, that discretion is limited by rule that a father cannot escape liability for support of his illegitimate child by mere circumstance that mother may be able to earn enough to take care of child.

2. Bastards ⚿78

Where mother prevails in paternity suit, judgment for support can be made to run from date of child's birth.

3. Bastards ⚿78

Under evidence as to earning capacity of mother and of defendant, and in view of uncertainty as to ultimate determination of paternity, trial court in paternity suit did not abuse its discretion in denying mother's request for support pendente lite for medical and hospital expenses.

G. K. Burgren, Bruce McMullen, San Francisco, for appellant.

Benjamin M. Davis, San Francisco, for respondent.

DRAPER, Justice pro tem.

This is an action to establish paternity. The trial court denied plaintiff's request for support pendente lite for medical and hospital expenses. The court did make a pendente lite order for counsel fees and costs on account. Plaintiff appeals from the order denying support and expenses pending trial.

At hearing on the order to show cause the mother testified that she had lived with defendant at the latter's apartment and had sexual intercourse with him at times which would be within the normal period of gestation of plaintiff child. On cross-examination, she showed considerable uncertainty as to the location of the apartment.

She testified that she is a licensed cosmetologist and the owner of "Artie's New Look Beauty Shop". She normally worked in the shop and rented out four booths to other beauty operators. The mother was not working at the time of the hearing but only because of the short time elapsed since birth of her child.

Both the mother and defendant are married but, unfortunately, not to each other.

[1] A trial court is allowed broad discretion in determining the amount to be awarded for child support. Upon a final judgment establishing paternity, that discretion is limited by the rule that a father cannot escape liability for support of his illegitimate child "by the mere circumstance that the mother may be able to earn enough to take care of the child." Kemppainen v. Hester, 113 Cal.App.2d 472, 475, 248 P.2d 103, 105.

[2] Here the application is only for support pending trial of the paternity issue. The issue of paternity is not fully tried or finally determined upon an order to show cause. If plaintiff prevails on trial of this action, the judgment for support can be made to run from date of the child's birth. Kyne v. Kyne, 38 Cal.App.2d 122, 133, 100 P.2d 806. Thus if plaintiff establishes paternity, the prejudicial effect of the interim

order, if any, can be remedied in the judgment.

[3] In the light of the testimony as to earning capacity of the mother and of defendant, and the uncertainty as to ultimate determination of paternity, we cannot say that the trial court abused its discretion here.

Appellant argues, in vague and general terms, that the trial judge had sat in juvenile court and therefore must be prejudiced in this type of case. Nothing in the record sustains any assertion of prejudice.

The order is affirmed.

NOURSE, P. J., and KAUFMAN, J., concur.

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132 Cal.App.2d 776

R. J. HOLCOMB and Hazel J. Barcus, Plaintiffs, Cross-Defendants and Respondents,

v.

John F. NUNES and Eva Nunes, Defendants, Cross-Complainants and Appellants,

and

F. S. Jacobsen, also known as S. P. Holt, Defendant.

Civ. 4945.

District Court of Appeal, Fourth District, California.

May 6, 1955.

Quiet title action by purchasers at sheriff's sale on execution on judgment. Grantees in deed made by judgment debtor before judgment and in deed from irrigation district cross-complained to quiet title in themselves. The Superior Court, Fresno County, Edward L. Kellas, J., rendered judgment for purchasers from sheriff. Grantees from judgment debtor appealed. The District Court of Appeal, Mussell, J., held that evidence that purchasers at sheriff's sale and judgment debtor had made contract whereby judgment debtor was to feed and pasture cattle furnished by purchasers, but not showing that judgment debtor was insolvent at time of conveyance or the amounts of his assets and liabilities or that another farm owned by judgment debtor was insufficient to feed cattle, was insufficient to support finding that after transfer of farm the judgment debtor was left with capital which was insufficient to carry out contract, so that transfer was not fraudulent as to purchasers from sheriff.

Judgment reversed.

1. Fraudulent Conveyances ⚷58, 64(1), 155

In determining the propriety of a creditor's challenge of a conveyance for lack of a fair consideration within meaning of Act providing that conveyance made without fair consideration when person making it is engaged or is about to engage in a business transaction for which property remaining in his hands after conveyance is an unreasonably small capital, is fraudulent as to creditors, test is whether debtor is thereby rendered execution proof, and the existence of any intent of fraud on the part of either the grantor or his grantee is an immaterial factor. West's Ann.Civ. Code, § 3439.05.

2. Fraudulent Conveyances ⚷297

In action to quiet title by purchasers at sheriff's sale upon execution of judgment, evidence that purchasers and judgment debtor had made contract whereby judgment debtor was to feed and pasture cattle furnished by purchasers at time judgment debtor transferred his farm, but not showing that judgment debtor was insolvent at time he conveyed the land or amounts of his assets and liabilities or that another farm that he owned was insufficient to provide feed for cattle, was insufficient to support finding that judgment debtor was left with unreasonably small capital to engage in transaction with purchasers, so that transfer from judgment debtor was not fraudulent. West's Ann.Civ.Code, §§ 3439.05, 3439.09.

3. Fraudulent Conveyances ⚷284

In quiet title action by purchasers at sheriff's sale on execution of judgment, to set aside transfer of farm made by judgment debtor before judgment, burden was on purchasers to show that judgment debtor was left with an unreasonably small capital, after executing conveyance, with which to carry out contracts made with purchasers to feed and pasture cattle owned by them, and that conveyance was therefore fraudulent. West's Ann.Civ.Code, §§ 3439.05, 3439.09.

4. Waters and Water Courses ⚷228½

Where there was no showing of any confidential relationship between purchasers of farm at sheriff's sale on execution of judgment, and grantees of that farm from irrigation district, and no showing of fraud in transfer from irrigation district, grantees of irrigation district acquired absolute title by conveyance from district. Water Code, §§ 26275–26280, 26300, 26301, 26303.

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Matt Goldstein, Fresno, for appellants. George A. Schroeder, Fresno, of counsel.

David E. Peckinpah, Denver C. Peckinpah, Charles F. Hamlin and L. N. Barber, Fresno, for respondents.

MUSSELL, Justice.

This is an action in which plaintiffs in their complaint and defendants in their cross-complaint seek to quiet title to 40 acres of ranch property in Fresno county. The ranch was purchased by F. S. Jacobsen, also known as S. P. Holt, on August 8, 1946, for the sum of $18,000, subject to a trust deed for $7,600. On March 19, 1947, said Holt deeded the property to defendants John F. Nunes and his wife and the deed was recorded on the same day. On October 22, 1951, the Fresno Irrigation District deeded the same property to defendant John F. Nunes and his wife, and that deed was recorded on February 20, 1952. Nunes and his wife claim title by virtue of these two deeds and plaintiffs' claim of title is based on a sheriff's deed to them dated July 23, 1951, executed pursuant to a sale under execution on a judgment which said plaintiffs obtained against Jacobsen for the sum of $3,100, and costs, on October 22, 1948.

It was the contention of plaintiffs at the trial that there was collusion between Jacobsen and Nunes for the purpose of enabling Jacobsen to evade liability arising out of a transaction about to be consummated between Jacobsen and the plaintiffs and that Jacobsen had voluntarily transferred title to the property to Nunes. The trial court entered an interlocutory judgment in favor of plaintiffs and defendants John F. Nunes and his wife appeal therefrom. Defendant Jacobsen defaulted in the action.

Plaintiff J. P. Holcomb testified that he became acquainted with Jacobsen in 1946; that there were some preliminary discussions relative to the buying of cattle by plaintiff and the feeding of them by Jacobsen; that Jacobsen had lots of pasture and two ranches but had no money; that he entered into definite discussions with Jacobsen relative to this matter in April, 1947; that along about February, 1947, plaintiff visited the property involved and had a discussion with Jacobsen about a business arrangement; that Jacobsen had some young stock on the ranch; that the said stock was mortgaged and Jacobsen said that if plaintiff would pay off the note, Jacobsen would bring the stock into "springing stage"; that plaintiff would sell them and they would split the profits; that plaintiff stated he would talk it over with his wife and the following day he told Jacobsen it was agreeable to his wife; that Jacobsen did not have any ready cash; that "all he had was pasture and hay and everything, feed"; that he had no written agreement with Jacobsen and that the first time he advanced any money to him was on April 7, 1947, at which time he gave Jacobsen $1,500 to pay off a note against some of his cattle; that Jacobsen gave him a bill of sale for this stock and agreed to feed them and furnish the labor; that it was agreed that plaintiff was to sell said stock, take his $1,500 out, and retain fifty per cent of the net profit; that on April 23, 1947, he gave Jacobsen $2,000 for a bill of sale for "another bunch of cows" to be fed and sold in the same manner; that on May 15, 1947, he gave Jacobsen a check for $462.50 to purchase four cows and four calves at an auction; that these animals were to be handled in the same manner as those previously purchased. Holcomb further testified that Jacobsen told him that he owned a ranch in Riverbend containing some 600 to 650 acres.

Plaintiff Hazel K. Barcus (formerly Holcomb) testified substantially to the same facts as her former husband and there was no contradiction between them with respect to the dates when the money was paid to Jacobsen or as to the purposes for which funds were so advanced.

Plaintiffs filed suit against Jacobsen in the superior court of Fresno county and caused an attachment to be levied on the property here involved on May 29, 1947. Thereafter plaintiffs recovered judgment against Jacobsen for the sum of $3,100 and costs. The record does not disclose the items making up this judgment or the facts of that case. Execution was issued on the judgment, the property was sold, and a sheriff's deed, upon which plaintiffs rely, was executed to them on July 23, 1951.

Defendant John F. Nunes testified and the record shows that Jacobsen gave him a deed to the property involved on March 19, 1947. He further testified that Jacobsen's son was married to his (Nunes) daughter prior to 1947; that Jacobsen had a ranch on Teilman Place in Fresno county where he maintained a dairy; that he, Nunes, supplied all labor in connection with milking the cows on this dairy and supplied the hay to feed said cows prior to March 19, 1947; that prior to this date he had supplied Jacobsen with approximately 200 tons of hay which he, Nunes, had grown on his ranch on west Belmont in Fresno county; that he valued the hay at $20 per ton and that he had not been paid for it; that he had worked for Jacobsen for two years prior to March 19, 1947, milking cows, and that Jacobsen had promised to pay him $120 per month for these services; that Jacobsen had paid him only $200 during the entire two year period; that he kept asking Jacobsen for money and that in 1947 Jacobsen said to him "I aint got no money. The only way I can pay you is you take the property"; that the property involved was deeded to him on March 19, 1947, by Jacobsen in payment of Jacobsen's past obligations to him; that at the time he took over the place there was a balance of $7,200 due on a deed of trust affecting the property, and that the water tax of approximately $100 was not paid; that his daughter and her husband occupied the premises from the time he acquired it from Jacobsen and that they paid all the taxes and made substantial improvements to the property; that he made the payments on the note secured by the deed of trust at the rate of $200 every six months, together with accumulated interest at five per cent per annum, and that the balance of the principal due on said note had been reduced to $4,400 at the time of trial; that he had been in possession of the property since March 19, 1947, by having his daughter and son-in-law live on it.

The evidence also shows that the 1948 irrigation tax imposed for the Fresno Irrigation District had not been paid and that on September 20, 1951, the tax collector issued to the district a tax deed to the property; that said district conveyed it to the defendants John F. Nunes and Eva Nunes by deed dated October 22, 1951.

The trial court found that the conveyance of said real property from defendant Jacobsen, also known as Holt, to the defendant John F. Nunes and his wife was made without fair consideration; that the property remaining in the hands of said defendant Jacobsen, after the said conveyance, was an unreasonably small capital for the transaction in which said defendant was about to engage with plaintiffs; that the defendants Nunes and his wife accepted the said conveyance without fraudulent intent; that the amount of repayment for which said defendants are entitled to hold the property as security was not put in issue by the pleadings in the action and could not be ascertained from the evidence; that except for the right of the defendants John F. Nunes and his wife to hold the said property as security for any amount to which they may be entitled to repayment on account of the purchase of said real property, the defendants have not, nor has either or any of them, any right, title or interest in or to said real property, and "that the allegations of the cross-complaint not expressly found herein to be true are found to be untrue." The court then concluded that a further hearing should be had for the purpose of determining the amount, if any, to which defendants John F. Nunes and his wife may be entitled as repayment of the consideration for the said conveyance. Judgment was entered that plaintiffs are the owners of the property and that all claims of said defendants are invalid and groundless, provided the said defendants Nunes should be entitled to hold possession of said property as security for any repayment to which they may be entitled under the provisions of section 3439.09 of the Civil Code.

[1] Section 3439.05 of the Civil Code, upon which the trial court based the interlocutory judgment herein, reads as follows:

> "Every conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors and as to other persons who become creditors during the continuance of such business or transaction without regard to his actual intent."

In Hansen v. Cramer, 39 Cal.2d 321, 324–325, 245 P.2d 1059, 1061, 30 A.L.R.2d 1204, the court held that:

> "The test in determining the propriety of a creditor's challenge of a conveyance for lack of a 'fair consideration' within the meaning of the Act depends on whether the debtor is thereby rendered execution proof, and the existence of any intent of fraud on the part of either the grantor or the grantee is an immaterial factor. Merchants' Bank v. Page, supra, 147 Md. 607, supra, 128 A. 272, 273."

[2] In the instant case while the record shows that plaintiffs recovered a judgment against the appellants, the evidence does not show that Jacobsen was rendered judgment proof by the conveyance of the property involved on March 19, 1947.

As stated by the trial court in its memorandum of opinion filed herein, there was no actual fraudulent intent or actual fraud shown with respect to the conveyance made from Jacobsen to the defendants. There was no showing that Jacobsen was insolvent at the time of this conveyance and no showing of the amounts he owed, if any, or the aggregate of his assets on March 19, 1947. The evidence shows that plaintiffs "Looked solely to the stock and feed as Jacobsen's contribution for the successful termination of their investment." As further stated by the trial court "There is nothing to indicate that the ownership of the property as such is material. There is nothing to indicate that the feed had been denied to the use of the joint adventure."

We conclude that the finding "That the property remaining in the hands of said defendant Jacobsen after the said conveyance (March 19, 1947) was an unreasonably small capital for the transaction in which the said defendant was about to engage with plaintiffs." is not supported by the evidence. The uncontradicted evidence is that plaintiffs agreed to buy the stock and Jacobsen agreed to care for it and feed it. He was not required to advance any money. The evidence indicates that Jacobsen had a 600 or 650 acre ranch in Riverbend and it is not shown that it was insufficient to provide the feed and pasture for the stock involved in these three transactions between plaintiffs and defendant Jacobsen. Furthermore, there was no evidence offered as to the value of this acreage.

In Miller v. Keegan, 92 Cal.App.2d 846, 852, 207 P.2d 1073, 1076, the court said:

> "As a general rule 'solvency and not insolvency is presumed.' Hasenjeager v. Voth, 91 Cal.App. 394, 397, 267 P. 146. To overcome this presumption

a fair interpretation of the statute requires some basis in evidence for determining that the amount of the debtor's obligations exceeded the then present fair salable value of his nonexempt assets. Such a basis is entirely wanting here."

[3] In the instant case the burden was upon plaintiffs to show that defendant Jacobsen was left with an "unreasonably small capital", after executing the conveyance to Nunes and his wife, with which to engage in the transactions involved. This is not shown by the record. The trial court's finding that defendant Jacobsen was "about" to engage in a business transaction on March 19, 1947, for which the property remaining in his hands after the conveyance involved is an unreasonably small capital, lacks sufficient evidentiary support. Plaintiff R. J. Holcomb testified that he entered into definite discussion with Jacobsen relative to engaging in transactions involving the purchase of stock which Jacobsen was to feed in the month of April, 1947, and after the deed to Nunes and his wife had been executed and recorded. There was no contract entered into by plaintiffs and Jacobsen prior to the date of this deed and there was no date agreed upon for the purchase of any of Jacobsen's stock prior to April 7, 1947. There were three separate transactions, each involving separate purchases of stock by plaintiffs, one on April 7, 1947, when plaintiffs gave Jacobsen $1,500 to pay off a note and took back a bill of sale for the stock, one on April 23, 1947, and the last on May 15, 1947. By these purchases plaintiffs became the owners of the stock, received bills of sale therefor and had the right to sell any or all of said stock.

[4] The land involved herein was sold to the Fresno Irrigation District by the tax collector for default in payment of assessments, which became due in two installments, one on the first Monday in December, 1947, and the other on the first Monday in June, 1948. The property was deeded to the district by the collector on September 15, 1951, and the deed thereto was recorded September 21, 1951. This deed was issued to the district pursuant to sections 26275 to 26280 of the Water Code. Said section 26275 provides for the delivery of a collector's deed to the district where property sold for delinquent assessments has not been redeemed and three years have elapsed from the date of its sale. Section 26300 of said code provides as follows:

> "*Conveyance of absolute title free of encumbrances: Exception: Prima facie evidence.* A collector's deed conveys to the grantee free of all encumbrances the absolute title to the property described in it except when the land is owned by the United States or this State, in which case it is prima facie evidence of the right of possession."

The following section, 26301, defines the rights of the district as follows:

> "*Rights of district to which property conveyed.* Where property has been conveyed to a district by a collector's deed, the district shall have the same rights in respect to the property and its rents, issues, and profits as a private purchaser."

And section 26303 provides that:

> "*Conclusive evidence of regularity of proceedings.* Except as against actual fraud a collector's deed acknowledged or proved is conclusive evidence of the regularity of all of the proceedings from the assessment by the assessor, inclusive, up to the execution of the deed."

In the instant case plaintiffs offered no evidence at the trial attacking the validity of the deed to the district or its effectiveness or irregularity. The record shows the district acquired absolute title to the property. On October 22, 1951, the district sold and conveyed the property to appellants and there is no showing, pleading or proof of fraud in this transaction.

In Dowd v. Glenn, 54 Cal.App.2d 748, 753, 129 P.2d 964, 967, the court said:

"Referring to a deed issued by the collector of an irrigation district, section 48, Stats.1931, p. 441 provides: 'Such deed duly acknowledged or proved is (except as against actual fraud) conclusive evidence of the regularity of all the proceedings from the assessment by the assessor, inclusive, up to the execution of the deed. The deed conveys to the grantee the absolute title to the lands described therein free of all encumbrances, except when the land is owned by the United States, or this state, in which case it is prima facie evidence of the right of possession.' Deering's Gen.Laws, Act 3854, § 48, p. 1834. In 1937, Stats. 1937, p. 379, section 47 was amended to include the following provision: 'The district may also sell, convey, lease, give and also take options upon, and issue and take contracts of sale upon and otherwise deal with such property including sale of the same to a former owner or holder of said property, on such terms and at such price as may be approved by the board of directors.' Deering's Gen.Laws, Act 3854, § 47, p. 1832. Reading the section as amended, it must be determined that the Legislature has formulated a policy of permitting a former owner to purchase land from an irrigation district upon terms approved by the board of directors, and that the deed thereupon given is conclusive evidence of the regularity of the proceeding 'except as against actual fraud.'"

Plaintiffs, although they claim to have owned the property since April 12, 1949, did not attempt to pay any of the taxes or assessments thereon or to acquire title from the district. There was no confidential relationship between appellants and plaintiffs and since no actual fraud was shown, appellants acquired absolute title by the conveyance to them from the district.

The judgment is reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

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133 Cal.App.2d 70

Ardine SCHIFANO, Plaintiff and Appellant,
v.
SECURITY BUILDING COMPANY, Doe One, Doe Two, Doe Three, Bridges Construction Company, Doe Four and Doe Five, Defendants,

Bridges Construction Company, Defendant and Respondent.
Civ. 16189.

District Court of Appeal, First District, Division 2, California.

May 18, 1955.

Action for injuries sustained by an employee of a tenant in defendant's building when the lid of a box constructed by codefendant contractor around a waste can in the building fell on plaintiff's head while she was leaning down to empty a waste basket into the can. From a judgment of nonsuit as against the contractor by the Superior Court, County of Santa Clara, John D. Foley, J., plaintiff appealed. The District Court of Appeal, Kaufman, J., held that the evidence was insufficient to take to the jury the question of defendant contractor's negligent construction of a box of abnormally dangerous nature, as danger of lid falling, if so close to wall as to balance precariously, was obvious.

Judgment affirmed.

1. Negligence ⟹124(1)

In action against building owner and contractor for injuries to employee of tenant in building when lid of box constructed by contractor around waste can in building fell on plaintiff's head while she was leaning down to empty waste basket into can, fact testified to by plaintiff that lighting was poor where box was located could not be considered in case against contractor, who had no control over such factor.

2. Trial ⟹165

On defendant's motion for nonsuit, testimony favorable to plaintiff must be accepted as true.

3. Negligence ⚷55

Generally, construction contractor, whose work has been completed and accepted by building owner, is not thereafter liable to third persons for injuries suffered because of condition of work.

4. Negligence ⚷55

Where thing constructed by contractor is inherently or imminently dangerous or contractor's acts result in imminently dangerous situation, natural or probable consequence of which would be injuries to persons likely to come into contact with work after its acceptance by owner of premises on which constructed, contractor's liability extends to such persons.

5. Negligence ⚷136(18)

In action against building owner and contractor, constructing boxes around waste cans in building, for injuries to employee of tenant in building when lid of one of boxes fell on plaintiff's head while she was leaning down to empty waste basket into can, evidence was insufficient to take to jury question of contractor's negligent construction of box of abnormally dangerous nature, as danger of lid falling, if so close to wall as to balance precariously, was obvious.

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Morgan & Beauzay, Robert Morgan, San Jose, for appellant.

Rankin, Oneal, Luckhardt, Center & Hall, San Jose, for respondent.

KAUFMAN, Justice.

This is an appeal from an order granting a motion for a nonsuit in favor of Bridges Construction Company. Plaintiff Ardine Schifano brought an action for damages against the owner of the premises, Security Building Company, for negligent maintenance of a defective condition on the premises, and against the contractor Bridges Construction Company, for negligent construction of a trash box of an abnormally dangerous nature which had been acceptd by the owner, Security Building Company. Motion for nonsuit against the owner, Security Building Company was denied, and the jury returned a verdict in favor of that defendant. Appeals were taken as against both defendants, but that against respondent Security Building Company was dismissed, as said appeal was taken only from the order denying plaintiff's motion for a new trial.

Plaintiff Ardine Schifano was an employee of a tenant on the second floor of the building owned by Security Building Company in San Jose, California. Janitor service was not furnished to the tenants, but a waste can was provided by the owner on the second and third floors. About seven months prior to the accident, for the purpose of fire prevention, defendant owner through its manager, Charles Munger, directed Bridges Construction Company to construct a box around each of these waste cans, each box to have a lid which could be raised to allow waste paper to be deposited in the receptacles. The boxes and lids were asbestos lined, and the lids were to be closed at all times when not in use, in order that any possible fire would be smothered for lack of draft. It was to be built so that the lid would not rest up against the wall, according to the builders' testimony, and he stated that it would not rest against the wall unless it were pushed back against the wall by the user. Witnesses testified variously as to the weight of the receptacle's lid, one witness estimating that it was 15 pounds. One of defendant's counsel had it weighed during the time the trial was in progress and testified that the weight was 8¾ pounds. The box lid measured 20 inches by 32½ inches and was attached to the box by hinges which were about 2 inches from the wall against which the receptacle was located. The box or receptacle was 40 inches in height in the front and 49 inches in the rear. After completion and installation of the waste receptacles and their acceptance by the owner, the contractor had nothing further to do with them.

[1] Plaintiff had been working in the building at the time the waste receptacle was installed on her floor. She used the box possibly hundreds of times without incident in the seven months period prior to the accident. On the morning of October 10, 1950 she took two waste baskets down the hall to empty them into the receptacle. She lifted the lid with both hands, put it against the wall with both hands, emptied one bas-

ket, and was leaning down emptying the second basket when the lid fell on her head, hitting her in the region between her eyebrow and hairline. She had always followed the same procedure in emptying the baskets, and this was the first time the lid fell. She did not know what caused it to fall. Plaintiff testified that the lighting was poor in the area where the receptacle was located, but that fact cannot be considered in the case against the building contractor as he had no control over that factor.

Mr. Munger, secretary-treasurer of the owner, testified that the lid was supposed to go up and stay back, but that it was to be always kept closed, and that on many occasions he found that it had been left open, and closed it himself. A Mrs. Stewart who had a place of business in the building testified that she used the waste receptacle frequently, that the lid would stay up against the wall if you didn't jar it, that there wasn't much of a lean to it. She could hold the lid part way back while she dumped her bucket. Her husband, who sometimes helped her, had once been hit on the nose by the lid. He testified that sometimes the lid would stay up without holding it. He could not say whether he had pushed the lid all the way back on the occasion when he got hit. The witness said that he was leaning over somewhat at the time, although he stated that it wasn't necessary to lean over. The janitor of the building admitted that the lid had once brushed against his shoulder.

[2] Appellant contends that it was error to grant the non-suit in that there was evidence which tended to support the allegations of the complaint, and on such motion, testimony favorable to the plaintiff must be accepted as true. Hale v. Depaoli, 33 Cal.2d 228, 201 P.2d 1, 13 A.L.R.2d 183; Toschi v. Christian, 24 Cal.2d 354, 149 P.2d 848; Hall v. Barber Door Co., 218 Cal. 412, 23 P.2d 279; In re Estate of Burns, 26 Cal.App.2d 741, 80 P.2d 77.

[3, 4] Appellant admits that the general rule is that when the contractor's work has been completed and accepted by the owner, the contractor is not thereafter liable to third persons for injury suffered by reason of the condition of the work. 13 A.L.R.2d 201; 13 Cal.Jur. 1051, sec. 23; 27 Am.Jur. 534, sec. 55; Johnston v. Long, 56 Cal.App. 2d 834, 837, 133 P.2d 409. Both appellant and respondent agree that one of the exceptions to the rule of non-liability of the contractor is that if the thing constructed is inherently or imminently dangerous, or if the contractor's acts result in an imminently dangerous situation the natural or probable consequence of which would be injury to persons who are likely to come in contact with the work after its acceptance, the liability of the contractor extends to such persons. Hale v. Depaoli, supra; Dahms v. General Elevator Co., 214 Cal. 733, 7 P.2d 1013; Johnston v. Long, supra.

[5] In Hale v. Depaoli, a porch railing gave way under plaintiff's weight, causing her to fall some distance to the pavement below. There was evidence from which it could be inferred that the railing had been defectively constructed by the contractor. Such condition was not one which was obvious to either the owner or third persons who might rely on the railing for support. It was a concealed defective condition of a highly dangerous character, for the very purpose of the rail was to prevent persons from falling to the area below. The court stated that "a structural defect in this protection would be 'reasonably certain to place life and limb in peril', and there was evidence from which a jury might infer that the railing was not erected in accordance with sound building practice." [33 Cal.2d 228, 201 P.2d 3.] There is no such testimony in the present case. Here danger in using the waste receptacle was an obvious one. It was an extremely simple contrivance and its operation was fully under the control of the person using it. If the lid balanced precariously that was something immediately observable by the person operating it. Plaintiff herein had used it hundreds of times. There is no evidence that there was anything different about the box on the day of the accident than on any other day. There was no testimony that any part of the structure gave way which would make this case comparable in any way to Hale v. Depaoli, supra, on which appellant relies.

This case cannot be considered comparable to Hall v. Barber Door Co., supra, nor to Johnston v. Long, supra. In the Hall case the independent contractor was held to owe a duty to plaintiff therein, where the work of installation of an overhead door was still in progress. The door weighed 300 Pounds and was operated by a cable which passed over a drum or pulley fitted to a shaft. When the accident occurred the door was not completely installed, and there was evidence that when the door fell the set-screws holding the drum had slipped because they had not yet been counter-sunk into the shaft. In Johnston v. Long, the Independent contractor was sued for failure to properly repair a large overhead lift-type door operated by a lifting apparatus attached to the door. A demurrer was sustained without leave to amend upon the theory that respondent was relieved of liability whether its status was an independent contractor or agent, by reason of its completion of the work and acceptance by the land-occupiers prior to the accident. Appellant therein contended that it was an abuse of discretion not to permit him leave to amend to show that the door was a dangerous instrumentality and to show also that there was knowledge of the defect on the part of the respondent and lack of knowledge on the part of the land-occupiers. It was held that the appellant should have been permitted to so amend his complaint.

In the instant case we have a simple hinged lid of a box, the working principles of which every person is familiar with from early childhood. If the lid of a box is too close to a wall it will not stay up without being held back. If it is so close that it balances precariously than the danger is an obvious one. We think that the trial court here properly granted the motion for nonsuit, for there is nothing in the evidence viewed in the light most favorable to appellant to warrant bringing this case within any of the exceptions to the general rule that the liability of the contractor for subsequent injuries to third persons ceases after acceptance of the work by the person for whom it was done.

In view of the foregoing, the judgment of nonsuit must be and is hereby affirmed.

NOURSE, P. J., and DRAPER, J. pro tem., concur.

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133 Cal.App.2d 52

Helen Margaret ORCHARD, Executrix of the Estate of Horace J. Orchard, deceased (substituted as plaintiff in the place and stead of Horace J. Orchard, deceased), Plaintiff and Respondent.

v.

C. E. PANCOAST, Defendant and Appellant.

In the Matter of the Arbitration between Horace J. Orchard and C. E. Pancoast.

Civ. 20607.

District Court of Appeal, Second District, Division 3, California.

May 17, 1955.

Action by executrix of deceased contractor to confirm arbitration award. The Superior Court, Los Angeles County, John J. Ford, J., entered judgment confirming arbitration award and building owner appealed. The District Court of Appeal, Shinn, P. J., held that there was no abuse of discretion in refusing to vacate order confirming award on ground of inadvertence and mistake in failing to introduce evidence consisting of record of disciplinary action taken against deceased by state licensing agency.

Affirmed.

1. Judgment ⚷12

A judgment or order which is made and entered after the death of a person and which purports to affect only his personal status is void.

2. Administrative Law and Procedure ⚷327
Licenses ⚷38

Disciplinary proceeding against contractor came to end upon his death and no valid order could be made against him thereafter. West's Ann.Bus. & Prof.Code, § 7029.

3. Appeal and Error ⚷935(1)

Where application to vacate order to allow introduction of new proof was denied, on appeal it must be assumed that application was denied on each tenable ground notwithstanding fact that point was not urged in trial court.

4. Arbitration and Award ⟸76

Application to vacate order confirming arbitration award on ground of inadvertence and mistake is addressed to the discretion of the court.

5. Arbitration and Award ⟸77

In proceeding by deceased contractor's executrix to confirm arbitration award, there was no abuse of discretion in denial of building owner's motion to vacate order confirming award on ground of inadvertence and mistake in failing to introduce evidence of disciplinary action taken by state licensing agency after contractor's death. West's Ann.Bus. & Prof.Code, § 7029; West's Ann.Code Civ.Proc. § 385.

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Philip N. Gepner, Los Angeles, for appellant.

Draper, Porter & Kramer, Monrovia, for respondent.

SHINN, Presiding Justice.

Horace J. Orchard, now deceased, as contractor, entered into an agreement to construct a residential building for C. E. Pancoast for the sum of $41,174. The parties fell into disagreement; the building was not completed; the claim of Orchard for money due for partial performance was submitted to arbitration pursuant to the contract; arbitration was duly had and an award was made against Pancoast and in favor of Helen Margaret Orchard, as executrix of the estate of Horace J. Orchard, in the amount of $11,988.14, the arbitration cost of $450 to be equally divided between the parties. Proceedings were had in court upon the application of the executrix to confirm the award, the opposition of Pancoast and his application for annulment of the award. The award was confirmed. Thereafter, Pancoast gave notice of intention to move for a rehearing and notice of intention to move the court to set aside the order confirming the award and permit him to offer further evidence. The ground of the motions was alleged mistake and inadvertence in failing to prove at the trial certain records of the Contractors' State License Board. The motions were made pursuant to notice and were denied. Pancoast gave notice of appeal from the judgment confirming the award and from the order denying his subsequent motions.

The ground of the appeals is that the order should have been vacated in order that Pancoast might present evidence that at the time the contract was entered into and at all times during performance thereof, Orchard was in partnership or was a joint adventurer with one Barr for the construction of the building, the subject of the contract, and that although Orchard and Barr each held a contractor's license as an individual they held no license as copartners or joint adventurers as required by section 7029 of the Business and Professions Code. In an answer to the application for confirmation of the award Pancoast alleged that Barr and Orchard were acting as copartners or joint adventurers in the construction of his building and that they had been found guilty of a violation of section 7029 by the Registrar of Contractors of the Contractors' State License Board by a decision under date of March 19, 1953. This contention was not made before the arbitrators. At the hearing on the application to confirm the award no evidence was introduced in support of the allegation that Orchard and Barr were copartners or joint adventurers. Upon the motion of Pancoast for a rehearing Pancoast filed the affidavit of one E. R. Adams which set forth what purported to be a copy of the findings of the hearing officer in proceeding before the Registrar which were dated February 23, 1953, and a copy of the decision of the Registrar adopting the findings and a proposed decision of the hearing officer which recommended the suspension of Orchard's license for 30 days and of Barr's license for 15 days, but provided that the suspension should not apply to any construction project or operation already actually started by Orchard or Barr. This copy, and a later copy of the same, certified by the Registrar constituted the only evidence respecting the alleged failure of Orchard to comply with the law which was before the court at any time, and, as we have stated, it was not produced until Pancoast made his motions for rehearing and for vacation of the award. In the hearing for confirmation of the award it was not disputed that Orchard held a license and that he alone entered into the contract. There was no evidence that he was required to have any license other than the one that he held as an individual. Upon the evidence produced at the hearing there was no justification for denial of confirmation of the award upon the ground that Orchard was unlicensed to enter into the contract or to perform it.

[1, 2] In ruling upon the motions the court did not err in refusing to accept the offered evidence as proof that Orchard was required to have a license as a copartner or joint adventurer with Barr. Orchard died February 23, 1953, 3 days before the hearing officer made and signed his findings; March 19, 1953, the Registrar adopted the findings and the proposed decision of the hearing officer. As proof of an adjudication respecting the licensing status of Orchard the record of the proceedings was a nullity. A judgment or order made and entered after the death of a person and which purports to affect only his personal status is void. § 385, Code Civ.Proc.; Boyd v. Lancaster, 32 Cal.App.2d 574, 90 P.2d 317; Clark v. Goodwin, 170 Cal. 527, 150 P. 357, L.R.A. 1916A, 1142; In re Estate of Parsell, 190 Cal. 454, 456, 213 P. 40, 25 A.L.R. 1561; 28 West's Cal.Dig., Judgment, 🔑12, pp. 38, 39; 1 C.J.S., Abatement and Revival, §§ 126, 128, pp. 173, 176. The disciplinary proceeding as against Orchard came to an end upon his death and no valid order could be made against him thereafter.

[3] It may be that the trial court did not base its ruling upon this ground of invalidity of the decision of the Registrar, since the point was not urged in that court. It is not discussed here in the briefs. We must assume, however, in support of the order, that the court denied the application to vacate its order confirming the award upon each tenable ground. It could well be that the court held the order of the Registrar to be ineffective as against the estate of Orchard for the reason that the findings of the hearing officer, which were adopted by the Registrar, were to the effect that no partnership existed between Orchard and Barr and that Barr was employed to act as foreman on the job for a percentage of the profits. Although the hearing officer drew a conclusion from the findings that Orchard and Barr engaged in a "combination or joint venture" it was not found as a fact that they jointly submitted a bid or otherwise acted in the capacity of a contractor. If Barr was merely an employee it was not necessary for them to have a third license and there was no violation of section 7029, Business and Professions Code.

We have no occasion to consider the applicability of the holding in Gatti v. Highland Park Builders, Inc., 27 Cal.2d 687, 166 P.2d 265, with respect to the sufficiency of the individual licenses of Orchard and Barr.

[4, 5] However, upon the application to vacate the order confirming the award upon the ground of inadvertence and mistake, no good reason was advanced for the failure to produce at the original hearing the record of the proceedings before the Contractors' State License Board. Such applications are addressed to the discretion of the court. It appears clearly that there was no abuse of discretion.

The judgment and order appealed from are affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

133 Cal.App.2d 15

Matter of the ESTATE of Ben ALVAREZ, also known as Benjamin R. Alvarez, and as Ben R. Alvarez, Deceased.

Mary ESTRADA, David Blanco, and Albert Jimenez, Appellants,

v.

Ben ALVAREZ and Lola G. Alvarez, Administratrix of the Estate of Ben Alvarez, also known as Benjamin R. Alvarez and Ben R. Alvarez, Deceased, Respondents.

Civ. 20805.

District Court of Appeal, Second District, Division 1, California.

May 16, 1955.

Proceeding upon petition by judgment creditors to require administratrix to pay judgment of such creditor. The Superior Court, Los Angeles County, Roy L. Herndon, J., denied petition, and creditors appealed. The District Court of Appeal, Doran, J., held that, where order decreeing distribution, adverse to wishes of claimants, had become final and was conclusive as to all unpaid creditors, including claimants, and written stipulation, which was made between claimants and administratrix, who was sole heir and distributee, and which arose out of Superior Court action between claimants and administratrix, provided that claimants were to have $5,000 judgment against administratrix personally and in her official capacity, probate court properly denied claimants' petition for order for payment of claim on basis of superior court judgment in view of fact that another method of payment was provided for in the stipulation.

Order affirmed.

1. Executors and Administrators ⚷315(6)

Where probate court overruled claimants' objections and ordered final distribution of estate, claimants' remedy was to appeal from such order, and order decreeing distribution became final and conclusive as to all unpaid creditors of the state, even though administratrix was also sole heir and distributee. Probate Code, §§ 931, 952, 954.

2. Stipulations ⚷14(12)

Where order decreeing distribution, adverse to wishes of claimants, had become final, and written stipulation, which was made between claimants and administratrix who was sole heir and distributee, and which arose out of Superior Court action between claimants and administratrix, provided that claimants were to have $5,000 judgment against administratrix personally and in her official capacity probate court properly refused to order payment of claim, in view of fact that another method of payment was provided for in the stipulation. Probate Code, §§ 931, 952, 954.

Larwill & Wolfe, Charles W. Wolfe, Los Angeles, for appellants.

C. Paul DuBois, Hunter & Liljestrom, Los Angeles, by Kenneth H. Clausen, Los Angeles, for respondents.

DORAN, Justice.

The appeal herein is from an order which denied a petition by a judgment creditor praying that the administratrix of the Estate of Ben Alvarez, deceased, be required to pay the judgment of such creditor. At the time of death, an action for fraud against the decedent was pending, instituted by the appellants.

Mr. Alvarez died on January 14, 1951, and on September 24, 1951, letters of administration were issued to Lola G. Alvarez. In December 27th, appellants filed a creditors claim against the estate setting forth the pendency of the action and the nature and amount of the claim, which claim was duly rejected by the administratrix. Thereafter Lola G. Alvarez, Administratrix, was regularly joined as a party defendant in the appellants' action, and appeared in said action.

On June 16, 1952, the administratrix filed in said estate a First and Final Account and petition for Distribution, which together with a supplement to the account were heard on July 16, 1952. The present appellants appeared at such hearing and objected to approval of the account and distribution and closing of the estate without providing for payment of the appellants' claim hereinbefore referred to. The account was approved and distribution of all assets ordered to Lola G. Alvarez, administratrix and widow of the deceased, which distribution was accordingly made, the distributee's receipt therefor being filed on August 18, 1952, since which date the administratrix has had no estate assets. No appeal was taken from the order approving the final account and ordering distribution.

Thereafter, appellants' action came on for trial in the Superior Court, and on January 27, 1954 a written stipulation was entered between appellants and Lola G. Alvarez that appellants have judgment in the sum of $5,000. The judgment entered was against Mrs. Alvarez personally and as administratrix. This stipulation specifically provides that certain personal property should be sold and the proceeds applied on account of the judgment; that Mrs. Alvarez obtain a $1,000 loan, also to be applied on the judgment, and that in addition to the foregoing, Mrs. Alvarez should pay $25 per month, or more, on the judgment. The judgment entered on February 11, 1954, provided that "payment of said judgment is to be made pursuant to the written stipulation of the parties filed concurrently herewith". On July 1, 1954 the appellants filed an abstract of said judgment in the estate proceedings, and on July 13th filed a "petition for order for payment of claim", which petition was denied, and this appeal followed.

It is appellants' contention that since Section 954 of the Probate Code makes an administrator personally liable for the payment of an allowed claim, the judgment in appellants' action "is and was at the time of the hearing in the probate proceedings, *res adjudicata*", and that therefore "The Court in probate erred in refusing to order the administratrix to pay said judgment". It is also claimed that "The administratrix has waived any grounds she might possibly have to evade the effect of the judgment".

[1] The appellants' position is untenable. As stated in respondents' brief: "When the court overruled the appellants' objections and ordered a final distribution of the estate the appellants' remedy was to appeal from the court's order if they wished to protect their rights. The order decreeing distribution became final and is now conclusive as to all unpaid creditors".

Section 931 of the Probate Code provides that "The order settling and allowing the account, when it becomes final, is conclusive against all persons interested in the estate". In Section 952, it is provided that "If the property of the estate is exhausted by the payment order, such account shall constitute a final account, and the * * * administrator shall be entitled to his discharge on producing and filing the necessary vouchers and proof showing that he has complied with the decree."

In this case the administratrix did file a distributee's receipt showing compliance with the court's order. The fact that Mrs. Alvarez, the administratrix, was also the sole heir and distributee in no manner affects the situation. "Certainly it is the law", states the court in Re Estate of Mailhebuau, 218 Cal. 202, 205, 22 P.2d 514, 515, "that an order allowing an account which has become final is conclusive upon all unpaid creditors". Likewise, in Federal Farm Mortgage Corporation v. Sandberg, 35 Cal.2d 1, 215 P.2d 721, 723, it was said that "in the absence of extrinsic fraud or mistake, when the decree (of distribution) becomes final, it is res judicata as to the rights of all persons interested in the estate."

[2] It is also significant that the judgment, following the stipulation, provided explicitly how the judgment was to be paid by Mrs. Alvarez, and it must certainly be assumed that such terms were agreeable to appellants as well as to the other party signing such stipulation. As respondents say: "it is obvious from the written stipulation that the plaintiffs in that action (appellants herein) did not expect or intend to be paid out of or through the estate of the deceased". Under these circumstances, the probate court could hardly be expected to take any other action than that of denying appellants' request.

The order is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

132 Cal.App.2d 863

WM. H. HOEGEE INVESTMENT COMPANY, a corporation, Plaintiff and Appellant,

v.

BURTON BROS., Inc., a corporation; Burton Mines, Inc., a corporation; Leona C. Burton, Vivian L. Burton, Alice E. Burton, Clifford G. Burton and Dorene M. Settle, a co-partnership doing business under the firm name and style of Burton Bros., a co-partnership; Leona C. Burton, Vivian L. Burton, Alice E. Burton, Clifford G. Burton and Dorene M. Settle, individually, Defendants and Respondents.

Civ. 4928.

District Court of Appeal, Fourth District, California.

May 13, 1955.

Action for underground trespass. From an adverse judgment of the Superior Court, Kern County, Robert B. Lambert, J., the plaintiff appealed. The District Court of Appeal, Mussell, J., held that the defendants, as owners of the northernmost of two adjacent mining claims had the right to follow a vein or lode, having its apex in such claim, on its downward course or dip through the south side line of the claim.

Judgment affirmed.

1. Mines and Minerals ⚷31(2)

Owner of northernmost of two adjacent mining claims had right to follow vein or lode, having its apex in such northernmost claim, on downward course or dip of vein through south side line of the claim.

2. Mines and Minerals ⚷38(22)

In action for underground trespass, question whether defendants' workings within side lines of southernmost of two adjacent claims were on vein or lode having its apex within northernmost claim was, under evidence, question of fact for trial court's determination.

3. Appeal and Error ⚷1010(1)

Where there was substantial evidence in action for underground trespass to support trial court's finding, judgment based thereon could not be disturbed on appeal.

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Borton, Petrini, Conron and Brown, Bakersfield, and Thomas A. Wood, Los Angeles, for appellant.

Baker, Palmer, Wall & Raymond, Bakersfield, for respondents.

MUSSELL, Justice.

This action was brought by plaintiff and appellant Hoegee Investment Company, a corporation, against the defendants Burton Bros., Inc., et al., for underground trespass. Plaintiff, owner of the Last Chance mining claim in an unorganized mining district in Kern county, alleged in its complaint that the defendants, owners of the Kid Lode mining claim, which adjoins the northerly side line of the Last Chance lode mining claim, wrongfully and unlawfully cut, made and excavated certain drifts, openings, crosscuts and underground workings into and under the mining ground of plaintiff and have mined, extracted and removed therefrom large quantities of mineral deposits, ores and other precious metals of great value, to the damage of plaintiff. The prayer of the complaint was for an accounting, judgment and injunctive relief.

Defendants in their answer denied the alleged trespass and alleged that all minal deposits, ores and other precious metals they extracted and mined from the area in controversy are and were part of a vein, lode or ledge having its top or apex within the surface lines of the Kid lode mining claim and were the property of the defendants; that the discovery vein, lode or ledge, having its top or apex within said Kid claim, in its easterly and westerly longitudinal course or strike, passes through the entire length of said Kid claim and entirely within the northerly and southerly side lines thereof, and passes through both end lines thereof, and that said end lines are parallel; that said discovery vein, lode or ledge, in its downward course within said Kid claim, departs from the perpendicular on its dip at an angle of from about 45 to 60 degrees from the horizontal in a southerly direction and under the plaintiff's Last Chance lode mining claim via the northerly side line thereof; that any entry defendants have made into the controverted area of plaintiff's claim has been within the southerly projected extension of the parallel and vertical end lines of defendants' claim and has been restricted to following downward on its dip the said Kid discovery vein, lode or ledge having its apex or top within said claim. Defendants denied having removed any mineral deposits, ores, or precious metals from any vein, lode or ledge from the controverted area except as above set forth. The trial court found generally in accordance with these allegations of the defendants and plaintiff appeals.

It is conceded that the only question to be determined here is whether there is any substantial evidence in the record to support the trial court's findings that the vein being worked by the defendants within the side lines of the Last Chance lode claim of plaintiff in fact has its apex within the Kid lode claim owned by the defendants.

The evidence and the maps introduced in evidence by both parties (Plaintiff's exhibit 1 and defendants' exhibit 7) show without question that defendants sunk a 740 foot shaft described as the "Kid Shaft" near the southeast corner of and on the Kid claim about 89 feet north of the compromise line and from this shaft ran crosscuts and drifts and conducted extensive underground mining operations within the side lines of both the Kid and the Last Chance claims. The side lines of these claims run generally east and west and it appears that as a result of a controversy between the parties as to the location of the side line between the two claims a compromise line was established, which is shown on the said maps and is and was accepted by the parties. It further appears from the evidence and said maps that the defendants excavated several crosscuts and drifts from the Kid shaft, one north and on the 100 foot level for approximately 190 feet, thence southwesterly approximately 250 feet; another north from said shaft on the 200 foot level for approximately 400 feet; one east on the 400 foot level approximately 280 feet; one south and east approximately 120 feet, thence in a general westerly direction and north of the compromise line between the two said claims and on the 400 foot level a distance of approximately 880 feet. The next crosscut and drift is on the 600 foot level southeast approximately 140 feet, thence in a general westerly direction approximately 480 feet; and the last principal crosscut and drift extends south approximately 240 feet from said Kid claim and thence in a general westerly direction approximately 920 feet on the 750 foot level.

James A. Noble, an experienced geologist specializing in mining geology, called as a witness in behalf of the defendants, testified that he had taken several degrees in geology and at the time of the trial had been employed by the California Institute of Technology as a mining geologist and professor of economic geology for six years; that subsequent to 1922 he worked for two years with a zinc company as mining engineer and geologist; that from 1924 to 1931 he worked in Peru for a copper corporation as a geologist in large mining operations and explorations; that from 1931 to 1947 he was chief geologist for the Homestead Mining Company in the Black Hills of South Dakota; that he was still consultant for three mining companies and was engaged in three or four special research jobs, one of which was a study of the geological histories and ore deposits of the Rosamond Hills, which includes the area involved in the present action; that in the fall of 1947 he first visited the claims here involved; that he saw the surface area and studied the maps for use for student instruction and for mapping and geological information for students; that the following spring he began to map the underground workings from the Kid shaft to see what the geology was; that in 1949 and each year since he has taken students in geology underground in the Kid mine to study the underground workings, using some of the maps and photographs in evidence. Dr. Noble pointed out to the court and traced the apex line or top of the lode continuously through the Kid claim from west to east through the end lines of said claim and running approximately east and west. He demonstrated that the apex-outcrop had a strike approximately east-west and a dip of from 45 to 70 degrees south, averaging about 60 degrees south and stated that he traced the strike himself; that the Kid shaft cut the lode at approximately the 400 foot level and the lode apexes well north of the shaft; that the Tropico lode, which apexes on the surface, is identifiable and continues on the 750 foot level as on the upper level; that the said lode is identifiable and continuous from the surface through the various levels to the lowest extremity on the 750 foot level and is part of the same lode which apexes at the surface of the Tropico lode; that all of the workings underground into the side line of the Last Chance and all minerals removed therefrom were from the Tropico lode.

Frank Royer, a graduate of the Colorado School of Mining, with a metallurgical and mining degree and who owns and operates the Kelly mine extension, testified that he went over the surface of the Kid claim and inspected the 400 and 600 foot levels; that he found the apex of the lode about the center of the Kid claim, parallel to the side lines; that the dip of the lode was on the average of 60 degrees to the south; that from his actual experience and from his examination of the maps and exhibits it was his opinion that the vein is continuous from the dump to the 600 foot level, which was the deepest one which he had seen.

Clifford G. Burton, who graduated from the University of California with a master of science degree in mining engineering, and who was the mining engineer of the entire Tropico mine, including the Kid mine, testified that the Tropico lode on its dip from the apex line is a continuous identifiable lode at all points and places from the apex line down through to the lowest workings. He further testified in detail as to the many samples taken from the 400 and 750 foot levels showing the mineralization of the material taken from the workings.

D. L. Gardner, an experienced geologist specializing in mining, testified that he mapped out the Kid shaft area, the 600 foot stope, the 600 and 400 foot levels, the 200 foot level and part of the outcrop. He traced the apex line of the Tropico lode from west to east through the end lines of the Kid claim and testified that all of the workings laterally into the Last Chance claim were on the Tropico lode, which dips 60 degrees south. He described in detail the characteristics of the lower workings on the Kid claim and as to the many samples taken showing mineralization, and also pointed out the identity of the formation of the lode at the surface and at the lower levels.

Earl Blickenstaff, a mining engineer, testified that he went down into the Kid mine a few days before the trial and also went over the surface; that in his opinion the apex of the Tropico vein goes through both end lines of the Kid claim and has a dip of approximately 60 degrees to the south; that in his opinion, based on his observation of the workings in the Kid claim, there is a continuous identifiable lode from the apex on the surface to the extremities of the lowest extralateral workings.

It is apparent from the record before us that there was substantial evidence to support the trial court's finding that the vein being worked by the defendants within the side lines of the Last Chance claim has its apex within the Kid claim. While Dr. John P. Buwalder, a mining engineer and geologist who examined the property involved, testified that there was very little evidence of mineralization on the 400 foot level; that there was very little alteration of rock which would be necessary to form a vein; that he took samples from the surface where the so-called vein was supposed to be and got samples from 30¢ to 75¢ and nothing higher; and that there was no vein extending through the Fairview, the Tropico and into the Kid and no place that a vein showed on the surface, this testimony merely created a conflict in the evidence which was resolved by the trial court.

A miner's vein or lode is defined in American Mining Law, Vol. 1, Sec. 125, page 114, as any body of ore, quartz or other mineral bearing substance lying within the crust of the earth, bounded on each side by the country rock, greatly varying in extent across and through the country for a greater or less distance. Section 129, following, provides as follows:

> "The terms 'vein, lode and ledge,' within the meaning of the mining act is whatever the miner could follow and find ore. But it is not an imaginary line without dimensions. It is not a thing without shape or form, but before it can legally and rightfully be denominated a lode or vein it must have length, width, and depth. It must be capable of measurement. It must occupy defined space and be capable of identification. It is by no means always a straight line of uniform dip, or thickness, or richness of mineral matter throughout its course."

Section 138 provides that:

> "The elements of a vein or lode are mineral or mineral-bearing rock and boundaries in place in the general mass of the mountain. When one of these is well established very slight evidence may be accepted as to the existence of the other. But every seam or crevice in the rock does not constitute a vein or lode nor every ridge of stained rock its croppings. The vein or lode need be continuous only in the sense that it may be traced through the surrounding rocks. It need not have well defined walls. It may vary in direction, width, dip, and value, may split or may, in various places, be turned, curled or cupped outward, or divide into branches both in length and in depth. These branches may or may not again unite. That it is occasionally found in the general course of the vein or shoot in pockets deeper down into the earth or higher up, does not affect its character as a vein, lode or ledge."

In section 185, page 139 of said volume, it is said that in determining either the fact or the likelihood of the extent of vein or lode a court may consider the topography of the mountain, its geological formation, together with its sands, limes, porphyry, quartzite, and granite formation, together with the mineralized rock in body and detachments; that the presence of a vein or lode may be determined by assay and analysis; that any dispute as to whether a given parcel of land is a vein or lode is a question of fact to be determined by men experienced in mining and it cannot be determined as a matter of law. It is further stated (Sec. 681, p. 400) that:

> "A person entering within the side lines of the mining claim of another for the purpose of mining the same is *prima facie* a trespasser. The presumptive trespass may be justified by showing the existence of a vein or lode having its apex within the boundaries of a valid lode location; that such vein or lode departs from the side lines of such location on its downward course between the planes of its parallel end lines and penetrates the ground in controversy."

[1–3] Defendants, as owners of the Kid lode claim, had the right to follow the Tropico vein or lode, having its apex in said claim, on its downward course or dip through the south side line of said claim. 17 Cal.Jur., sec. 67, p. 382; 32 West's Cal.Dig., Mines and Minerals, 🔑31, and cases cited. The question whether defendants' workings within the side lines of the Last Chance claim were on a vein or lode having its apex within the Kid claim was a question of fact for the trial court's determination and where, as here, there is substantial evidence to support its findings, the judgment based thereon cannot be disturbed on appeal. Berniker v. Berniker, 30 Cal.2d 439, 444, 182 P.2d 557; In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

Carl Herschel BONHAM, Petitioner and Appellant,

v.

F. Britton McCONNELL, Insurance Commissioner of the State of California, substituted for John R. Maloney, Insurance Commissioner of the State of California, Respondent.

Civ. 16513.

District Court of Appeal, First District, Division 1, California.

May 18, 1955.

Rehearing Denied June 17, 1955.

Hearing Granted July 15, 1955.*

Mandamus proceeding to review an order of the Insurance Commission revoking license of insurance agent. The Superior Court, City and County of San Francisco, Albert C. Wollenberg, J., denied the writ of mandamus and the insurance agent appealed. The District Court of Appeal, Peters, P. J., held that where Insurance Commissioner found that licensed insurance agent falsely engaged in general scheme to sell members of apartment house association individual policies, and he knowingly misrepresented those policies to be group policies possessing additional benefits, and deliberately inserted false answers on applications that adversely affected insureds, and Superior Court found all of charges to be supported except three charges, which were minor parts of whole charge, revocation of agent's license was not affected by unsupported charges, and court was not required to return case to Commissioner for reconsideration of penalty.

Judgment affirmed.

1. Insurance ⚿12

Quantum and nature of penalty imposed on licensed insurance agent for misconduct in sale of insurance is question for Insurance Commissioner, and his determination can be upset only where an abuse of discretion appears.

2. Insurance ⚿12

Where a licensed insurance agent is charged with multiple charges of misconduct and Commissioner imposes a single penalty for all offenses, and court holds that some of charges are unsupported, if unsupported charges are minor and supported ones are major in nature and it appears that penalty would have been imposed regardless of unsupported charges, court will affirm and not send case back for reassessment of penalty, but if unsupported charges constitute a major part of charges as a whole and it appears that penalty imposed would not have been imposed solely for supported charges, then case will be remanded to Commission for reassessment of penalty.

3. Insurance ⚿12

Where Insurance Commissioner found that licensed insurance agent falsely engaged in general scheme to sell members of apartment house association individual policies, and he knowingly misrepresented those policies to be group policies possessing additional benefits and he deliberately inserted false answers on applications that adversely affected insureds, and Superior Court found all of charges to be supported except three charges, which were minor parts of whole charge, revocation of agent's license was not affected by unsupported charges, and court was not required to return case to Commissioner for reconsideration of penalty. Insurance Code, § 1731; West's Ann.Code Civ.Proc. § 1094.5.

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Keith, Creede & Sedgwick, John S. Howell, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Harold B. Haas, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

Petitioner, Carl Herschel Bonham, the holder since 1937 of licenses to act as an insurance broker, insurance agent and as a life and disability agent, was charged with a series of misrepresentations alleged to have been made by him to various persons in the solicitation and sale of hospital and disability insurance in violation of several subdivisions of section 1731 of the Insurance Code. The hearing officer found that, pursuant to a general scheme to defraud, many such violations had occurred and recommended that Bonham's licenses be revoked. The findings and recommendation of the hearing officer were adopted by the Insurance Commissioner *in toto*. Upon petition for a writ of mandate the Superior Court, exercising its independent judgment on the facts, found that all but three of the misrepresentations found to have been made by the hearing officer were supported by the weight of the evidence, and determined that the findings of the hearing officer that were supported by the weight of the evidence were sufficient to support the Commissioner's order revoking the licenses, and denied the writ of mandate. Bonham appeals, making no attack on the sufficiency of the evidence, his sole contention being that, inasmuch as the Superior Court found that three out of the many adverse findings were unsupported, the court was required, as a matter of law, to return the case to the Commissioner for a reconsideration of the penalty.

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* Opinion vacated 288 P.2d 502.

The facts are as follows: In September of 1949 Bonham conceived the idea of selling a group plan of hospital, surgical, and medical expense insurance to the members of the Apartment House Association of Alameda County. He discussed his project with the Constitution Life Insurance Company, and was told by the representatives of that company that the company would be glad to underwrite such a group policy if a sufficient percentage of the group membership necessary to meet legal and underwriting requirements could be signed up. The representative of the company doubted that Bonham could secure a sufficient sign up from this association to qualify for a group policy, and he suggested that Bonham should take applications for individual policies that could later be merged into the group plan if a sufficient number qualified. The basic difference between group and individual disability insurance is that with group disability insurance the insured's pre-existing physical condition is disregarded after the policy becomes effective, while individual disability insurance is not issued to cover a pre-existing condition, and misrepresentations as to such condition will void the policy.

Bonham engaged in a campaign to sell the members of the association insurance policies covering medical, surgical, and hospital expense. During this campaign he made the series of misrepresentations involved in this proceeding. The charges and findings are most detailed. The findings disclose that Bonham engaged in a scheme to sell to various members of the association individual policies, representing falsely that they were group policies. He also inserted false answers on the applications of some of the applicants. It is found that, pursuant to this scheme, at a convention of the Apartment House Association in San Francisco, he solicited generally the members, employees and dependents of the association to subscribe to a group plan of disability insurance and pointed out to them the advantages of group over individual insurance. A few days later at the office of the Alameda County Association he stated that the Constitution Life Insurance Company offered, and would provide, a group plan of insurance for the members of the association that would not be available to other persons, and that this type of insurance was cheaper than individual insurance. He also told six members, to induce them to subscribe, that a certain union in Los Angeles had a group plan similar to the one he was offering, and was satisfied with it. This representation was false inasmuch as the members of the union in fact did not have a group policy. He told a committee of the association appointed to consider the plan that it was a group plan and that the savings over individual policies would be substantial. He represented to a meeting of association members called to consider the plan that it was a group plan, and then left advertising material with applications attached for individual policies, and a pamphlet describing the life insurance group plan for the Los Angeles Apartment House Owners Association. A few days later he left with the manager of the association a galley proof of a form of a policy issued by the Constitution Life Insurance Company, representing that it was a group policy prepared by the company for the association members. In fact, the policy was an individual one and the company had no such group plan for these members. He also misrepresented the rates called for by this policy to be $3.50 per month per adult, when in fact the rate called for was $2.50. He delivered to the secretary of the manager of the association for mailing to the membership an announcement of the group plan, summarizing its benefits. He then solicited and sold individual policies to various members of the association, falsely representing that they were group policies costing less than individual policies. All purchased in the belief induced by Bonham that they were getting group policies. The Superior Court found, and such findings are not challenged, that such sales and such representations were made to Robert Snell, manager of the association, to C. H. McCaslin, its president, who purchased two such policies, and to Mabel Britt, Helen Miebach, Grace Goodwin and George Adelson. The Superior Court also found that after Mrs. Goodwin purchased her policy, she had an operation for a condition that existed at the date of the policy which would have been covered under a group policy but on which the insurance company denied liability under the terms of the individual policy purchased by her. In the sale to Mrs. Miebach of the policy, which also covered her husband, in response to the question whether her husband had high blood pressure, Mrs. Miebach told Bonham that her husband suffered this affliction, and also had been treated for it. Bonham nevertheless wrote "No" on the application. Later, Mr. Miebach contracted pneumonia, but the policy was rescinded and his claim denied because of this false answer on the application. Bonham also solicited from Mrs. Miebach a policy on her son-in-law, and asked her the answers to the questions on the application knowing she did not have full and complete information, and then induced her to sign her son-in-law's name. This application contained answers known by Bonham to be untrue.

The hearing officer also found that similar misrepresentations were made to Bentley, Bessette and Spongberg. These findings the trial court held were not supported by the weight of the evidence.

The sufficiency of the evidence to support the findings of the trial court is not challenged. The sole contention is that because the trial court found that the representations made to Bentley, Bessette and Spongberg were unsupported, that court should have, in view of the findings and as a matter of law, sent the case back to the commissioner for a reconsideration of the penalty.

The law on this subject is by no means clear. Prior to the adoption of section 1094.5 of the Code of Civil Procedure in 1945 it had been held that the courts on either *certiorari* or *mandamus,* were limited to the determination of whether the administrative board had exceeded its jurisdiction. So far as the penalty imposed by the administrative board was concerned, this meant that however drastic the penalty appeared to the reviewing court it had no power to modify the punishment if it was within the jurisdiction of the board to impose. In such a situation, if all the charges made by the board were supported by the evidence, the court had to affirm. Painless Parker v. Board of Dental Examiners, 216 Cal. 285, 14 P.2d 67; Fuller v. Board of Medical Examiners, 14 Cal.App.2d 734, 59 P.2d 171. In Rinker v. State Board of Medical Examiners, 59 Cal.App.2d 222, 138 P.2d 403, decided in 1943, the petitioner had been charged with two counts of unprofessional conduct involving abortions. The appellate court found that the evidence was sufficient to sustain one count, and in denying the petition for a writ of mandate held that it was not necessary to consider the evidence on the other count because "if the evidence is sufficient to sustain the charge in either of these counts the judgment [revoking a license] must be affirmed." 59 Cal.App.2d at page 223, 138 P.2d at page 403. Then, in 1944, came the case of King v. Board of Medical Examiners, 65 Cal.App.2d 644, 151 P.2d 282. There the board found that petitioner had committed three acts of misconduct. The Superior Court found that the two main charges were unsupported, but that the third, a mere technical violation, was supported. It held that revocation of the license based solely on the third charge was unjustified, that the board had been unfair and arbitrary, and reversed the revocation. The appellate court affirmed, holding that while disciplinary action is vested in the administrative agency, and the court "is without power to substitute its discretion for that of the Board in matter of form of discipline to be imposed", 65 Cal.App.2d at page 652, 151 P.2d at page 283, the court could control an abuse of discretion.

In 1945 section 1094.5 of the Code of Civil Procedure was enacted purporting to regulate the scope of review by the courts in *mandamus* proceedings. Subdivision (b) of that section provides: "The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence."

Subdivision (e) of the section provides: "The court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in the light of the court's opinion and judgment and may order respondent to take such further action as is specially enjoined upon it by law but the judgment shall not limit or control in any way the discretion legally vested in the respondent."

Under this section two lines of authority have been developed. One line of cases is illustrated by Hohreiter v. Garrison, 81 Cal.App.2d 384, 184 P.2d 323. There the commissioner revoked petitioner's insurance license because of six charges of misrepresentation. All six were upheld by the Superior Court. On appeal the appellate court also held that all six were supported. In so holding, the court stated, 81 Cal.App. 2d at page 388, 184 P.2d at page 325: "We are of the opinion that the evidence amply supports the findings that appellant violated the law as charged in all six counts, but it should be pointed out that if the evidence substantially supports any one of the six points, the insurance commissioner was empowered, under section 1731 of the Insurance Code, to revoke the license, and this court would have no power to reverse the decision of the trial court."

A somewhat similar holding is found in Genser v. State Personnel Board, 112 Cal. App.2d 77, 245 P.2d 1090. There the Board found petitioner guilty of six counts of misconduct. The Superior Court reversed on the ground of insufficiency of evidence. The appellate court found that two of the charges were supported, and reversed the lower court. In discussing the penalty the court stated, 112 Cal.App.2d at page 88, 245 P.2d at page 1097: "It is clear that the Board intended to exact the penalty imposed on each count of the charges, and in view of the fact that we have reached the conclusion that the findings as to the first two charges are supported by substantial evidence, it is unnecessary to discuss at any length the remaining charges and findings. The State Personnel Board here has done what in effect a court does when a defendant in a criminal prosecution is convicted on a number of counts and decrees that the sentences shall run concurrently. The rule in criminal law is that where one is convicted on two counts and sentenced thereon, the sentences to run concurrently, a subsequent invalidation of the conviction on one count will not secure the release of the defendant. [Citing a case.] So even if we should find that any or all of the remaining charges and findings are not supported by substantial evidence, we would still be required to reverse the judgment requiring appellant Personnel Board to set aside its decision."

Concurrently with these cases a different line of authority developed. These cases are well illustrated by Cooper v. State Board of Medical Examiners, 35 Cal.2d 242, 217 P.2d 630, 18 A.L.R.2d 593. There the Board revoked a license based on two charges of unprofessional conduct. The Superior Court held both charges supported by the evidence. The Supreme Court found one of the charges unsupported. It held, 35 Cal.2d at page 252, 217 P.2d at page 636: "The board made a single order of license revocation based on its findings and conclusions that both count seven and count nine had been violated. Inasmuch as we hold that the findings do not support the conclusions of unprofessional conduct as to count seven, and since license revocation is in any event a drastic penalty, and, furthermore, in consideration of the fact that we have no means of knowing whether the board itself would have imposed so severe a penalty for violation of count nine alone, we are of the view that the judgment should be reversed with directions to the trial court to set aside the order and send the matter back to the board for reconsideration of the penalty." Similar holdings are to be found in Jones v. Maloney, 106 Cal.App.2d 80, 234 P.2d 666, and Nelson v. Department of Corrections, 110 Cal.App.2d 331, 242 P.2d 906.

In Garfield v. Board of Medical Examiners, 99 Cal.App.2d 219, 221 P.2d 705, a one-year suspension was imposed by the Board upon finding that petitioner had committed two acts of unprofessional conduct. The Superior Court reversed. This court found the minor charge supported and the major one unsupported. Under such circumstances because "we have no way of knowing what penalty the board would have imposed for violation of count I alone, the judgment will have to be reversed and the matter sent back to the board for reconsideration of the penalty. [Citing the Cooper case.]" 99 Cal.App.2d at page 231, 221 P.2d at page 713.

In Stoumen v. Reilly, 37 Cal.2d 713, 234 P.2d 969, a liquor license was revoked upon the board finding two charges of misconduct supported. The Superior Court denied a writ of mandate. The Supreme Court found one charge of selling liquor to a minor aged 20, supported, but the other charge of permitting the licensed premises to be used as a disorderly house unsupported. The court stated, 37 Cal.2d at page 717, 234 P.2d at page 971: "A separate penalty was not assessed for this offense, the order of indefinite suspension being based upon the finding that plaintiff had violated both sections 58 and 61(a). * * * It appears that the usual punishment imposed under such circumstances varies from a reprimand to a limited suspension of not more than thirty days. Since it does not seem likely that plaintiff's license would have been suspended for an indefinite period on this charge alone, the matter should be remanded to the board."

[1, 2] These two lines of authority are not necessarily inconsistent, although it is somewhat difficult to reconcile some of the language of the various cases. We interpret the cases to mean that the questions of the quantum and nature of the penalty are ones for the administrative board, and that its determination can be upset only where an abuse of discretion appears. Where all the charges found by the board are held to be supported by the courts, the board's penalty will seldom be interfered with except in the rare case where the penalty is so excessive as compared with the offense that an abuse of discretion is apparent as a matter of law. The difficulty comes in those cases where multiple charges of misconduct are found by the board to have been committed and the board imposes a single penalty for all offenses, and the courts hold that some of them are unsupported. Then the proper rule to be followed depends upon the sense of fairness and common sense of the appellate courts. If the unsupported charges are minor and the supported ones are major in nature, and of a character to alone support the penalty, and where it appears reasonably certain that the penalty would have been imposed regardless of the unsupported charges, the courts will affirm and not send the case back for a reassessment of the penalty. On the other hand, where the unsupported charges constitute a major or important part of the charges as a whole, and where it appears certain or even reasonably probable that the penalty imposed would not have been imposed solely for the supported charges, then the case will be remanded to the board for a reassessment of the penalty.

[3] How do these rules apply in the instant case? Here the Commissioner found that petitioner had falsely engaged in a general scheme or plan of trying to sell to the members of the association individual

policies, and knowingly misrepresented these policies to be group policies possessing the additional benefits of such policies. All of the basic steps charged to have been taken by Bonham in carrying out this scheme the Commissioner found supported. The Superior Court made similar findings, and these findings are in no way challenged on this appeal. Likewise, in several instances, the Commissioner found Bonham deliberately inserted false answers on the applications that adversely affected the insured. These findings were upheld by the Superior Court and are not challenged on this appeal. The majority of the sales to individual members found by the Commissioner to have been secured by the false representation that the policies were group policies were upheld by the Superior Court and are not challenged on this appeal. The only charges held not to be substantiated were the charges that he misrepresented the nature of the policy or its date of effectiveness to Bentley, Bessette and Spongberg. These were minor parts of the whole charge. The whole basic scheme and plan to defraud still stands unchallenged, as do the findings as to a majority of the individual sales, as well as those relating to the false answers. Reading the record as a whole it is apparent that the Commissioner did not consider each sale of a policy a separate isolated event, but considered all the sales as being related and integrated parts of a plan or scheme to defraud. The substance of that plan was overwhelmingly proved. The Superior Court knocked out three details, but the substance of the scheme to defraud remains. This being so, it would be an idle act to remand the case to the Commissioner for a reassessment of the penalty. It cannot be reasonably argued that if the case were remanded there is any reasonable probability that there would be a change in penalty. There is no reasonable basis for the argument that the penalty was in any way affected by the unsupported charges. The penalty of revocation of this man's licenses held by him since 1937, is undoubtedly a severe one and extremely serious to him, but so are the charges found to be supported. Under the circumstances we cannot interfere with the discretionary order of the Commissioner or require him to reconsider his ruling.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

Arthur Paul SCOTT, a minor, by his Guardian ad litem, Henry R. Scott, Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSION of the State of California, Respondent.

Civ. 20953.

District Court of Appeal, Second District, Division 3, California.

May 16, 1955.

Rehearing Denied June 10, 1955.

Hearing Granted July 13, 1955.*

Minor, by his guardian ad litem, brought proceedings for writ of prohibition or mandate to restrain the Industrial Accident Commission from taking any further proceedings in the matter of an application for adjustment of claim of petitioner. The District Court of Appeal, Shinn, P. J., held that where minor brought action in Superior Court against corporation for injuries, on ground that he was an invitee on corporation's premises when he was injured through negligence of corporation, and corporation filed amended answer alleging that exclusive jurisdiction with respect to its liability for minor's injuries rested with Industrial Accident Commission, on ground that minor was an employee at time of injury, but Superior Court struck such defense, and corporation and State Compensation Insurance Fund filed an application with Industrial Accident Commission for adjustment of minor's claim, exercise of jurisdiction by Superior Court should not be interfered with and proceedings before Commission should be stayed.

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* Opinion vacated 293 P.2d 18.

Writ of mandamus issued.

1. Courts ⚷472(1)

Where separate tribunals have concurrent jurisdiction, and either may grant relief, to which litigant is entitled, question whether one shall give way to the other is one of court policy and administration.

2. Courts ⚷475(1)

Where separate tribunals have concurrent jurisdiction, and either may grant the relief to which a litigant is entitled, the tribunal which first accepts and exercises jurisdiction is the only one which should be allowed to proceed.

3. Mandamus ⚷73(1)

Where minor brought action in superior court against corporation for injuries, on ground that he was an invitee on corporation's premises when injured through negligence of corporation, and corporation filed amended answer alleging that exclusive jurisdiction rested with Industrial Accident Commission, on ground that minor was an employee at time of injury, but superior court struck such defense, and corporation and State Compensation Insurance Fund filed application with Commission for adjustment of minor's claim, proceedings before Commission should be stayed.

4. Jury ⚷12(1)

Workmen's Compensation ⚷1180

Though State Industrial Commission in compensation proceeding has exclusive jurisdiction were necessary conditions of employment exist, it does not have exclusive jurisdiction to determine whether they do exist, and the Legislature has not limited right to trial by jury.

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Hindman & Davis, Los Angeles, for petitioner.

Everett A. Corten, San Francisco, Daniel C. Murphy, for respondent.

Dryden, Harrington, Horgan & Swartz, Los Angeles, for amicus curiae in support of respondent.

SHINN, Presiding Justice.

The petition of Arthur Paul Scott, a minor, by his guardian ad litem, seeks a writ restraining the Industrial Accident Commission from taking any further proceedings in the matter of the application for adjustment of claim of the petitioner herein heretofore filed with said commission by Pacific Coast Borax Co. and State Compensation Insurance Fund. The commission has filed its answer and an amicus curiae brief has been filed on behalf of the Borax Co. opposing the granting of a writ.

The petitioner alleges that on August 15, 1952, he was an invitee on the premises of the Borax Consolidated, Limited, doing business as Pacific Coast Borax Co., Division of Borax Consolidated Limited, at Death Valley Junction, Inyo County, California, and that while on said premises he was seriously and permanently injured through the negligence of the company; he filed an action against the company December 23, 1953, for the recovery of damages; the defendant answered. The cause was set for trial February 1, 1955; September 16, 1954, defendant with leave of court filed its amended answer alleging as a fifth affirmative defense that exclusive jurisdiction with respect to liability for plaintiff's injuries rested in the Industrial Accident Commission; on November 19, pursuant to motion, the court struck from the amended answer the above affirmative defense; November 23, 1954, the company and State Compensation Insurance Fund filed with the commission an application for adjustment of plaintiff's claim; petitioner has filed no application with the commission; the commission mailed notice of hearing of the application to be held December 23 and caused a subpoena to be served upon petitioner; the referee before whom the matter was pending declined to accede to petitioner's request for a stay of proceedings; January 7 certain evidence was taken by the referee and the matter of further hearing continued to March 8, 1955; January 24, the Borax Co. moved the court to stay proceedings until the matter pending before the commission was finally determined, which motion was denied; at the time set for trial February 1, 1955, the court denied a similar motion for continuance; the cause was tried and after the evidence was closed defendant moved for a directed verdict on the ground that the evidence showed as a matter of law that plaintiff was injured in the course of his employment by defendant and that the commission had exclusive jurisdiction; the motion was denied; the cause was submitted to the jury and the jury failed to reach a verdict; retrial is set for June 14, 1955; thereafter the company moved for a directed verdict in its favor upon the ground it had previously urged; the motion was denied; February 18 petitioner moved the Industrial Accident Commission for an abatement or stay of proceedings pending judgment in the superior court action, which motion was denied. The matter is still pending before the commission but further action has been restrained by our alternative writ until the further order of this court.

Obviously the sole question is whether jurisdiction to determine the factual and legal issues with respect to the liability of the company should be allowed to remain with the superior court to the exclusion of further exercise of its jurisdiction by the commission. We have concluded that the exercise of jurisdiction of the superior court should not be interfered with and that proceedings before the commission should be stayed.

The answer of the commission states: "We do not dispute that the Superior Court has jurisdiction to hear the matter before it, but we assert that the Industrial Accident Commission also has jurisdiction." The commission further says: "The Industrial Accident Commission has a constitutional and statutory duty to determine disputes arising out of the Workmen's Compensation Law expeditiously and without encumbrance of any character." It is the position of the company, and it appears to be the position of the commission that although the superior court has properly assumed and exercised jurisdiction it may be robbed of its jurisdiction to proceed further by the institution of a proceeding before the Industrial Accident Commission, the question whether petitioner was an employee of the company or its invitee being the same in the action and the proceeding. It is conceded that the question was in issue under the pleadings in the action and that the superior court was competent to decide it.

[1] Where separate tribunals have concurrent jurisdiction and either may grant the relief to which a litigant is entitled the question whether one shall give way to the other is one of court policy and administration. Ordinarily the conflict arises when it is sought to bring about deferment of proceedings in an action later instituted in order that the tribunal first exercising jurisdiction may alone proceed to a determination of the controversy. Of such a situation we said in Simmons v. Superior Court, 96 Cal.App.2d 119, 124, 214 P.2d 844, 849, 19 A.L.R.2d 288: "The rule which forbids a later action in the same state between the same parties involving the same subject matter rests upon principles of wisdom and justice, to prevent vexation, oppression and harassment, to prevent unnecessary litigation, to prevent a multiplicity of suits,—in short, to prevent two actions between the same parties involving the same subject matter from proceeding independently of each other. We think there is no distinction in reason or difference in principle between a case where a later action between the same parties involving the same subject matter is commenced in the same state and a case where a later action between the same parties involving the same subject matter is commenced in another state. If proceedings should be stayed in the first case mentioned, it is in order to avoid a multiplicity of suits and prevent vexatious litigation, conflicting judgments, confusion and unseemly controversy between litigants and courts." And we said, as applicable to the Simmons case: "The fruits of the recognition of the rule of comity 'have been so beneficent, when applied to courts of concurrent jurisdiction created by different sovereignties, as to justify the conclusion that it is not only a rule of comity, but one of necessity.' Phelps v. Mutual Reserve Fund Life Ass'n, 6 Cir., 112 F. 453, 465 [50 C.C.A. 339], 61 L.R.A. 717, * * *. It is settled California law that the pendency

of a prior action in a court of competent jurisdiction, predicated on the same cause of action and between the same parties, constitutes good ground for abatement of a later action within the same jurisdiction either in the same court or in another court having the jurisdiction, 1 Cal.Jur. 23, sec. 4; and it is held that the first court to assume and exercise jurisdiction in a particular case acquires exclusive jurisdiction and prohibition lies to restrain another court from proceeding if it is threatening to do so. Browne v. Superior Court, 16 Cal.2d 593, 597, 107 P.2d 1, 131 A.L.R. 276; Myers v. Superior Court, 75 Cal.App.2d 925, 930, 172 P.2d 84; Rilcoff v. Superior Court, 50 Cal.App.2d 503, 123 P.2d 540; Wright v. Superior Court, 43 Cal.App.2d 181, 183, 110 P.2d 529." 96 Cal.App.2d at pages 122–123, 214 P.2d at page 849.

Respondent rests its opposition upon the decision in Giacalone v. Industrial Acc. Comm., 120 Cal.App.2d 727, 262 P.2d 79, 87, contending that it is decisive of the present question. We are in full agreement with the holding in that case and with the reasoning of the opinion but we do not read it as one which supports the position of the respondent. It may not be doubted that the mere filing of an action in the superior court does not furnish a sufficient reason for staying pending proceedings before the Industrial Accident Commission involving the same controversy. Such were the facts of the Giacalone case. However, passages from the opinion and quotations from cited cases relating to the question of res judicata may not be applied to the present case as respondent seeks to apply them. The court did not hold that each tribunal must be allowed to proceed to a final adjudication *without interference,* even though a direct conflict may result. Such a holding would have been in conflict with the settled rule we have quoted from the Simmons case. Upon the contrary it was said in Giacalone v. Industrial Acc. Comm., supra: " 'Wherever a court or board is authorized to act upon the existence of a certain state of facts, it has jurisdiction to determine the existence or non-existence of the requisite facts.' Palermo Land & Water Co. v. Railroad Comm., 173 Cal. 380, 385, 160 P. 228, 230. Necessarily, then, when, as here, two tribunals have mutually exclusive jurisdiction, neither can be compelled to defer determination of that jurisdiction until the other has acted. But once the other has acted by actually determining and exercising its jurisdiction, that jurisdiction becomes exclusive. As the superior court has not exercised its jurisdiction and the commission has concurrent jurisdiction of the subject matter, the proceeding before it cannot be abated as a matter of right."

[2, 3] Here the superior court accepted and exercised jurisdiction. It struck from the amended answer the special defense which challenged the jurisdiction of the court upon the ground that the commission had exclusive jurisdiction. The court proceeded to a trial of the issues and proposes to go to retrial in the continued exercise of its jurisdiction, as it has a right to do. It has refused to defer action pending determination of the controversy. The situation which faces the litigants is that the two proceedings will proceed simultaneously with the prospect that the decisions of the principal issue may be in direct conflict. It is the manifest purpose of the company to press the proceeding before the commission to finality before a judgment rendered in the action can reach that stage. If this purpose should be accomplished the order of the commission would prevail over the judgment and the entire court proceedings would have been in vain. It is possible that in a similar situation a judgment of a court might for the same reason defeat an order of the commission. "Races between parties likely to result in unseemly controversy between courts of different states should be frowned upon and avoided if possible." Simmons v. Superior Court, supra, 96 Cal.App.2d at page 130, 214 P.2d at page 852. The duty rests upon the courts to intervene for the correction of this absurd situation. Proceedings in one tribunal or the other should be stayed and the solution which has been adopted as the most logical and practical is the recognition of the tribunal which first accepts and exercises jurisdiction as the only one which should be allowed to proceed. In the present situation that tribunal

is the superior court which acted in the exercise of its jurisdiction by proceeding in a normal manner toward a trial of the action and by striking out the special defense which sought abatement of the action. This was before the commission had taken any action upon the application of the company and the state fund.

It is the contention of the commission that as between any order it may make and any judgment that may be rendered in the action, the one that first becomes final will prevail over the other and that nothing short of a final judgment should be permitted to interfere with its pending proceeding. If this position is sustainable in view of the fact that no judgment has been rendered in the action, either party against whom a judgment might be rendered could invoke the jurisdiction of the commission at any time before the judgment became final in the hope of securing a final order of the commission which would nullify the judgment. This should not be permitted.

There is another consideration which we believe supports the contention of the petitioner and which we shall mention briefly. Petitioner has a constitutional as well as a statutory right to a jury trial of the principal issue whether he was an employee of the company, engaged in the performance of his duties as such, or merely an invitee upon the premises of the company at the time he suffered the alleged injuries. The question before us is one of policy of the courts. We do not question for a moment that in matters of policy the courts should prefer a course which preserves the right of a litigant to a jury trial. We do not base our decision on that ground but we do say that, other conditions permitting, preservation of the right should be regarded as a controlling factor.

[4] It is clear that the rule which applies as between courts of the same state or different states having concurrent jurisdiction, where in either court the litigants would be afforded the same rights, should also be applied as between a court and the commission lest the right to jury trial be denied. Although the commission has exclusive jurisdiction where the necessary conditions of employment exist the legislature has not given it exclusive jurisdiction to determine whether they do exist, and in that respect has not limited the right to trial by jury.

Let a writ of mandamus issue.

PARKER WOOD and VALLÉE, JJ., concur.

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132 Cal.App.2d 854

Charles M. WYLIE, Plaintiff and Respondent,

v.

George T. VELLIS, Defendant and Appellant.

No. 16238.

District Court of Appeal, First District, Division 2, California.

May 13, 1955.

Action for personal injuries suffered in intersection collision. The Superior Court, City and County of San Francisco, William, T. Sweigert, J., gave judgment for plaintiff. Defendant appealed. The District Court of Appeal, Kaufman, J., held that where defendant testified that as he was approaching intersection he observed plaintiff approaching, and that plaintiff was looking straight ahead at all times and appeared dazed, and that both automobiles traveled about same distance at about same speed until the moment of impact, court did not err in giving jury last clear chance doctrine instruction.

Judgment affirmed.

1. Automobiles 🔑227(1)

In action for injuries suffered in intersection collision, where defendant said he saw plaintiff begin to cross intersection, and realized plaintiff was not looking, and appeared to be dazed, in determining if last clear chance doctrine was applicable, question was not whether defendant actually knew from such circumstances that plaintiff was in danger, but rather whether a reasonable man in this situation would have made such deduction.

2. Automobiles ⚷246(58)

In action for personal injuries resulting from intersection collision, where defendant testified that he observed plaintiff approaching intersection, and that as he approached plaintiff continued to look straight ahead at all times and appeared dazed, and that from time he first saw plaintiff both vehicles traveled just about same distance at about same speed, court did not err in giving jury last clear chance doctrine instruction.

◆

Harold H. Cohn, San Francisco, for appellant.

Hoberg & Finger, San Francisco, for respondent.

KAUFMAN, Justice.

This is an appeal from a judgment after jury verdict, in the sum of $20,000 in favor of respondent Charles M. Wylie, in an action for personal injuries arising out of an intersection collision in San Francisco.

Appellant's sole claim of error on this appeal is that the trial court should not have given the instruction on the doctrine of last clear chance in view of the evidence herein. It is conceded that the instruction itself was correct, but it is contended that it was inapplicable in this case.

The accident occurred on the afternoon of July 2, 1951, at the intersection of 28th Avenue and Kirkham Street in San Francisco. Respondent Wylie was driving a 1940 Chevrolet panel truck in a northerly direction on 28th Avenue, while appellant and his wife were proceeding east in Kirkham Street in their new 1951 Frazer automobile. Respondent looked to his left as he approached the intersection and saw no car approaching. He slowed down and was traveling at about 10 miles per hour as he entered the intersection. He looked to his right after he passed the cross-walk. When he was about in the center of the intersection respondent first saw the appellant's car approaching and it was then very close to him. The collision occurred when appellant's car had traveled about 8 feet beyond the center of 28th Avenue and 3 to 5 feet north of the center of Kirkham Street.

Appellant testified that he was about 15 feet from the intersection when he first saw respondent who appeared to be going at between 3 and 5 miles per hour just as he approached the intersection. He was about 62 feet from the point of impact when he first saw respondent. His car was in second gear at all times in the intersection.

Appellant observed that respondent as he was approaching the intersection was looking straight ahead, and that he continued to look straight ahead at all times from the first time appellant saw him until the accident occurred, that respondent appeared dazed. Appellant admitted that he had no reason to suppose at any time prior to the impact that respondent knew of appellant's approach. There was nothing which prevented appellant from applying his brakes, or from sounding his horn to arouse respondent. Although appellant turned his car in an effort to avoid the collision after he had passed beyond the center of the intersection, he admitted that there was nothing physically preventing him from turning to the left before he arrived at the center of 28th Avenue. He testified that from the time he first saw respondent, both vehicles traveled just about the same distance and at about the same speeds up to the moment of impact.

Appellant contends that the last clear chance doctrine may not be applied under circumstances such as those in the present case where two automobiles enter an intersection not more than 65 feet apart, where the parties have no more than a brief second to respond to an emergency and must act on impulse. He quotes at length from Rodabaugh v. Tekus, 39 Cal.2d 290, 246 P.2d 663, a case in which both cars were approaching an intersection at about 40 miles per hour. Respondent was driving on the through highway protected by stop signs. Decedent failed to heed the stop sign and proceeded into the intersection without reducing speed. It was there held that *after* respondent acquired knowledge of decedent's perilous situation, he did not have a clear chance to avoid the collision by the exercise of ordinary care. The court said that disregarding the fact that respondent was on a through highway and that decedent was traveling on a road plainly marked with stop signs it was apparent that the case was one of the "usual types of intersection collisions between two rapidly moving vehicles." It was said that the fact that respondent saw that decedent was looking straight ahead while traveling the 500 feet in approaching the intersection did not establish that decedent was in a position of danger this entire distance for respondent had the right to assume that he had normal faculties and would heed the stop signs which were directly within his range of vision. The court declared that the last clear chance doctrine is inapplicable to such cases citing numerous decisions.

The present case differs greatly from the cited case, in that here we do not have the usual type of collision between two rapidly moving vehicles. Ten miles per hour appears to have been the top speed that either vehicle was traveling at any time after entering the intersection. If two vehicles enter an intersection at approximately the same time and travel the same speed throughout, it is obvious that they will collide somewhere in the center if one does not yield the right of way to the other. There was evidence here that both vehicles were traveling at about the same speed. Appellant, seeing that respondent had begun to traverse the intersection and that he was looking straight ahead, and having no reason to believe that respondent had seen appellant's car, should have realized that respondent was in a position of danger. Appellant having made these observations as he entered the intersection, had ample opportunity to sound his horn to alert respondent, or to cut his own speed to insure missing the truck.

Appellant says that he does not dispute that the facts show that respondent was unaware of his peril, but contends that in the exercise of ordinary care there was no clear chance for him to avoid the collision. He says that the overall time which elapsed between the moment when he first saw respondent's truck to the moment of collision was not more than four seconds. There was, of course, no reason why respondent would stop within the intersection, once he had entered it, unless he saw appellant. But appellant points to evidence that when appellant first saw respondent he appeared to be slowing down, and therefore appellant thought that he would stop. However, there is other evidence in the record of appellant's deposition wherein he testified that he was going about 10 miles per hour and respondent 15, and that the speed of repondent's car did not change at any time between the time he first saw it and the time the collision occurred. The jury could therefore have believed that appellant was aware of respondent's peril as he entered the intersection, and all the time thereafter until the impact.

In Girdner v. Union Oil Co., 216 Cal. 197, 13 P.2d 915, an intersection collision case, which is somewhat similar in its facts to the case herein, and where both vehicles were traveling between 12 and 15 miles per hour, the court held that the last clear chance doctrine was applicable. In Buck v. Hill, 121 Cal.App.2d 352, 263 P.2d 643, 647, the doctrine was held applicable. This case involved a head-on collision in the center lane of a three-lane highway. The court held that defendant had a last clear chance to avoid the accident by applying his brakes fully instead of lightly as he did. There defendant had 2⅘ seconds from the time he started to react to decedent's peril in which to avoid the accident. Decedent's speed was between 80 and 85 miles per hour and that of the defendant's bus, between 40 and 60 miles per hour when decedent entered the center lane between 200 and 150 feet distant from the bus. The court there said that it could not say as a matter of law, having in mind the time element and the fact that in approximately 16 feet more, decedent's Ford would have cleared the bus, "that in all reasonable probability a heavy application of the bus' brakes would not have afforded ample time for the Ford to get by the bus" and that this question was for the jury to determine.

[1] The Supreme Court in Peterson v. Burkhalter, 38 Cal.2d 107, 237 P.2d 977, 980, referred to the case of Poncino v. Reid-Murdock & Co., 136 Cal.App. 223, 28 P.2d 932 (a case also relied on by appellant herein) and stated that said case does not stand for the proposition that "as a matter of law, a defendant with two seconds within which to avoid an accident had no chance to do so. In a proper case, an appellate court might say that the defendant did not have a chance which amounted to a 'clear' one." It does not appear that the case now before the court is one in which it may be said as a matter of law that there was insufficient time for appellant to have avoided the collision in view of the fact that he had at least 4 seconds from the time he saw respondent begin to cross the intersection and realized that he was not looking in appellant's direction and appeared to be dazed. The question is not whether appellant then actually knew from these circumstances that respondent was in danger, but rather whether a reasonable man in this situation would have made such a deduction. As was said in Peterson v. Burkhalter, supra, 38 Cal.2d at page 113, 237 P.2d at page 980, "It cannot be said, as a matter of law, that he did not have sufficient time in which to do something, and the jury properly might have found that sounding his horn * * * would have constituted the exercise of reasonable care on his part to avert the accident."

[2] Appellant's argument that he did not realize that respondent was in a position of danger until he was within a few feet of appellant and it became obvious that respondent was not going to stop, is answered in Daniels v. City and County of San Francisco, 40 Cal.2d 614, 255 P.2d 785, 789, wherein much the same argument was made in regard to appellant's bus driver. It was there held that the awareness by the bus driver of plaintiff's car reducing its speed as it came into the intersection and began crossing the 55 mile per hour highway on which the bus was traveling, might be said to be a warning of the imminently perilous position of the plaintiff, even before her car came to a stop in the path of the bus. The court said it "would be a disregard of the realities of the situation" to hold that under no view of the evidence could it be said the circumstances confronting appellant's driver reasonably constituted a sufficient warning of the imminently perilous situation of plaintiff.

It appears, therefore, that the trial court did not err in giving the instruction on last clear chance in the present case and, accordingly, the judgment must be affirmed.

Judgment affirmed.

NOURSE, P. J., and DRAPER, J. pro tem., concur.

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133 Cal.App.2d 49

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Roque RODRIGUEZ, Defendant and Appellant.

Cr. 5332.

District Court of Appeal, Second District, Division 1, California.

May 17, 1955.

Defendant was convicted of possession of narcotics. The Superior Court, Los Angeles County, Clement D. Nye, J., entered judgment of conviction, and defendant appealed. The District Court of Appeal, Drapeau, J., held that evidence was sufficient to sustain conviction.

Judgment affirmed.

1. Criminal Law 🔑535(2)

In prosecution for possession of narcotics, prima facie showing of possession of narcotics by defendant was sufficient to establish corpus delicti. Health and Safety Code, § 11500.

2. Criminal Law ⇐412(1)

In prosecution for possession of narcotics, action of trial court in admitting extrajudicial statements of defendant made in conversation with arresting officer at scene of crime, was not error, where there had been prima facie showing of possession sufficient to establish corpus delicti. Health and Safety Code, § 11500.

3. Poisons ⇐9

In prosecution for possession of narcotics, evidence was sufficient to sustain conviction. Health and Safety Code, § 11500.

◆

John J. Bradley and Max Solomon, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice.

By information, defendant was charged with the possession of a preparation of heroin, denounced by section 11500, Health & Safety Code, and with one prior conviction of the same offense.

Defendant was found guilty as charged, and appeals from the judgment of conviction.

It is here urged that the verdict is contrary to the law and the evidence.

Appellant particularly urges that the evidence did not establish the *corpus delicti*, i. e., possession of the narcotics by him or any other person. Therefore, it was error to receive and consider evidence of his extrajudicial statements.

At the beginning of the trial, appellant admitted the prior conviction, and the cause was submitted on the testimony taken at the preliminary examination.

Mr. M. V. Duncan of the Los Angeles Police Department, one of the arresting officers, testified that about 9:15 p. m. on July 20, 1954 (a dark night), he saw appellant coming out of the front door of a residence on Rowan Street, Los Angeles. The officer went across the street and stood behind appellant's automobile. He saw appellant walk directly over to a palm tree growing in the front yard of the house. There appellant "squatted down and leaned forward, reached down with his hands to the base of the palm tree. Then he stood up." Meanwhile, officer Duncan approached and, using his flash light, told appellant to stand back. In the ensuing search, nothing was found on appellant's person. However, the officer did find a small piece of a green rubber balloon on the ground at the base of the palm tree, where appellant had been squatting. Upon opening the balloon in appellant's presence, officer Duncan counted twenty-nine capsules. Later these were analyzed by a chemist in the police department and were found to contain a narcotic known as heroin.

Over the objection of appellant's counsel that the *corpus delicti* had not been established, the trial court admitted in evidence a conversation between officer Duncan and appellant at the scene of the crime, to wit:

Appellant told the witness Duncan that he had picked up the capsules from a man at the corner of Whittier and Rowan by the drug store. When asked if he had carried them and planted them at the base of the palm tree, appellant said "No", that some one else had put them there. And that he went out to get one "so he could sniff it." Later, he told the officer that he had bought the capsules from some fellow at the drug store and had paid about $15 a gram for them.

Officer Duncan admitted that he went to the address in question because an informant had told him he would find some narcotics under a tree.

In People v. Martin, 76 Cal.App.2d 317, 319, 172 P.2d 910, 911, the narcotic was found in appellant's parked automobile during his absence therefrom. At the trial defendant admitted ownership of the car but denied all knowledge of the narcotic.

The court there held: "From the several decisions long followed (People v. Sinclair, 129 Cal.App. 320, 322, 19 P.2d 23; People v. Belli, 127 Cal.App. 269, 271, 15 P.2d 809; People v. Randolph, 133 Cal.App. 192, 196, 23 P.2d 777; People v. Gallagher, 12 Cal.App.2d 434, 436, 55 P.2d 889; People v. Noland, 61 Cal.App.2d 364, 366, 143 P.2d 86; People v. Bassett, 68 Cal.App.2d 241, 246, 156 P.2d 457), the Supreme Court has recently derived the rule that the jury must be convinced that one accused of possessing a narcotic found in a cache on his premises or *within reach of his habitation* must have knowledge of the presence of such narcotic and that such knowledge is the essence of the crime of possession under the Narcotic Act. People v. Gory, 28 Cal.2d 450, 455, 170 P.2d 433. * * * (Emphasis added.)

"It was therefore incumbent upon the court below to advise the jury that they should determine whether appellant knowingly possessed the narcotic found in his automobile during his absence therefrom." For failure to so instruct, the judgment was reversed.

In People v. Bassett, 68 Cal.App.2d 241, 243, 156 P.2d 457, the narcotic was found under a metal hood in a lightwell. The bathroom windows from appellant's apartment and the adjoining apartment both opened on the same lightwell where the sack containing the narcotic was discovered.

In that case this court stated in 68 Cal. App.2d at page 247, 156 P.2d at page 460: "'Possession' of a chattel is established when it is shown that a person has physical control thereof with the intent to exercise such control, or having had such physical control, has not abandoned it and no other person has that possession. (Rest., Torts, sec. 216). The statute does not require 'proof of possession' at the very time of arrest (People v. Belli, 127 Cal.App. 269, 271, 15 P.2d 809), nor is it necessary to prove that the accused had the unlawful article on his person. People v. Sinclair, 129 Cal.App. 320, 322, 19 P.2d 23. The question therefore arises, does the evidence in the case before us establish the fact that 'possession' of the narcotics was immediate and exclusive and under the dominion and control of appellant."

"But knowledge of the *existence* of the object is essential to 'physical control thereof with the intent to exercise such control' and such knowledge must necessarily precede the intent to exercise, or the exercise of, such control." People v. Gory, 28 Cal. 2d 450, 455, 170 P.2d 433, 436. (Emphasis included.)

[1, 2] The record discloses that appellant came out of the house into the darkness and walked down a thirty or thirty-five foot walk to a point twelve or fourteen feet from the gate. He then turned off the walk upon loose dirt and proceeded directly to the palm tree, which was six feet from the walk. Here he squatted down, leaned forward and reached down with his hands to the base of the tree. And while he was in that position, officer Duncan entered the gate and told him to stand up and stand back, which he did. The officer then picked up the balloon containing the capsules.

This evidence clearly supports an inference that appellant had knowledge of the existence of the narcotics at the base of the palm tree. Also, that he had the intent to exercise, and was in fact exercising control over them, when he stood at the officer's command. This prima facie showing of possession was amply sufficient to establish the *corpus delicti*. As a result, there was no error in the trial court's ruling admitting the extrajudicial statements.

[3] As stated in People v. Bassett, supra, 68 Cal.App.2d 241, 248, 156 P.2d 457, 461: "Taking all the facts into consideration, together with the statements made by the defendant, they certainly show more than a suspicion of guilt, and constitute sufficient evidence to sustain the inference made by the trial judge that the defendant was immediately and exclusively in possession and control of the narcotics." Likewise here.

For the reasons stated, the judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

133 Cal.App.2d 82

J. W. BURCHELL, Plaintiff and Appellant,

v.

Edna V. ROHNERT et al., Defendants and Respondents.

Civ. 16247.

District Court of Appeal, First District,
Division 2, California.
May 18, 1955.

Action by employee of defendant for accounting of profits and to recover amount allegedly due him under profit sharing agreement. The Superior Court, San Benito County, Anthony Brazil, J., entered judgment for defendants and plaintiff appealed. The District Court of Appeal, Draper, J. pro tem., held that claim of employee against employer for adjustment of charges for property acquired by employer, with consequent increase of employee's bonus under profit-sharing agreement, was claim for breach of express oral agreement, which, after expiration of nearly eight years after rejection of claim, was barred by limitations.

Judgment affirmed.

1. Limitation of Actions ⚷27

Claim of employee against employer for adjustment of charges for property acquired by employer, with consequent increase of employee's bonus under profit-sharing agreement, was claim for breach of express oral agreement, which, after expiration of nearly eight years after rejection of claim, was barred by limitations. West's Ann.Code Civ.Proc. § 337, subd. 2.

2. Limitation of Actions ⚷27

Fact that employee seeking accounting from employer for amount allegedly due him under profit-sharing agreement based his claim on alleged agreement between parties which made no mention of amount sought, did not relieve employee of limitation prescribed by statute for commencement of action to enforce his claim. West's Ann.Code Civ.Proc. § 337, subd. 2.

3. Master and Servant ⚷81

In action by employee of defendant for accounting of profits and to recover amount allegedly due him under profit-sharing agreement, evidence was sufficient to support trial court's finding that no open and current account had ever existed between employer and employee and that only account which ever did exist between them was book account kept by employer.

4. Master and Servant ⚷72

Fact that employee had received 37½% of bonus fund distributable to executive employees for period of years pursuant to profit-sharing agreement with employer, did not entitle such employee to same percentage of bonus fund in future, where profit-sharing agreement expressly stipulated that percentages would fluctuate as conditions and number of employees eligible changed.

◆

Jones, Lane, Weaver & Daley, Stockton, for appellant.

Wyckoff, Parker, Boyle & Pope, Watsonville, for respondent.

DRAPER, Justice pro tem.

Plaintiff appeals from judgment for defendant following trial without a jury. As a result of rulings upon demurrers, the action was tried only against defendant Edna v. Rohnert, and this appeal is prosecuted only against her.

The action was tried upon the second amended complaint. Its first count alleges that appellant was employed by respondent from late 1933 through 1950 under an oral agreement by which he was to be paid a salary and a share of the profits of the business. It sets up in detail the asserted oral agreement for computation and distribution of profits, and alleges that respondent, contrary to the agreement, charged improper operating expenses against the business and improperly reduced appellant's share of profits. The second cause of action is a common count alleging respondent's indebtedness to appellant "on an open book account", and the third is a common count for "the balance due upon a mutual, open and current account." Each count alleges that a sum "in excess of $120,000" is due to appellant. The prayer is for an accounting of profits and for judgment for the amount found due.

Waldo Rohnert, for many years until his death, owned and operated a business of growing and marketing seeds, known as Rohnert Seed Company. Appellant became an employee of this business about 1914.

Waldo Rohnert died November 18, 1933. His wife, respondent Edna V. Rohnert, succeeded to his ownership of the business. At that time the senior employees of the business were appellant, who was in charge of farming operations and also made selling trips, and Joseph A. Garcia, who was in charge of the office.

Mr. Rohnert, in his lifetime, had established a bonus plan for employees who had been with the firm for 5 years or more.

His widow and her son consulted with appellant, Mr. Garcia and other experienced employees, as to the advisability of continuing the business. They determined to do so, and at the same time orally agreed to employ these men at agreed monthly salaries and to continue the bonus plan.

The oral agreement for profit-sharing provided that operating expenses to be deducted in determining annual net profits should include allowance to the owner for assets furnished to the business by her.

The amount remaining each year, after deduction of operating expenses, including the allowance to respondent owner, was to be distributed half to the owner and half to those employees who had worked for the business for 5 years or more.

From the half to be paid to employees, a bonus first would be paid to those employed in non-executive positions (referred to by the parties as "wage-earners"), in an amount to be determined by respondent. The remaining share of the employees' bonus was to be divided among executive employees in such proportions as those employees might mutually agree upon, subject, however, to approval and ultimate determination by respondent. It was agreed that, as other employees reached the seniority requisite for participation, they would share in the 50% of annual profits distributable as bonuses. It was also contemplated that the shares of the several executive employees would be adjusted from time to time as additional employees in that class were added, or as duties and responsibilities changed. Each employee's share was to be credited to his account annually, and it was agreed that any balance remaining in any such account would bear interest, to be paid by respondent, at the rate of 4% per year.

For three or four years before his death, Waldo Rohnert had experimented with the growing of seeds on lands near Cotati, in Sonoma County, and had contracted to purchase some such lands. Following his death, when she determined to continue the seed business, respondent elected to continue the Cotati experiments. She and her two children executed agreements May 22, 1934, to complete the purchase previously negotiated by Waldo Rohnert, and began negotiations which shortly led to contracts for purchase of additional lands in that area.

There was no certainty that these parties would be able to complete the purchases. Accordingly, at about the time the first Cotati agreements were executed in May of 1934, respondent and her employees agreed that the annual total payments on account of principal, interest and taxes on the several Cotati purchase agreements should be charged as operating expenses in determining the profit which was to be the basis for the bonus to employees. It was also agreed that an adjustment of these Cotati charges would be made when the purchases of these lands were completed, and that the amount by which this adjustment should increase bonuses would be paid to the employees at that time.

No bonuses were paid under the profit-sharing agreement until about the time of distribution of the estate of Waldo Rohnert, deceased. On January 15, 1936, respondent signed a notice prepared by the executive employees which specified the amounts to be paid to the 9 participating employees as bonuses for 1933 and 1934, appellant being the largest sharer with distribution of $16,574.72, amounting to 36% of the executive employees' fund.

The same notice stated that "For the year 1935 and until further notice, distribution of bonuses will be made on the following basis:

"1—J. W. Burchell	37½%
"2—J. A. Garcia	37½%
"3—C. C. Carley	10%
"4—T. A. Gleason	6%
"5—A. Pera	6%

"Other employees—a percentage of salary."

(It will be noted that the above figures total only 97%. It is not disputed that the 1935 shares of the last three named were increased by 1% each, and that the intent at all times was to first deduct the bonuses of wage earners, and to distribute 100% of the remainder among the executive employees.)

This notice also restated the provision that an employee must have worked 5 years to become elegible for bonus participation.

In 13 of the 18 years from 1933 through 1950, bonuses were credited to appellant, in amounts ranging from $3,944.46 in 1936 to $160,992.86 in 1943. The total of bonuses paid him in the 18 years was $482,399. Additionally, he received interest upon bonus credits left by him with the company in the sum of $23,733.08. Appellant received 37½% of the executive employees' share of the bonus from 1935 through 1937 and in 1939. In 1938 there was no profit and thus no bonus distribution. In 1940 appellant's proportion was reduced to 34%, and further reductions in his percentage share were made thereafter.

Each year, when the bonus calculations were made, written notice was given to each employee of the amount credited to him. Full records, including detailed annual profit and loss statements and annual calculations of bonuses due each employee were maintained and were at all times fully known to appellant, who thus knew both the amount and the percentage share of his bonus each year. Also, the amount credited to him and his account balance were at all times shown on the ledger account carried in his name, which was available and known to him at all times. He made no protest to respondent as to amount or percentage, with one exception.

Final payment on the Cotati land purchases was made February 10, 1943, and the adjustment of bonuses (reduction of operating expenses for the 10-year period, and resulting increase of bonus) contemplated by the oral agreement of May, 1934 became due. Soon thereafter, appellant demanded this adjustment of respondent, who refused his demand.

Appellant's principal claim in the present action is for the amount of this adjustment. The trial court found that the adjustment called for by the agreement was to consist in reduction of the Cotati costs to reasonable rental value of the Cotati lands. On this basis, $7,783.17 would be due appellant. Appellant disputes this finding, and contends that the true amount due him on the adjustment is $26,870.36.

But the trial court also found that all three causes of action were based upon the same transactions; that there was no book account or mutual, open and current account between the parties save the book account kept by respondent's office, and that nothing was due appellant upon that account. Appellant's claim upon the Cotati adjustment having been made and denied almost 8 years before filing of the action, the court determined that the claim was barred by the statute of limitations.

Appellant argues at length the admitted rule that the statute of limitations does not run piecemeal against the items of an open book account or a mutual, open and current account, but only runs from the date of the last entry. His contention breaks down when he seeks to apply this established rule to the facts of his case.

[1] His claim for adjustment of the charges for the Cotati property, and consequent increase of his bonus, is one for breach of an express oral agreement. But performance of this agreement fell due early in 1943. Appellant knew of this due date, and demanded performance in February, 1943. His demand was rejected promptly. Both because performance was then due, and because of the demand and refusal, his time to sue for breach of the

contract began to run then, and clearly had ended long before this action was filed January 2, 1951.

But, says appellant, the account kept by respondent operates to defer the commencement of the statutory period until the date of the last item in the account (which in fact is after the date complaint was filed).

The difficulty with this argument is that appellant cannot rely upon the account and at the same time disavow it.

To secure the benefit of the statutory period for which he contends, appellant must show that his is "An action to recover (1) upon a book account * * *; * * * (3) a balance due upon a mutual, open and current account". Code Civ.Proc. sec. 337, subd. 2.

But appellant, in fact, is not relying upon the account for his claimed recovery. The account admittedly shows nothing whatever due him. (The sum of $1,614.49, shown by the books to have been due when complaint was filed January 2, 1951, was in fact paid to and accepted by him January 29, 1951.) Nor does the account contain any item or entry even remotely referring to any adjustment of the Cotati charges. The trial court found, upon ample evidence, that this "J. W. Burchell Ledger account" is the only account between the parties.

[2] Appellant really contends that because there is an account between the parties which makes no mention of the amount he seeks, he is relieved of the limitation otherwise applicable to his action. More baldly stated, his contention is that the statute does not run piecemeal against items which are *not* in the account. Thus stated, it becomes clear that his position is wholly untenable.

Egan v. Bishop, 8 Cal.App.2d. 119, 126, 47 P.2d 500, 504, establishes the rule. There defendant appealed from a judgment against him upon an open book account, which included amounts not entered in the books. Although affirming the judgment as to amounts covered by entries in the books, the court held that the other claims, since they "were not contained in the book account", were barred by the statute of limitations. Amount of the judgment was reduced accordingly. Wright v. Loaiza, 177 Cal. 605, 171 P. 311, and Edwards v. California Sweet Potato Corp., 104 Cal.App. 715, 286 P. 733, hold that an account carried in the books against one person cannot be enforced against another.

Appellant relies upon Parker v. Shell Oil Co., 29 Cal.2d 503, 175 P.2d 838, for a contrary rule. But the Parker case does not so hold. The court does observe that the Egan, Wright and Edwards cases dealt with book accounts, and that a different rule applies to mutual, open and current accounts. The opinion points out that whether a mutual account existed and whether the disputed rent was an item in that account were, the evidence being conflicting, issues of fact. There was no finding upon either of these issues, and judgment was reversed and new trial ordered because of the lack of such findings.

[3] In the case at bar the trial court specifically found that "No mutual, open and current account ever existed between plaintiff and defendant" and that the only account which ever did exist between them was the book account kept by defendant. This account is set forth, in summary, in the findings. It contains no reference, direct or indirect, to the adjustment which appellant now seeks. These findings are amply supported. In fact, the record is devoid of any evidence in any way tending to show that either party ever had any account, written or oral, mutual or individual, open or closed, which included the claim appellant here asserts.

Thus the Parker case, whatever might be its application otherwise, can have no application to the facts of the case at bar. Here the finding which was lacking in Parker v. Shell Oil Co., supra, has been made and is adverse to appellant.

Pedley v. Doyle, 177 Cal. 284, 170 P. 602, and Schwindt v. Billiwhack Stock Farms, 45 Cal.App.2d 208, 113 P.2d 902, are cited by appellant for the same point. Both are distinguishable from the present case upon other grounds but, in any view, they can have no application here since each of those actions is upon a mutual, open and current account, which is specifically found not to exist here.

Appellant's claim upon the "Cotati adjustment" is barred by the statute of limitations. This is not a case where a party being charged upon a book account defends by disputing its accuracy or by going outside the account to establish a counterclaim. Here appellant is the plaintiff. He has adopted the account as the very essence of his claim in order to avoid the bar of the statute of limitations.

Appellant also asserts error in the failure of the trial court to find that he was entitled to 37½% of the bonus fund distributable to executive employees from 1940 through 1950. This claim is based upon the notice of January 15, 1936, quoted above, which states the bonus percentages "For the year 1935 and until further notice." Appellant's share, as stated in the notice, was 37½%. Except for the year 1938, when there was no profit and no bonuses were paid, this share was paid to him through 1939. In 1940 he received 34%, 1941 through 1943 33%, and in 1944 32½%. Other reductions followed.

Consideration of this contention requires reference to the agreement for payment of bonuses. As found by the trial court, this agreement called for distribution of the share of the executive employees among them in such proportions as those employees might agree upon among themselves each year, subject, however, to approval and ultimate determination by defendant. The agreement, as found, also provided that additional employees should become participants in the fund and that the shares of the participants should be adjusted accordingly.

Appellant does not attack these findings, which are fully supported by the evidence, and which are conclusive upon this point. It is obvious that as the number of employees participating in the bonus plan increased, the percentages paid to previous participants would decrease, and that this was clearly contemplated in the agreement. It is clear that 100% is all, and leaves no room for flexibility upward. Appellant, in his testimony, readily conceded that the plan had, from the outset, contemplated addition to the bonus group of employees who reached the 5 year qualification. Neither appellant nor his counsel has been able to explain how such a provision can be reconciled with continuing fixed percentages in the original group of participants.

[4] The notice dated January 15, 1936, is not the contract between the parties, nor is it claimed to be more than some evidence of it. The agreement in fact entered into, as found by the court, completely negatives the idea of payment to appellant of any continuing fixed percentage of the total bonus fund. Thus appellant's complaint is unfounded, regardless of whether there were annual accounts stated.

Without in any way questioning these findings which seem fatal to his contention, appellant directs his attack on this issue solely to the court's finding that there was an account stated between the parties each year, and that appellant accepted the bonus credit each year in full satisfaction of his claim, with the single exception that he did not accept any payment in full satisfaction of his claims on the Cotati adjustment.

Since the findings, supported by the evidence, show that appellant received percentages determined in full accordance with the oral bonus agreement, it is not necessary to determine whether the finding of annual accounts stated is sound. We point out, however, that the record shows that appellant questioned his percentage only once. That concerned the 1940 reduction. His complaint then was made to his fellow executive employee, Mr. Garcia, who appears to have had much to do with determining the distribution of the executives' share among them. After brief discussion, appellant said to Garcia "if that's it, I guess it's all right, Joe." Appellant testified that he also discussed the 1940 percentage with respondent's son, but the latter testified to the contrary. No protest to respondent is claimed. Thus there was, at most, one protest about one year's reduction, followed immediately by acquiescence, and no complaint whatever as to any other year, although appellant always was fully informed as to the distributions of the bonus. The court's finding that there were annual accounts stated is supported.

Appellant argues that the court erred in finding that the Cotati adjustment was to be "paid" when purchase of the Cotati land was completed. He contends that the agreement was to "credit" or to "adjust" his account at that time. It is immaterial whether he was to be "paid" or "credited". Neither was done. Appellant complained of the omission and demanded performance. His demand was refused. Hence the statute of limitations began to run on this claim in February of 1943, as more fully pointed out earlier in this opinion.

Appellant also attacks the finding that reasonable rental value of the Cotati lands is the proper basis for the Cotati adjustment. The court received evidence of the reasonable rental value of these lands, determined that the Cotati charges should be reduced to that amount and found that, save for the defense of the statute of limitations, $7,783.17 would be due appellant on this item. Appellant asserts that, under the agreement, the deduction for use of the Cotati property was to be 6% annually upon the investment, and that if the adjustment were made on this basis, the sum due him would be $26,870.36.

In view of our determination as to the statute of limitations, this issue is not material. We point out, however, that there is no evidence that the oral agreement of May 1934 made any reference whatever to details of the future Cotati adjustment. It might be suggested that such detail could be found from the pattern of like deductions for other lands used in the business. But there is no fixed pattern. The "Home Ranch" at Hollister was compensated for, in the bonus computations, at a specified rental value. Use of the Walnut Grove ranch was charged at 6% of book value. There was no other real estate. Thus to assume that use of the Cotati lands was to be charged for at the same rate as the other lands is of no aid. There were two other parcels of land, charged for at differing rates which cannot be reconciled. It is true that there is no evidence of direct agreement to support the finding that reasonable rental value was to be charged for the Cotati lands. But this is not helpful to appellant, for there is an equal lack of evidence to support his contention that 6% on investment was to be charged for this land. The true fact appears to be that, unless reasonable rental value is implied as a term of the agreement, there is no evidence of any basis of adjustment save one too vague to be enforced.

In any event, our conclusion as to the operation of the statute of limitations against this claim makes the issue moot.

The judgment is affirmed.

NOURSE, P. J., and KAUFMAN, J., concur.

133 Cal.App.2d 56

Marguerite A. MOORE, Plaintiff and Appellant,

v.

Richard J. MOORE, Defendant and Respondent.

Civ. 16296.

District Court of Appeal, First District, Division 1, California.

May 18, 1955.

Proceeding upon divorced husband's motion for reduction of support and maintenance awards made in divorce decree. The Superior Court, City and County of San Francisco, Theresa Meikle, J., reduced award and ordered monthly payments of past unpaid alimony, and divorced wife appealed. The District Court of Appeal, Peters, P. J., held that evidence was sufficient to establish that change in circumstances, which would warrant reduction of alimony awarded in prior divorce decree, existed.

Order affirmed.

1. Divorce 🔑245(1)

In absence of showing of change of condition subsequent to entry of interlocutory or final divorce decree, trial court does not have authority to make order reducing amount of alimony awarded in such decree, but, upon such showing, court does possess power to modify an alimony order because of changed circumstances. West's Ann.Civ.Code, § 139.

2. Divorce 🔑245(2)

Propriety of order reducing amount of alimony awarded in an interlocutory or final divorce decree depends upon facts and circumstances of each case. West's Ann. Civ.Code, § 139.

3. Divorce 🔑245(3)

Propriety of a modification of alimony awarded in interlocutory or final divorce decree rests largely in trial court's discretion. West's Ann.Civ.Code, § 139.

4. Divorce 🔑245(2)

Change in circumstances which will warrant reduction of amount of alimony awarded in an interlocutory or final divorce decree can exist when severity of existing conditions becomes aggravated. West's Ann.Code Civ.Proc. § 1008.

5. Divorce 🔑245(3)

In divorce proceeding, evidence was sufficient to establish that change in circumstances, which would warrant reduction of alimony awarded in prior divorce decree, existed. West's Ann.Civ.Code, § 139.

6. Motions 🔑4

Under statute providing that, where order subsequently sought has been previously refused, upon subsequent application for such order, affidavit must show what previous application was, when and to what judge previous application was made, what order or decision was made thereon, and what new facts are claimed, and that violation of such statute may be punished as contempt, the penalties are not mandatory. West's Ann.Code Civ.Proc. § 1008.

7. Motions 🔑4

Failure to comply with statute which pertains to application for order after prior refusal is not jurisdictional. West's Ann. Code Civ.Proc. § 1008.

8. Divorce 245(3)

Where, in proceeding to obtain modification of support and maintenance award in divorce action, wife did not move to revoke order granting reduction, wife, by attempting to raise such point on appeal, was in violation of statute pertaining to application for order after prior refusal. West's Ann.Code Civ.Proc. § 1008.

9. Divorce 🔑286

Where fact that previous motion to modify support and maintenance award made in divorce action had been denied was brought to court's attention by plaintiff's own affidavit and fully developed at the hearing, neither plaintiff nor court was prejudiced by defendant's failure to aver required facts under statute pertaining to application for order after prior refusal thereof. West's Ann.Code Civ.Proc. § 1008.

10. Trial 🔑56

Trial court has discretion to prevent redundant, repetitive testimony that will add nothing not already covered.

11. Witnesses 🔑275(2)

Where, in proceeding to obtain modification of support and maintenance award made in divorce action, husband testified at each of several hearings and was cross-examined by wife, trial court's stopping of further cross-examination of defendant on issue of his physical condition after court had expressed great faith in medical report on such subject did not constitute an abuse of trial court's discretion.

12. Divorce 🔑245(3)

In proceeding to obtain reduction in support and maintenance award made in divorce action, court could not make ruling affecting property rights of husband's alleged common-law wife in view of fact that such person was not a party to the proceeding.

13. Divorce ⚷286

Where there were full and complete hearings with testimony, under oath and subject to cross-examination, in regard to motion for reduction in support and maintenance award made in divorce action, affidavits, which were used on motion to modify, and their evidentiary worth would not be considered upon appeal from order reducing award. West's Ann.Civ.Code, § 139.

14. Divorce ⚷269(12)

In absence of finding of ability to pay, contempt order, which was based upon husband's failure to make support and maintenance payments to wife in accordance with divorce decree, could not be supported.

15. Divorce ⚷269(13)

In proceeding to obtain reduction in support and maintenance award made under divorce decree, trial judge's statements that she was going to find husband in contempt and that he was in contempt did not amount to a "contempt order". West's Ann.Civ.Code, § 139.

See publication Words and Phrases, for other judicial constructions and definitions of "Contempt Order".

16. Divorce ⚷245(2)

Mere existence of unpaid, past-due alimony does not prevent court, in proper case, from granting a modification as to future installments.

◆

William Berger, San Francisco, for appellant.

Alfred M. Miller, San Francisco, for respondent.

PETERS, Presiding Justice.

In June of 1952 plaintiff Marguerite Moore was awarded $100 per month alimony. In June of 1953, on motion of the defendant Richard Moore, the trial court modified this order by reducing it to $65 per month, and further ordered defendant to pay $10 a month on past unpaid alimony. From this order plaintiff appeals. She contends that there was no evidence of change of circumstances between 1952 and 1953 to warrant the modification, that, in any event, the court had no jurisdiction over the motion to modify because of the claimed failure of defendant to comply with certain procedural requirements, and that certain rulings on the evidence were erroneous.

The following list of dates and events will serve to give the background of this proceeding:

June 13, 1952: Trial court ordered defendant to pay plaintiff $100 per month for her support and maintenance.

August 14, 1952: Defendant moved for a modification on ground of reduced income and because he had a back and leg disability which threatened to prevent him from working full time. The plaintiff countered with a contempt proceeding for failing to pay past alimony.

August 21, 1952: Motion to modify denied and defendant found in contempt. (Order filed October 6, 1952.)

November 10, 1952: Plaintiff again started contempt proceedings, and requested an order of execution.

January 13, 1953: Court found defendant was not then employed, and was unable to pay the past due alimony. Defendant was discharged from the contempt, but a writ of execution was issued.

March 6, 1953: Plaintiff filed another affidavit for an order to show cause in re contempt, and for other relief.

April 2, 1953: While the contempt proceeding was still pending the defendant moved to modify, averring that, when the original order for alimony was made in 1952, he was gainfully employed as a cook and in good physical condition; that since June of 1952 he has suffered a serious illness, resulting in physical disability that has caused him to lose his employment; that he is now unemployed; that because of back and leg injuries and an arthritic condition he is unable to secure gainful employment; that he has no property from which to pay the $100 per month.

June 3, 1953: After a hearing, the trial court filed its order reducing the award, and ordering the monthly payments on past unpaid alimony.

[1–3] The first contention of plaintiff is that there was no evidence of a change of circumstances sufficient to justify the modification. The law on this subject is clear. Because "it would be incongruous to allow an appealable order to become final and yet to concede the power of a court at a later date, upon the same state of facts, to issue an order nullifying it", Snyder v. Snyder, 219 Cal. 80, 81, 25 P.2d 403, it is well settled that "the trial court is without authority to make an order reducing the amount of alimony awarded in an interlocutory [or final] decree of divorce in the absence of a showing that there has been a change in conditions subsequent to the entry of the interlocutory [or final] decree of divorce." Ralphs v. Ralphs, 86 Cal.App.2d 324, 325, 194 P.2d 592. It is equally clear, however, that, upon a proper showing, "the court possesses power to modify an alimony order because of changed circumstances, § 139, Civ.Code; that the propriety of such an order depends on the facts and circumstances of each case; and that the propriety of such a modification rests largely in the discretion of the trial court." Triest v. Triest, 67 Cal.App.2d 320, 322, 154 P.2d 2, 4; see also Greene v. Greene, 86 Cal.App. 275, 260 P. 845; Furniss v. Furniss, 75 Cal. App.2d 138, 170 P.2d 486.

The plaintiff contends that there was no substantial evidence of a change in conditions; that the record shows that defendant is presently gainfully employed and could continue to be employed; and that the record shows that defendant is presently suffering from the same ailments complained of in the motion to modify of August 14, 1952, which was denied. Undoubtedly, there is evidence in the record that supports plaintiff's contentions. But there is also evidence to the contrary. Defendant testified that when his motion to modify was denied on August 21, 1952, he was regularly employed as a cook making $74 a week. He further testified that, shortly thereafter, he became ill and spent 16 days in the hospital undergoing heat treatments for neuritis of the spine, and has not worked at all since January 1, 1953, and was suffering from arthritis. He also testified that he was not married to the woman with whom he was living, and that that woman owned a small restaurant; that he helped out around the restaurant but did no regular work and received no salary. The plaintiff testified that on frequent occasions she had observed defendant working at the restaurant as a cook. At this state of the proceedings both sides agreed that the court could appoint a doctor to examine the defendant to determine whether his health would permit him to work. This report was subsequently secured and read in the presence of counsel, and introduced by stipulation. The doctor reported that defendant, who was then 63, suffers from hypertension, varicose leg veins, which are very painful, and a duodenal ulcer, and must keep on a strict diet. The doctor opined that defendant was able to work on about a 50 per cent schedule.

[4, 5] Plaintiff argues that defendant admitted that he had suffered from most of the ailments now affecting him for many years, and contends that this shows no change in conditions. A change in circumstances can exist when the severity of existing conditions become aggravated. There is substantial evidence in support of the conclusion that that is the factual situation here presented.

Plaintiff places much reliance on defendant's testimony that in May of 1953 he felt better than before he went to the hospital and better than he did in August of 1952. The trial court chose to believe the doctor's report as to the physical condition of defendant. This the court was empowered to do.

Thus, there was evidence that circumstances and conditions had altered between August of 1952 and June of 1953 so as to warrant the court in ordering a modification.

Although the point was not mentioned in the trial court, plaintiff now on appeal contends that the court had no jurisdiction to modify because defendant did not comply with section 1008 of the Code of Civil Procedure. That section provides, in part: "When an application for an order has been made * * * and refused in whole or in part * * * and subsequent application for the same order, upon an alleged different state of facts, shall be made, it shall be shown by affidavit what application was before made, when and to what judge, what order or decision was made thereon and what new facts are claimed to be shown. For a failure to comply with this requirement, any order made on such subsequent application may be revoked or set aside on ex parte motion.

[6–9] "A violation of this section may be punished as a contempt * * *." Clearly, defendant violated this section in that in his affidavit in support of the motion to modify he did not aver the facts required by this section. For this failure the section provides the penalty—the plaintiff could have moved, *ex parte,* for a revocation of the order or the court could have found plaintiff in contempt. But the penalties are not mandatory. The section carefully uses the term "may" and not "shall." This is not jurisdictional language. Moreover, it has been held that the section is not jurisdictional. Storrs v. Storrs, 47 Cal.App.2d 108, 117 P.2d 381. It should be pointed out that at no time did plaintiff move to revoke the order so that she too, by attempting to raise the point on appeal, is in violation of the section. It should also be pointed out that neither the plaintiff nor the court was prejudiced by the failure of defendant to aver the required facts. The fact that the previous motion to modify had been denied in August of 1952 was brought to the attention of the court by plaintiff's own affidavit, and was fully developed at the hearing.

[10, 11] Plaintiff also complains that she was unduly restricted in her cross-examination of defendant as to his physical condition. There were several hearings on the two motions then involved. The defendant testified at each of these hearings and plaintiff cross-examined him at some length. After the doctor's report was considered, and after the court had expressed great faith in it, the court stopped any further cross-examination of defendant on the issue. The issue had been fully inquired into. The trial court has discretion to prevent redundant, repetitive testimony, that will add nothing not already covered. The court did not abuse the discretion conferred upon it.

[12] Plaintiff also objects that she was deprived of fully examining into certain property standing in the name of defendant's so-called common-law wife. That person was not a party to the proceeding. Nevertheless, the court did permit a full inquiry into the matter and merely held that it could not make a ruling affecting the absent person's property rights. This correctly stated the law.

[13] Plaintiff next objects to the use of affidavits on the motion to modify, claiming that such affidavits were merely hearsay, and cannot be relied on to establish a change of circumstances. It is somewhat difficult to understand this contention. Independent of the affidavits, there were full and complete hearings with testimony, taken under oath, subject to cross-examination. That evidence supports the finding. The affidavits and their evidentiary worth need not be considered.

[14–16] The last contention of plaintiff is that since the court found that defendant was in contempt as to past installments of alimony it was error to grant him a modification. Undoubtedly the court on August 21, 1952, found defendant in contempt. On January 13, 1953, the defendant was discharged of the contempt because of inability to pay. Since then he has made payments of $550, but was still in arrears. It is equally true that several times during the hearings of the present motions the trial judge stated that she was going to find defendant in contempt and that he was in contempt, but the trial judge also stated that she was convinced that defendant did not have the present ability to pay. Without a finding of ability to pay a contempt order would not, of course, be supported.

At the close of the hearings the trial court merely made an order modifying the alimony award and ordered defendant to pay $10 a month on past due alimony. The trial court made no order of contempt and apparently did not directly pass on that proceeding. What the trial court stated during the hearings did not amount to a contempt order. There is no order in the present proceedings that defendant is in contempt. The mere existence of unpaid past due alimony does not prevent the court, in a proper case, from granting a modification as to future installments. The correct rule was set forth in Triest v. Triest, 67 Cal.App.2d 320, 322, 154 P.2d 2, 4, as follows:

"It is also a well settled proposition in most jurisdictions, including California, that the existence of accrued and unpaid alimony does not *per se* prevent the court from granting a modification as to future installments. [Citing some 14 authorities from this and other states.] These cases hold that the existence of accrued and unpaid alimony is not conclusive on the court, but is merely one of the circumstances that may justify a refusal to modify, but that whether the order will be modified depends upon all the facts and circumstances of the particular case, and rests in the sound discretion of the trial court. They also establish that modification will not be denied even a husband who is in default when such denial would produce an inequitable result."

The court then quoted from Merritt v. Merritt, 220 Cal. 85, 88, 29 P.2d 190, so holding, and then continued, 67 Cal.App.2d 323, 154 P.2d at page 4:

"Of course, if the husband has willfully refused to comply with the order of the court and has a present ability to comply, he is in contempt, and no order of modification will be granted. But all defaults in alimony payments do not constitute contempts. Where the husband is not in contempt and has not the present ability to comply with the order, a modification should not be refused simply because the husband is in arrears. To refuse such modification in a proper case would be inequitable and, in many cases, useless. See note 22 Cal.L.Rev. 699."

The present record supports the modification order.

The order appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

Ena Dorothy LANGLEY, Plaintiff and Appellant,

v.

Spencer SCHUMACKER, Defendant and Respondent.

Civ. 20701.

District Court of Appeal, Second District, Division 3, California.

May 13, 1955.

Rehearing Denied June 6, 1955.

Hearing Granted July 6, 1955.*

Former wife brought action against former husband to recover damages for fraud, because he married while entertaining a concealed intent not to consummate the marriage. The Superior Court, Los Angeles County, James G. Whyte, J., entered judgment adverse to former wife, and she appealed. The District Court of Appeal, Ashburn, J. pro tem., held that she was not entitled to recover damages for the fraud, even after procuring annulment of the voidable marriage.

Judgment affirmed.

1. Marriage ⇨58(7)

Where husband married wife while entertaining concealed intent not to consummate the marriage, husband was guilty of fraud, which went to the essence of the relationship and afforded ground for annulment.

2. Divorce ⇨313

Husband and Wife ⇨205(2)

One spouse may not, during marriage relationship, sue the other for a personal tort, or after a divorce has been had, even though tort was committed after separation or during interlocutory period of divorce action.

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* Opinion vacated 297 P.2d 977.

3. Husband and Wife ⚷205(2)

At common law, marriage extinguishes right of action for personal tort, committed by one spouse against the other before marriage.

4. Marriage ⚷54

Where husband married wife while entertaining a concealed intent not to consummate the marriage, the marriage was voidable and not void.

5. Marriage ⚷54

A marriage, which is void needs no decree of annulment to establish the fact and is open to attack at all times and in all places.

6. Marriage ⚷54

A voidable marriage is valid until annulled, not only against the world, but also as between the parties.

7. Marriage ⚷54

A merely voidable marriage must be treated as valid for all civil purposes until annulled by judicial decree.

8. Marriage ⚷54

A voidable marriage must be accepted as a valid marriage until decree of annulment has become final.

9. Marriage ⚷54

A voidable marriage is to be regarded as perfectly valid until ground for annulment is established

10. Marriage ⚷62

Temporary alimony and suit money may be awarded in action to annul voidable marriage.

11. Marriage ⚷63

Property acquired during a voidable marriage is treated and apportioned as if it were community property.

12. Marriage ⚷67

Annulment of a voidable marriage does not undo transactions or change the complexion of the events occurring during its existence.

13. Marriage ⚷36

The injured party to a voidable marriage had an election to waive the fraud and affirm and validate the marriage.

14. Fraud ⚷25

Fraud without damage is not actionable.

15. Marriage ⚷67

Wife, who had voidable marriage annulled because of fraud of husband who married her while entertaining concealed intent not to consummate the marriage, was not entitled to recover damages from him because of his fraud.

◆

Maurice Rose, Bellflower, for appellant.

Crawford & Baker, Los Angeles, for respondent.

ASHBURN, Justice pro tem.

[1] Plaintiff appeals from a judgment entered after demurrer sustained to her second amended complaint without leave to amend. She sues for damages for fraud, alleging that defendant married her while entertaining a concealed intent not to consummate the marriage. This is a fraud which goes to the essence of the relationship and affords ground for annulment. Maslow v. Maslow, 117 Cal.App.2d 237, 241, 255 P.2d 65.

The parties were married on April 17, 1953 and separated on May 2, 1953. Plaintiff then sued for divorce on the ground of cruelty. Defendant cross-complained for annulment or divorce alleging inter alia that plaintiff had another husband at the time she married him, also charging concealed sterility on her part. At some time prior to January 6, 1954 plaintiff changed attorneys and a stipulation was then made to the effect that plaintiff might add to her complaint a cause of action for annulment, and that same be deemed denied. The opening brief says that defendant had already agreed to dismiss his cross-complaint and that this was later done. Pursuant to the stipulation plaintiff filed an amended complaint charging fraud in that defendant secretly intended not to consummate the marriage and that he never did do so;

she prayed for an annulment. On January 29, 1954 the court granted plaintiff's prayer for annulment. Notice of entry of judgment was served upon defendant's attorneys on the same day. About ten days after the expiration of time for any appeal, on April 9, 1954, this damage action was filed. Though there is no affirmative showing to that effect the record exudes a faint aroma of an annulment by consent.

[2, 3] Counsel for the respective parties agree that in this state one spouse may not during the marriage relationship sue the other for a personal tort. Both sides cite Peters v. Peters, 156 Cal. 32, 103 P. 219, 23 L.R.A.,N.S., 699; Cubbison v. Cubbison, 73 Cal.App.2d 437, 166 P.2d 387; Paulus v. Bauder, 106 Cal.App.2d 589, 235 P.2d 422, and Watson v. Watson, 39 Cal.2d 305, 246 P.2d 19.[1] These cases do so hold and they go further. The action cannot be maintained after a divorce has been had, Peters v. Peters, supra, 156 Cal. at page 34, 103 P. 219; this is true even though the tort was committed after separation, Cubbison v. Cubbison, supra, or during the interlocutory period of a divorce action. Paulus v. Bauder, supra, 106 Cal.App.2d at page 590–591, 235 P.2d 422; Watson v. Watson, supra, 39 Cal.2d at page 306, 246 P.2d 19. In the Peters case the court says, 156 Cal. at page 36, 103 P. at page 221: "In the language of the Supreme Court of Maine in Abbott v. Abbott [67 Me. 304] supra, the relation of marriage, while it continues, 'so to speak, acts as a perpetually operating discharge of all wrongs between man and wife, committed by one upon the other.' The only remedies for such wrongs, afforded by our law, as it stands, are to be found in the Penal Code and in the action for divorce or maintenance, with the additional portion of the community property which may be given to the wronged party where cruelty is the cause for which divorce is adjudged." This language suggests the further established rule which is thus stated in 41 C.J.S., Husband and Wife, § 396, p. 880: "At common law neither spouse may maintain an action against the other for a tort committed before marriage. As the rule is usually stated, at common law marriage extinguishes the right of action for a personal tort committed by one spouse against the other before marriage, as, for example, where the woman who sustains the injury subsequently marries the tort-feasor, even though they were living apart at the time the action was commenced." Numerous cases to this effect are collected in 160 A.L.R. at page 192. Once purged by marriage such ante-nuptial torts are not revived by termination of coverture. 41 C.J.S., Husband and Wife, § 396c, p. 886; 30 C.J. § 319, p. 715.

Counsel for appellant argues that these authorities are inapplicable here because we deal with an annulment, saying "While a voidable marriage is valid unless and until annulled, the decree of annulment wipes out the marriage from the beginning, and is in effect an adjudication that no valid marriage between the parties ever existed." This is the crux of the case.

[4–11] It is important in this connection to keep in mind the difference between void and voidable marriages, and the fact that we here deal with one which was voidable, not void. A marriage which is void needs no decree of annulment to establish the fact; it is open to attack at all times and in all places. 16 Cal.Jur.2d § 323, p. 629. But a voidable marriage is valid until annulled. "In the absence of a decree of annulment, it is valid, not only against the world, but also as between the parties. Coats v. Coats [160 Cal. 671], 118 P. 441 [36 L.R.A.,N.S., 844]. A merely voidable marriage 'must be treated as valid for all civil purposes until annulled by judicial decree.' State ex rel. Scott v. Lowell, 78 Minn. 166, 80 N.W. 877, 46 L.R.A. 440, 79 Am.St.Rep. 358; Willits v. Willits, 76 Neb. 228, 107 N.W. 379, 5 L.R.A.,N.S., 767. It would appear to necessarily follow that, so far as the annulment proceedings are concerned, it must continue to be accepted as a valid marriage until the decree of annulment therein has become final." Dunphy v. Dunphy, 161 Cal. 87, 89, 118 P. 445, 446. "In such cases the marriage is to be regarded as perfectly valid until the ground for the annulment is established." Tayian v. Tayian, 64 Cal.App. 632, 636, 222 P. 377, 379. This truth is exemplified by the rule that temporary alimony and suit money may be awarded in such an action. Dunphy v. Dunphy, supra, 161 Cal. at page 90, 118 P. 445; 16 Cal.Jur.2d § 337, p. 640. In the Dunphy case it was held proper to allow a defendant wife moneys to enable her to prosecute an appeal from a judgment annulling her marriage on the ground of plaintiff's mental incapacity.[2] Property acquired during a voidable marriage is treated and apportioned as if it were community property. Turknette v. Turknette, 100 Cal. App.2d 271, 274, 223 P.2d 495; Coats v. Coats, 160 Cal. 671, 678, 118 P. 441, 36 L.R.A.,N.S., 844. Other applications of the concept of validity until annulment are found in Re Estate of Gregorson, 160 Cal. 21, 116 P. 60, L.R.A.1916, 697; In re Estate of Harrington, 140 Cal. 244, 248, 73 P. 1000; Linebaugh v. Linebaugh, 137 Cal. 26, 69 P. 616. The general rule is stated in 55 C.J.S., Marriage, § 35, p. 876: "Unless and until its invalidity is thus established, a voidable marriage is fully valid for all civil purposes * * *." See also 38 C.J. § 9, p. 1281; 35 Am.Jur. § 57, p. 220. Appellant's opening brief says: "Although the marriage of the Plaintiff to the Defendant was voidable, she was his legal wife so long as the marriage was not annulled by judicial decree. Until after the entry of such annulment decree, while Plaintiff was still Defendant's legal wife, she could not recover damages from Defendant for his tort * * *."

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[1] These cases represent the weight of authority. See Thompson v. Thompson, 218 U.S. 611, 31 S.Ct. 111, 54 L.Ed. 1180; 27 Am.Jur. § 589, p. 191; 41 C.J.S., Husband and Wife, § 396, p. 877; Annotation, 89 A.L.R. 118; Annotation, 160 A.L.R. 1406.

[12, 13] It follows logically from the above-cited cases that annulment of a voidable marriage does not undo transactions or change the complexion of events occurring during its existence. If an assault committed during a valid marriage gives rise to no cause of action, the same rule should apply to a like event committed during the continuance of a conditionally valid one, commonly called voidable; the injured party to a voidable union has an election to waive the fraud and affirm and validate the marriage. And, as shown above, until an election to repudiate has been followed through to decree of annulment the marriage is valid for all civil purposes.

[14] In the present instance the fraud lay in a secret intent not to consummate the union. But fraud without damage is not actionable. If defendant had changed his mind immediately after the ceremony and had then consummated the marriage no cause of action could have arisen, either for annulment or for damages.

It is only because of acts done or omitted after the marriage ceremony that any grievance, any damage to plaintiff, could arise and that would be during the time that the marriage was valid. There seems to be no sound distinction between the effect of divorce and annulment of a voidable union in the respect now under discussion. Pertinent authorities are few in number and they are conflicting. Before discussing them it is well to dispose of a generality appearing in the books, one inclined to mislead at bar.

It is thus stated in an annotation at page 531 of 62 A.L.R.: "The general rule appears to be that a woman has a right of action against a man with whom she has cohabited, on the ground of fraud in representing that they were lawfully married, when in fact either there had been no marriage at all, or the marriage was void because of his incapacity to marry." Similar statements are found in 38 C.J. § 142, p. 1362; Restatement of Law of Torts, § 555, p. 133; 35 Am.Jur. § 242, p. 343. The language seems broad enough to encompass an action for fraudulently inducing a voidable marriage as well as a bigamous (void) one. But examination of the cases cited in 62 American Law Reports, 38 Corpus Juris and 35 American Jurisprudence discloses that, with the exception of certain ones hereinafter specifically mentioned, each of the cited cases involved a situation in which there was no marriage at all or one which was void in the absolute sense, usually because one of the parties had a living spouse. A cause of action for damages lies in such cases as there is no marriage, no need for a decree of annulment, and no room for application of the rule of the Peters and similar cases, supra.

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[2] Two cases cited contra by appellant involved void marriages and hence are inapposite. They are Parmann v. Parmann, 56 Cal.App.2d 67, 132 P.2d 851; In re Cook, 42 Cal.App.2d 1, 108 P.2d 46; Millar v. Millar, 175 Cal. 797, 810, 167 P. 394, L.R.A.1918B, 415 does not support appellant's position.

Cases which deal specifically with the effect of an annulment of a voidable marriage are Cohen v. Kahn, 263 App.Div. 728, 30 N.Y.S.2d 875; Henneger v. Lomas, 145 Ind. 287, 44 N.E. 462, 32 L.R.A. 848; Callow v. Thomas, 322 Mass. 550, 78 N.E.2d 637, 2 A.L.R.2d 632, annotated in 2 A.L. R.2d 637.[3]

In Callow v. Thomas, supra, the marriage was annulled for defendant's fraud through concealment of a contagious disease, the court adjudging the marriage to be "null and void." Before that time, while the parties were living together, plaintiff had been injured through negligence of defendant in operating an automobile in which both were riding. After the annulment plaintiff sued defendant for her personal injuries. The court stated the problem thus, 78 N.E.2d at page 638: "The question for decision is whether a wife after the marriage has been annulled can maintain an action against her former husband for a tort committed during coverture. The question is one of first impression in this Commonwealth." Then said: "That no cause of action arises in favor of either husband or wife for a tort committed by the other during coverture is too well settled to require citation of authority. Recovery is denied in such a case not merely because of the disability of one spouse to sue the other during coverture, but for the more fundamental reason that because of the marital relationship no cause of action ever came into existence. That this is so is revealed by the fact that it has uniformly been held that even after divorce no action can be maintained by either spouse for a tort committed by the other during coverture." At page 639: "In general it may be said that an annulment is to be distinguished from a divorce in that it is not a dissolution of the marriage but is a judicial declaration that no marriage has ever existed. In other words, the decree of annulment makes the marriage void ab initio. * * *

"But the doctrine that such a decree makes the marriage void ab initio has not always been applied unqualifiedly. See Sleicher v. Sleicher, 251 N.Y. 366, 369, 167 N.E. 501, 502." After discussing certain English cases to the effect that "* * * such transactions as have been concluded and such things as have been done during the period of the supposed marriage * * cannot be undone or reopened after the marriage has been declared null and void", the court said, at page 640: "We are of opinion that the exception recognized in these cases is sound and that the present case falls within it. At the time of the accident the parties were husband and wife for all intents and purposes. Had no proceedings been brought to annul the marriage, this status would have endured until the marriage was terminated by death or divorce. In other words, the marriage here was voidable and not void and was valid until it was set aside by the decree of nullity. 1 Bish.Mar.Div. & Sep. §§ 258, 259, 271, 281; Anders v. Anders, 224 Mass. 438, 441, 113 N.E. 203, L.R.A.1916E, 1273; Sleicher v. Sleicher, 251 N.Y. 366, 369, 167 N.E. 501, 502." Also: "While it doubtless is true that a decree of nullity ordinarily has the effect of making a marriage, even one which is voidable, void ab initio, this is a legal fiction which ought not to be pressed too far. To say that for all purposes the marriage never existed is unrealistic. Logic must yield to realities. Public policy requires that there must be some limits to the retroactive effects of a decree of annulment.

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[3] Alexander v. Kuykendall, 192 Va. 8, 63 S.E.2d 746, 749, discusses but does not actually decide the point, for the record did not disclose whether the marriage was void or voidable.

It was said by Cardozo, C. J., in American Surety Co. [of New York] v. Conner, 251 N.Y. 1, 9, 166 N.E. 783, 786, 65 A.L.R. 244, 'The decree of annulment destroyed the marriage from the beginning as a source of rights and duties * * * but it could not obliterate the past and make events unreal.' The better rule, we think, is that in the case of a voidable marriage transactions which have been concluded and things which have been done during the period of the supposed marriage ought not to be undone or reopened after the decree of annulment. Applying that principle here, the plaintiff is not entitled to recover. On the day after the accident if the plaintiff had brought suit against the defendant it could not have been maintained, for the marriage at that time had not been declared invalid. The situation was unaffected by the subsequent decree of annulment."

Opposed to this ruling is Cohen v. Kahn, supra, 30 N.Y.S.2d 875.[4] The wife there sued for damages for false representations as to defendant's health, which induced the marriage. The husband's challenge to the sufficiency of the complaint was overruled, the court saying: "Appellant contends that section 57 of the Domestic Relations Law, Consol.Laws, ch. 14, and section 37–a of the General Construction Law, Consol.Laws, ch. 22, do not give plaintiff a right to maintain the action. Her right to maintain this action arises from the fact that she is not and never was legally a married woman; therefore, she is not suing her husband and does not need the aid of either statute in order to maintain the action which she is legally entitled to maintain." At page 876. There is no further discussion and no recognition of the rule that the "'doctrine of relation is a fiction of law adopted by the courts solely for the purposes of justice.' * * * The courts have shaped and restrained it in adaptation to its purpose." Sleicher v. Sleicher, 251 N.Y. 366, 167 N.E. 501, 502.

[15] Henneger v. Lomas, supra, 145 Ind. 287, 44 N.E. 462, 467, holds that an action for seduction will lie against the husband after the marriage has been annulled for his fraud. After concluding that the wife was "* * * entitled to bring an action against appellee, and have the same [the marriage] declared void by judicial decree" the court disposed of our question in this brief remark: "After such decree had been rendered, she had the right to sue appellee for her seduction, the same as if she had never been married to him." The court relied upon Bishop v. Redmond, 83 Ind. 157, 160; but its reasoning is no more extended or enlightening than that of the Henneger case. The Supreme Court of the United States aptly observed in Sutton v. Leib, 342 U.S. 402, 410, 72 S.Ct. 398, 403, 96 L.Ed. 448, 456: "It is frequently said, as a legal fiction, that annulment makes the annulled marriage ceremony as though it had never occurred. That fiction is variously treated in different jurisdictions." This truth is illustrated by the cases just reviewed. We find the reasoning of Callow v. Thomas, supra, 322 Mass. 550, 78 N.E.2d 637, more convincing and we hold that no cause of action for damages arose at or after the event of marriage in this case; also that the subsequent annulment of this voidable marriage did not give birth to a cause of action which did not previously exist.

No other points raised in opposition to plaintiff's right to recover require discussion.

Judgment affirmed.

SHINN, P. J., and VALLÉE, J., concur.

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[4] This case is followed in Amsterdam v. Amsterdam, Sup., 56 N.Y.S.2d 19, 22; Saunders v. Saunders, Sup., 63 N.Y.S.2d 880, 882; Lee v. Lee, 184 Misc. 686, 57 N.Y.S.2d 97; Risikoff v. Risikoff, Sup., 120 N.Y.S.2d 776, 778.

133 Cal.App.2d 102

Harriet BALEY, Plaintiff and Appellant,
v.
J. F. HINK and SON (a corporation), and Doris G. Potter, Defendants and Respondents.
Civ. 16271.

District Court of Appeal, First District,
Division 2, California.
May 18, 1955.

Hearing Denied July 13, 1955.

Action by customer of department store against store owner and dog owner for personal injuries suffered when dog allegedly tripped customer. The Superior Court, County of Alameda, Charles Wade Snook, J., granted nonsuits for both defendants. Customer appealed. The District Court of Appeal, Kaufman, J., held that where dog owner admitted dog caused accident, and store owner knew that dog owner and dog were often in store, questions of defendants' negligence were for jury.

Judgments reversed.

Nourse, P. J., dissented in part.

1. Trial 🔑165

In ruling on motion for nonsuit, trial court must assume that all relevant favorable evidence to plaintiff is true, and all presumptions, inferences, and doubtful questions must be construed most favorably toward plaintiff and interpreted most strongly against defendant.

2. Trial 🔑165

In ruling on motion for nonsuit, testimony elicited from defendant as an adverse witness is to be weighed for plaintiff in so far as it is favorable, and is to be disregarded in so far as it is unfavorable. West's Ann.Code Civ.Proc. § 2055.

3. Animals 🔑68

Reasonable care in bringing a small dog on a leash into a department store demands constant alertness and freedom from distraction on part of the dog owner sued for injuries sustained by customer when dog allegedly tripped customer.

4. Animals 🔑74(8)

In action by customer against store owner and dog owner for personal injuries suffered when dog allegedly tripped customer in department store, the evidence, including evidence that dog ran between legs of customer, raised question for jury as to contributory negligence of customer.

5. Trial 🔑105(2)

If inadmissible hearsay is admitted without objection, it has the same weight to prove the fact to which it relates as admissible evidence, and it may be sufficient to establish a fact or support a finding.

6. Trial 🔑105(2)

In action by customer against store owner and dog owner for personal injuries suffered when dog allegedly tripped customer in department store, where dog owner brought out on cross-examination of customer's physician, statement that customer had told physician at hospital that dog had run between her legs, but dog owner did not object to such statement as self-serving declaration, such evidence remained in record.

7. Animals 🔑74(8)

In action by customer against store owner and dog owner for personal injuries suffered when dog allegedly tripped customer in store, evidence raised question for jury as to whether dog owner was negligent.

8. Animals 🔑68

Where dog owner had brought dog on leash to department store on prior occasions, there was notice to store owner, either actual or constructive, of a dangerous condition, as respects liability of store owner for injuries to customer who was allegedly tripped by dog.

9. Animals 🔑67, 68

A storekeeper must exercise reasonable care to protect a customer from harm by dog or other animals, but is, however, not liable for an injury by a dog not owned or kept by the storekeeper, where he did not know, and had no reason to know, that the dog would commit such injury.

10. Negligence ⚷32(1)

Store owner had duty to exercise reasonable care to maintain supervision and reasonably safe aisles for its customers.

11. Animals ⚷74(8)

In action by customer against store owner and dog owner for personal injuries suffered when dog allegedly tripped customer in store, evidence raised questions for jury as to whether store owner was guilty of negligence in permitting dog to be brought into store during business hours and whether store owner had notice of the hazard.

◆

John D. Martin, Ricksen, Freeman & Johnson, Oakland, for appellant.

Barfield & Barfield, San Francisco, for respondent J. F. Hink & Son.

Harris, Darter & Older, Oakland, Cyril Viadro, San Francisco, of counsel, for respondent Doris G. Potter.

KAUFMAN, Justice.

This is an appeal by plaintiff from a judgment of nonsuit in an action for personal injuries sustained while plaintiff was a customer in the department store of respondent, J. F. Hink and Son, in Berkeley. A nonsuit was likewise granted on plaintiff's suit against the defendant Doris Potter, a customer in the aforesaid store, whose leashed dog was alleged to have been the cause of appellant's fall from which she suffered serious personal injuries.

Appellant's complaint against respondent Hink alleged that appellant was a business invitee; that respondent Doris Potter, owned a dog which she knew to be lively, mischievous and frolicsome; that respondent store negligently consented to respondent Potter bringing said dog into the store and into an aisle thereof when appellant was present and negligently consented and allowed respondent Potter to "guide and control said dog in such a careless, negligent and unlawful manner, that it was carelessly, negligently and unlawfully caused, permitted and allowed by respondent Potter, to collide with and trip" appellant and throw her to the floor with great force and violence. It was further alleged that appellant was unable to arise, and that respondent Hink was negligent in providing her with assistance, thereby exacerbating the injuries sustained in the fall. Respondent Hink generally denied all the charging allegations and pleaded contributory negligence and unavoidable accident. Respondent Potter likewise denied the allegations of the complaint and pleaded negligence of respondent Hink as the sole proximate cause; negligence of appellant as the sole proximate cause; contributory negligence and unavoidable accident.

The case was presented before a jury, but motions for nonsuit in favor of both respondents were granted at the close of appellant's case on the ground that there was no evidence of negligence on the part of respondent Hink proximately causing or contributing to the injuries of appellant and none on the part of respondent Potter proximately causing or contributing to the happening of the accident.

Although appellant pleaded the unruly and mischievous nature of the dog, there was no attempt made at the trial to show the disposition of the dog or any previous knowledge of such disposition by either respondent. Appellant's theory at the trial was simply negligence in bringing the dog to an improper place and carelessly controlling and guiding it while there. Most of the cases involving dogs that have been previously decided in this state are not helpful, since they are concerned with proof of prior knowledge of eccentricity, traits, or disposition of the particular animal.

Appellant testified that she entered the respondent store with the intention of making a purchase at about 5 p. m. She made a purchase in the Baby Department in the rear of the store. She then went to the gift wrapping desk at the left of the store to pick up her purchase. From there she had walked about ten or fifteen feet up the center aisle when she suddenly fell to the floor. She said that she felt something hit her legs and she went down. Appellant was unable to arise. Immediately when she landed she saw respondent Potter with the dog on a leash to her right. The dog appeared to be a springer. Respondent Potter told her to lie still until help would come. People from the store brought ammonia and placed it under her nose as she felt she would faint. They did not move her from the floor, nor did they put any covering over her. She thought it was about a half hour before the ambulance arrived to take her to the hospital.

Just prior to the accident appellant had been proceeding to meet her sister and was looking straight ahead. She was not looking at the floor, but the floor was within her range of vision. Appellant was wearing glasses with corrective lenses which brought her vision to normal. She would glance to the side at the merchandise as she moved along the aisle. Appellant was walking when she felt something hit her legs and she went down. She did not feel it with just one of her legs. She believed the dog was reddish-brown in color. Upon objection the court struck out the following answer given in cross-examination.

> "Q. And you determined that (the dog was a springer) while you were on the floor did you not? A. Well, the dog was at the side of me then, when it hit me. I didn't see the dog when it hit me."

The answer was stricken on the ground that it was the opinion and conclusion of the witness. Appellant contends that this was erroneously stricken, for although appellant had not previously seen the dog, she was capable of identifying what hit her by faculties other than sight.

Respondent Potter testified that the dog was a cross between a springer and a cocker and that it was completely black in color. She had it on a leash about 6 feet in length attached to the dog's collar. She was in the vicinity of appellant when she fell. Respondent Potter testified as follows:

> "Q. And you say you were in contact with Mrs. Baley when she fell? A. When she fell; and when she fell, when she hit me, yes.
>
> "Q. When she hit you? A. She fell by herself.
>
> "Q. She fell by herself? A. That is right.
>
> "Q. And she hit you after she fell? A. No, before.
>
> "Q. Before, and what were you doing at that time? A. I was walking toward the front of Hink's.
>
> * * * * * *
>
> "Q. And when she fell, where did she fall with respect to you? A. Oh, I would say she cleared me about 2 feet, because I know there was a space as I watched her there, as I looked there was a space of light between us, 2, I would say 2 feet.
>
> "Q. Was she closer to the front or closer to the back of Hink's when she fell? A. Nearer the back.
>
> * * * * * *
>
> "Q. And your dog was in the same area? A. The dog was in front of me."

Respondent Potter testified that Mrs. Baley was unable to get up and she told her that the sensible thing to do was to go over to Herrick Hospital and have it X-rayed. Respondent stated that she had no conversation with anyone about appellant falling over her dog, and that she did not tell Mrs. Baley or any police officer that she was sorry about it, and not to worry that everything would be taken care of. She said that she was involved in this thing but she was not responsible, that she was positive her dog had nothing to do with it.

Respondent Potter followed appellant to Herrick Hospital. Appellant's sister and nephew arrived while appellant was still in Herrick Hospital. It was then decided to send appellant by ambulance to Permanente Hospital. Respondent Potter drove her own car over to Permanente and waited in the reception room.

Miss Potter also testified that appellant was in the respondent store about one half hour after the accident before the ambulance arrived, but stated that the employees brought out a stretcher and placed her on it, covering her with a blanket which she threw off, saying she was too warm. There were several people of Hink's around, one brought a pillow, others brought smelling salts and water.

Miss Potter testified to a conversation with Mr. Winston from the Johnson Bureau of Investigation. He asked her if she knew Mrs. Baley was still in the hospital and then asked if she carried insurance to cover this sort of thing. She said she carried insurance but didn't know if it covered this sort of thing and referred him to her insurance representative. The investigator then told her that she had said everything would be taken care of. She explained that Mrs. Baley had been worried about her car being overparked, and she had said, "Everything will be taken care of; parking, overparking is not a serious crime." She also said "Everything will be taken care of, just relax and take it easy." The investigator told Miss Potter, that the police report showed that she said everything would be taken care of, and she replied that she had only answered police questions as to her name, address and telephone number. She did not talk to the police about the dog.

Arthur Winston, the investigator, testified that he endeavored to find out from Miss Potter what she meant by "everything would be taken care of", and that "she said that her dog had caused Mrs. Baley to fall." He had previously introduced himself, had told her where he was from and had given her his card.

Harry Cook, a nephew of appellant, saw Miss Potter at Herrick Hospital. She told him that "she couldn't explain the action of the dog, how it did happen, that it was just an unfortunate action of the dog getting loose." She then said that she didn't mean loose in the way she said it. She admitted that the dog was involved, but did not give him any explanation of how the dog was involved.

Respondent Potter when called under Code of Civil Procedure, § 2055 stated that she did not talk to Mr. Cook about the dog tripping Mrs. Baley, that she did not talk to him about the dog at all, that she purposely avoided talking about the accident. He asked her what kind of dog it was and she told him it was a cross between a spaniel and a springer.

Dr. Thomas Ivers testified that appellant was admitted to Permanente Hospital on November 7, 1951, and that she gave him a history of having fallen in Hink's Department Store when a dog ran between her legs. She developed pneumonia and surgery had to be delayed until her recovery from that illness. The doctor stated that the failure to cover appellant while she was lying injured on the floor could be a contributing cause of the pneumonia.

[1, 2] Appellant contends that there was sufficient evidence of negligent conduct on the part of respondent Potter which required submission of the case to the jury. In ruling on motion for nonsuit, the trial court must assume that all relevant evidence favorable to plaintiff is true, and all presumptions, inferences, and doubtful questions must be construed most favorably toward plaintiff and interpreted most strongly against defendant. 16 Cal.Jur.2d 209, sec. 45. And testimony elicited under section 2055, Code of Civil Procedure, is to be weighed for plaintiff in so far as it is favorable, and is to be disregarded in so far as it is unfavorable. 16 Cal.Jur. 2d 212, sec. 46.

Although appellant complains of the order striking out the statement that the dog was at appellant's side when it hit her, as a conclusion because she had not previously seen the dog, there is still considerable evidence in the record to the effect that appellant was caused to fall by contact with the dog. Winston testified that Miss Potter told him the dog caused appellant to fall. Harry Cook stated that she told him that the dog was involved in the accident. The doctor reported that appellant told him that she fell when a dog ran between her legs in Hink's Department Store. Miss Potter admitted to being very close to appellant when she fell, as she cleared her by about two feet.

[3, 4] The dog in the present case was not a free roaming animal as was true in Hagen v. Laursen, 121 Cal.App.2d 379, 263 P.2d 489, where a dog at play ran into a group of people knocking one down, and it was held that this action of the dog could

not have been anticipated. Here the dog was not on its home premises, or out of doors on the street, as was the case in Eigner v. Race, 54 Cal.App.2d 506, 129 P.2d 444, where a great dane weighing 120 pounds held on a leash by defendant's twelve year old daughter suddenly turned around when plaintiff spoke to the girl. Plaintiff was behind the girl and the dog. When the dog turned it brushed against the plaintiff, throwing her to the sidewalk. It was there held that the ordinance requiring a dog to be on a leash in the hands of a person capable of controlling it, was not the proximate cause of the accident, since it would have occurred even if the dog had been in charge of an older and stronger person. Here, however, we have a small dog on a leash held by an adult who is charged with the duty of keeping it under control in a place where people are expected to have their vision distracted by the merchandise on the counters and are entitled to assume that the aisles are free of obstructions. Reasonable care in bringing a small dog on a leash into such a setting demands constant alertness and freedom from distraction on the part of the dog owner. If, therefore, there is evidence that in such a place, a dog on a leash runs between the legs of another customer who is walking in the aisle of the store, that in itself would be some evidence of lack of care and watchfulness and control on the part of the owner which would place on her the burden of explanation. It does not appear that appellant's evidence herein is subject only to the inference that she was contributorily negligent as a matter of law. Therefore the question of contributory negligence would be for the jury.

Respondent discusses the testimony of appellant's nephew Cook, pointing out that although he first testified that Miss Potter couldn't explain to him the action of the dog, that it was just an unfortunate accident of the dog getting loose, he later admitted that she said no such thing, that he meant that she had no definite explanation of the accident, other than that the dog was involved. Respondent says this may create a conflict with Miss Potter's testimony that the dog was not involved, but does not prove that she was negligent in controlling the dog. However, if the admission that the dog was involved, which must be taken as true on a motion for nonsuit, is coupled with the inference favorable to plaintiff arising from Miss Potter's statement to the investigator that the dog "caused" the accident, there would seem to be evidence from which it can be inferred that Miss Potter knew that she had been remiss in controlling her dog. Miss Potter's conduct in following appellant from Herrick Hospital on to Permanente Hospital even though appellant's relatives had already arrived upon the scene at Herrick, would appear to be a further admission by conduct of a knowledge that the dog was involved in the accident. It is true that this particular conduct of Miss Potter is just as open to the inference that she was an unusually charitable and solicitous person, but in weighing the evidence on a motion for nonsuit, the inference most favorable to plaintiff must be drawn.

[5–7] Respondent says that the testimony of Dr. Ivers in which he related the history that a dog had run between the legs of appellant is a self-serving declaration, and must be disregarded because appellant herself admitted that the accident happened so quickly that she could not explain how it happened. These statements are not necessarily in conflict. If inadmissible hearsay evidence is admitted without objection, it has the same weight to prove the fact to which it relates as admissible evidence, and it may be sufficient to establish a fact or support a finding. 19 Cal.Jur.2d 238, sec. 474; Keim v. D. B. Berelson & Co., 105 Cal.App.2d 154, 233 P.2d 123. Respondent's counsel brought out this self serving declaration on cross-examination of the doctor, and since he did not ask that it be stricken, it remains in the record.

We conclude that the nonsuit in favor of respondent Potter was improperly granted.

[8, 9] Appellant contends that the trial court also erred in granting a nonsuit in favor of respondent J. F. Hink & Son, basing his argument principally upon the proposition that under the rules of general

negligence liability is imposed for bringing an animal into an improper place, and for the act of improperly permitting another to do so in premises of proprietorship and control. Appellant cites Weaver v. National Biscuit Co., 7 Cir., 125 F.2d 463, 464, a case of a docile horse negligently permitted upon a public street in a populous city which playfully injured a minor, and Dickson v. McCoy, 39 N.Y. 400, cases which recognize the "improper place" rule and impose liability for negligently permitting animals to be where they should not be and where it is to be expected "they will follow their untrammelled natural propensities." In the present case, however, we do not have an animal free to follow its natural inclinations, as in the above cases, but rather one, which as far as respondent store is aware, is completely under the control of its owner. In Barnett v. La Mesa Post, No. 282, 15 Cal.2d 191, 99 P.2d 650, cited by appellant, a nonsuit was reversed, for although there was no showing of prior knowledge of the disposition of the horse, which was taking part in a parade, negligence in the supervision and management of the animal was a matter for consideration of the jury. This case is distinguishable from the present case, for here the management of the dog was under the control of respondent Potter. Appellant contends that respondent store should have recognized that the dog on a six foot leash involved an appreciable risk of harmful consequences to another, and the evidence shows that respondent Potter had visited the store on prior occasions with this dog on the leash. While there was no showing of any prior conduct in controlling her dog on these occasions, or on this particular occasion, up to the moment of the accident, which would have put the respondent store on notice that she would be negligent in exercising such control, there was however notice to the respondent store either actual or constructive, of a dangerous condition. See Louie v. Hagstrom's Food Stores, 81 Cal.App.2d 601, 184 P.2d 708. The general rule is expressed in Am.Jur. 742, sec. 65, to the effect that a storekeeper must exercise reasonable care to protect a customer from harm by dogs or other animals, but is, however, not liable for an injury by a dog not owned or kept by the storekeeper, where he did not know and had no reason to know that the dog would commit such an injury.

While undoubtedly a customer must exercise greater caution in conducting a dog among the aisles of a department store than on an open sidewalk, because of the fact that the attention of other customers will be diverted by the displays of merchandise, there is no law prohibiting bringing a dog into a store. This case is quite distinguishable from Kenney v. Antonetti, 211 Cal. 336, 295 P. 341, cited by appellant. There a motorist was injured at night by unseen horses which were negligently permitted to escape to the highway. A statute provided that if persons owning or controlling livestock negligently permitted them to stray onto a fenced public highway or remain unaccompanied thereon, they would be responsible for injury to another occasioned by want of ordinary care and skill in the management of such property. There the statutory standard was given weight in holding that a prima facie case was established simply by the happening of the accident.

Appellant has cited a New York case, Steubing v. Hooper, 272 App.Div. 866, 72 N.Y.S.2d 276, in which a customer tripped over defendant storekeeper's dog which she had not seen. It was held that since the dog was in and out of the store and in the narrow aisles thereof on many occasions, the jury was justified in finding that the condition was a source of danger to customers which defendant might reasonably have anticipated.

[10, 11] It is our view that it was the duty of respondent Hink to exercise ordinary care for the safety of appellant. It was for the jury to determine whether or not said respondent was guilty of negligence in permitting dogs to be brought into the store during business hours whether on a leash or not.

Appellant was a business invitee and it was the duty of respondent Hink to exercise reasonable care to maintain supervision and reasonably safe aisles for its customers. See Porter v. Thompson, 74 Cal.App.2d 474, 169 P.2d 40; Hodge v. Weinstock, Lubin & Co., 109 Cal.App. 393, 293 P. 80; Barnett v. La Mesa Post No. 282, supra.

Our Supreme Court in Austin v. Riverside Portland Cement Co., 44 Cal.2d 225, at page 233, 282 P.2d 69, at page 73, lays down the rule as follows: "Generally the owner of property '* * * is under a duty to keep in a safe condition all portions of "premises over which he has control;"' Sexton v. Brooks, 39 Cal.2d 153, 156, 245 P.2d 496, 498, and in more detail: 'A possessor of land who knows, or reasonably should know, of a natural or artificial condition upon his premises which, he should foresee, exposes his business visitors to an unreasonable risk, and who has no basis for believing that they will discover the condition or realize the risk involved therein, is under a duty to exercise ordinary care either to make the condition reasonably safe for their use or to give a warning adequate to enable them to avoid the harm.' Crane v. Smith, 23 Cal.2d 288, 296, 144 P.2d 356, 361; see also Prosser on Torts, pp. 642 et seq."

In Mosley v. Arden Farms Co., 26 Cal.2d 213, at page 219, 157 P.2d 372, at page 375, 158 A.L.R. 872, the Supreme Court held:

> "'If the realizable likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious or criminal does not prevent the actor from being liable for harm caused thereby.' Rest.Torts, § 449. It has been held that the rules on the subject in the Restatement of Torts, sections 442–453, are applicable in this state. Stasulat v. Pacific Gas & Electric Co., 8 Cal.2d 631, 67 P.2d 678."

Here the hazard of another customer bringing a dog into the crowded aisles of a department store makes the defendant department store negligent particularly in view of the fact that the evidence shows that the dog had been brought into the store on previous occasions. The jury could have concluded that the department store had notice of the hazard.

In Porter v. Thompson, supra, plaintiff was an invitee of defendant at a cattle auction. A fractious cow jumped the fence of an enclosure and injured plaintiff who was sitting in one of defendant's bleachers. It was held to be a jury question as to whether the defendant exercised ordinary care for plaintiff's safety.

In Hodge v. Weinstock, Lubin & Co., supra, it was held that it was the duty of defendant when it invited the public into its store, to exercise ordinary care and prudence to keep the aisles and passageways of the premises in and through which, by their location and arrangement, a customer in making purchases was induced to go, in a reasonably safe condition so as not unnecessarily to expose the customer to danger or accident.

We hold therefore that the nonsuit in favor of respondent Hink was improper for the foregoing reasons.

There remains the further question then, of whether the respondent store's treatment of appellant while she lay on the floor for approximately a half hour awaiting the ambulance, contributed in any way to her injuries. In view of our holdings that the nonsuits are improper on other grounds we need not decide this question.

Judgments of nonsuit reversed.

DRAPER, J. pro tem., concurs.

NOURSE, Presiding Justice.

I concur in the reversal as to respondent Potter.

I dissent to the reversal as to the respondent Hink & Son.

Hearing denied; SCHAUER, J., dissenting.

133 Cal.App.2d 63

In re Scott BEAMER on Habeas Corpus.

Cr. 3132.

District Court of Appeal, First District, Division 1, California.

May 18, 1955.

Habeas corpus proceeding to review propriety of conviction for driving automobile at 35 miles per hour in 25-mile zone based upon sole evidence obtained by use of electromagnetic radar speed meter. The District Court of Appeal, Peters, P. J., held that where customarily marked police automobile, parked near curb in plain view of persons using street, was mounted with a speed meter to detect speeding motorists, and where automobile was manned by uniformed police officers and motorcycle used in making arrest was properly painted and openly patrolling highway, such method of checking speed of passing automobiles did not constitute a speed trap as prohibited by statute, and evidence obtained thereby was admissible, even though speed meter computed speeds by measuring distance traveled and time consumed in traveling such distances.

Writ discharged.

1. Habeas Corpus ⚷1, 30(1)

Habeas corpus is a writ normally limited to testing jurisdiction of court; it does not have scope of appeal and ordinarily cannot be used to review mere irregularities or errors committed by court within scope of admitted jurisdiction.

2. Habeas Corpus ⚷30(1)

District Court of Appeal would assume jurisdiction of proceeding in habeas corpus to review propriety of conviction for driving an automobile 35 miles per hour in 25-mile zone based upon sole evidence obtained by use of electromagnetic radar speed meter, because of public importance of question as to admissibility of such evidence in obtaining a conviction, and because this was only way cause could be taken to appellate court. Vehicle Code, §§ 510, 511, 751, 752.

3. Automobiles ⚷331

The only type of "speed trap" prohibited by statute is one combining these four characteristics, (1) a particular section of highway, (2) measured as to distance, (3) with boundaries marked, designated or otherwise determined, and (4) the speed of vehicle calculated by computing time it takes vehicle to travel known distance. Vehicle Code, § 751.

See publication Words and Phrases, for other judicial constructions and definitions of "Speed Trap".

4. Criminal Law ⚷394

Where customarily marked police automobile, parked at curb in view of persons using highway, was mounted with a speed meter to detect speeding motorists, and where automobile was manned by police officers, and where motorcycle used in making arrest was properly painted and was openly patrolling highway, such method of checking speed did not constitute a "speed trap" as prohibited by statute, and evidence obtained thereby was admissible, even though speed meter computed speed by measuring distance traveled by motorist and time consumed in traveling such distance. Vehicle Code, §§ 510, 511, 751, 752, 753.

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Kennedy Jackson, Oakland, for petitioner.

J. F. Coakley, Dist. Atty., of Alameda County, L. E. Dayton, Asst. Dist. Atty., Oakland, for respondent.

PETERS, Presiding Justice.

Beamer was charged with and convicted of a violation of sections 510 and 511 of the Vehicle Code in that at a designated time and place he drove an automobile upon a public street at 35 miles per hour in a prima facie 25-mile zone. The sole evidence of Beamer's speed was obtained by the use of an electromagnetic radar speed meter. The Municipal Court admitted this evidence over Beamer's objection that such evidence was inadmissible under sections 751 and 752 of the Vehicle Code. He was sentenced to a fine or imprisonment. The Appellate Department of the Superior Court affirmed the conviction by a two-to-one vote. People v. Beamer, 130 Cal.App.2d Supp. 874, 279 P.2d 205. Beamer seeks to review the propriety of his conviction by this proceeding in habeas corpus.

[1] The District Attorney urges that, regardless of whether the speed meter evidence was or was not admissible, the propriety of the conviction cannot be determined in this habeas corpus proceeding. Habeas corpus is, of course, a writ that normally is limited to testing the jurisdiction of the court. It does not have the scope of an appeal, In re Schunke, 81 Cal.App.2d 588, 184 P.2d 700, and ordinarily cannot be used to review mere irregularities or errors committed by a court within the scope of an admitted jurisdiction. In re Lindley, 29 Cal.2d 709, 177 P.2d 918. The District Attorney correctly points out that the Municipal Court had jurisdiction of the person and subject matter, and that the Superior Court had jurisdiction to review on appeal.

[2] However, the present case does not involve a "mere" ruling on the admission of evidence. Here the sole evidence to support the conviction consists of the challenged evidence. If such evidence was inadmissible there is no lawful evidence upon which the court was entitled to act. Because we have concluded that in any event the writ should not issue, and in view of the broad expansion of the scope of the writ made by the appellate courts in recent years, In re Byrnes, 26 Cal.2d 824, 161 P.2d 376;[1] In re Bell, 19 Cal.2d 488, 122 P.2d 22; Rodman v. Superior Court, 13 Cal.2d 262, 89 P.2d 109; In re Silverstein, 52 Cal.App.2d 725, 126 P.2d 962, and because of the public importance of the question, and for the reason that this is the only way the cause can be taken to an appellate court, we will assume jurisdiction. This conclusion makes it unnecessary to pass on the constitutionality of section 753 of the Vehicle Code which, by express terms, purports to deprive any court of "jurisdiction to render a judgment of conviction * * * if such court admits any evidence" secured by means of a speed trap. The constitutionality of that section has never been passed upon, and we do not pass upon it in this opinion.[2]

The basic question involved is whether the method of checking speed here employed constitutes a "speed trap" as that term is defined in the California Vehicle Code.

Section 751 of that Code provides:

"(a) No peace officer or other person shall use a speed trap in arresting, or participating or assisting in the arrest of, any person for any alleged violation of Division IX of this code nor shall any speed trap be used in securing evidence as to the speed of any vehicle for the purpose of an arrest or prosecution under this code.

"(b) A speed trap within the meaning of this chapter is a particular section of a highway measured as to distance and with boundaries marked, designated or otherwise determined in order that the speed of a vehicle may be calculated by securing the time it takes said vehicle to travel such known distance.

"(c) No evidence as to the speed of a vehicle upon a highway shall be admitted in any court upon the trial of any person for an alleged violation of Division IX of this code when such evidence is based upon or obtained from or by the maintenance or use of a speed trap."[3]

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[1] In that case, 26 Cal.2d at page 827, 161 P.2d at page 377, the Supreme Court held that the "writ may be used to present questions of law that cannot otherwise be reviewed or are so important as to justify an extraordinary remedy."

[2] In People v. Stewart, 107 Cal.App.Supp. 757, 759, 288 P. 57, 58, the point was raised. The court stated that "in view of the conclusion to which we have come as to its interpretation, we do not deem it necessary for the purposes of this case to express any opinion on the constitutional question."

[3] The substance of this section was first added to our law, as was § 752, as § 155 of the Vehicle Act in 1923, Stats. of 1923, p. 567, Chapter 266, and both sections as subsequently amended became part of the Vehicle Code in 1935. Section 752, quoted *infra*, reads as the section was amended in 1949.

Section 752, subd. (a) provides: "In any prosecution under Division 9 of this code upon a charge involving the speed of a vehicle every officer or other person shall be incompetent as a witness if the testimony of such officer or person is based upon or obtained from or by the maintenance or use of a speed trap." Subdivision (b) of this section makes incompetent, with certain exceptions, the testimony of an officer in a speeding case unless such officer was dressed in a distinctive uniform and operating a motor vehicle painted a distinctive color. See People v. Stewart, 107 Cal.App. Supp. 757, 288 P. 57. This portion of the section is not here involved because all of the officers involved were dressed in uniform, and the automobile upon which the speed meter was mounted was painted distinctive colors usually used on police cars. It should also be mentioned that this police car was parked at the curb in plain view of all using the roadway.

Judge Hoyt, in the majority opinion of the Appellate Department of the Superior Court, fully and properly described the radar device here used in the following language, 130 Cal.App.2d Supp. 875, 279 P. 2d 205, 206:

"Three experts testified as to the electronic principles underlying the operation of this device. Their testimony was to the effect that basically it consists of an ultra high frequency radio transmitter and receiver operating on a frequency of 2445 megocycles, a visual speed indicator calibrated to show miles per hour, and a graphic recorder on which speed in miles per hour is recorded.

"Electromagnetic waves traveling at the speed of light are beamed from the transmitter by means of a directional antenna. The crests of these waves are approximately 2.1 inches apart. When these waves hit a solid object they are reflected or bounced back to the receiver. The reflected waves travel at the same speed as the outgoing waves. If the object reflecting the waves back to the receiver is standing still, the same number of waves are received per second by the receiver as are transmitted per second by the transmitter. If the object reflecting the waves is moving away from the transmitter and receiver, each succeeding transmitted wave travels a slightly greater distance than the preceding wave, and each reflected wave travels the same increased distance, with the result that the number of reflected waves returning to the receiver in any given time period is decreased in direct proportion to the speed with which the reflecting object is moving away from the transmitter and receiver. The device then electronically compares the transmitter frequency with the decreased frequency with which reflected waves return to the receiver, and from this comparison registers the speed with which the reflecting object is moving away from the transmitter and receiver on a visual dial calibrated in miles per hour.

"Similarly, when the reflecting object is moving toward the transmitter and receiver, the distance traveled by each succeeding wave is reduced in direct proportion to the speed with which the reflecting object is moving toward the device, with the result that the number of reflected waves returning to the receiver in any given time period is increased in direct proportion to the speed with which the reflecting object is moving toward the transmitter and receiver. The device then electronically compares the transmitter frequency with this increased frequency with which reflected waves return to the receiver and determines from this comparison the speed with which the reflecting object is moving toward the transmitter and receiver, and registers that speed on the visual dial. The speeds obtained are likewise recorded upon the graphic recorder.

"The device will work equally well whether the reflecting object is approaching or moving away from it. It is not necessary for the device to be stationary. If it is moving, the speed of its movement must be added to or subtracted from the speed of the reflecting object as registered on the speed indicator, depending upon whether the device is moving toward or away from the reflecting object."

The expert evidence also was to the effect that the machine is simple to operate, is remarkably accurate within a range of 175 feet, and can measure the speed of a moving vehicle within that range while the vehicle is traveling but a few inches. The experts also pointed out that the machine is fundamentally a counting device, counting the outgoing and incoming waves and calibrating the difference into miles per hour. The police evidence was to the effect that the speed of the Beamer car was determined by the speed meter well within the 175-foot effective range of the device.

Does the use of such machine constitute a "speed trap" as that term is used in section 751? That is the sole question presented in this proceeding. The answer to that question depends not simply upon determining whether the methods here employed constituted a "speed trap" generally, but upon whether such methods constituted a "speed trap" as that term is defined in section 751. That section, and the following one, prohibit the use of only those "speed traps" defined in the statute. There is nothing inherently wrong with "speed trap" evidence, and many states, in the absence of statute, permit its use. California has seen fit to prohibit "speed traps" of a certain defined kind, but only those "speed traps" coming within the definition are prohibited. The validity of the statute within its scope, is beyond doubt. Fleming v. Superior Court, 196 Cal. 344, 238 P. 88.

Of course, when the substance of section 751 of the Vehicle Code was first enacted as section 155 of the Vehicle Act in 1923, the Legislature did not have in mind radar devices, for the obvious reason that radar, for such purposes, had not yet been developed. That fact, while of importance, is not conclusive because if the statute, reasonably interpreted, includes such devices they are barred whether in existence when the statute was passed or not.

The use of radar to compute speed is of such recent origin that there is but little case law on the subject generally, and none at all in this state. The cases from outside this state have not dealt with the problem here involved. Most of them are concerned with whether judicial notice can be taken of the nature of the machine, of its accuracy, or how it operates. All the decided cases hold that expert testimony is necessary on this subject, but where such evidence has been produced the cases have quite generally upheld the use of such devices.[4]

[3] The only type of "speed trap" prohibited by section 751 has four characteristics: (1) A particular section of a highway, (2) measured as to distance, (3) with boundaries marked, designated or otherwise determined, and (4) the speed of the vehicle calculated by computing the time it takes the vehicle to travel the known distance. If any one of these elements is absent the device does not fall within the prohibition of the section.

It seems quite clear that the method here used to secure the evidence that petitioner was violating the law does not fall within the prohibition of section 751. In no real sense was there "a particular section of a highway measured as to distance and with boundaries marked, designated or otherwise determined". While in a general sense a particular portion of the street was involved in that the effective range of the speed meter is the 175 feet effective range, forwards and backwards, from the device, that cannot be the "particular section of a highway" mentioned in the code because only a very small portion of that section of the highway was used to ascertain the speed. Certainly, the boundaries of the area used to measure the speed were not "marked, designated or otherwise determined", because any few inches of the roadway within the effective range of the device could be used for measuring purposes. The device may be used anywhere on the highway wherever the device is located, whether stationary or on a moving vehicle. It is obvious that section 751 was passed to meet a particular evil existing in 1923 of

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4. For two excellent discussions of the general problem and of the cases from outside California on the general subject see "Radar in the Courts" by D. W. Woodbridge in 40 Va.L.Rev. 809 (1954), and "Radar Traffic Controls" by C. H. Langschmidt, Jr., in 23 Tenn.L.Rev. 784 (Feb., 1955).

enforcement officers physically marking a portion of a highway and then, while in hiding, "clocking" the suspect car as it passed over that marked area. Fleming v. Superior Court, 196 Cal. 344, 238 P. 88. That evil does not here exist.

[4] Petitioner's basic argument is that the speed meter falls within the prohibition of section 751 because it measures the distance a vehicle travels on the highway and computes the time it takes the vehicle to travel that distance. The argument proves too much. If correct, it would mean that no one could be arrested for speeding, because speed, in every case, necessarily, by very definition, is the distance traveled in a certain time. No one could reasonably contend that when an officer "clocks" a speeding vehicle by following it and checking its speed by the speedometer on the officer's car, that such evidence is inadmissible under section 751. Obviously, the officer, in such event, is measuring the distance the suspected vehicle travels in a certain time, because that is precisely what a conventional speedometer does. If petitioner's argument that any device used to ascertain speed that measures distance divided by time is prohibited, then all evidence of speeding based on speedometer "clocking" would be prohibited. Obviously, section 751 was never intended to have that result.

Counsel for petitioner refers to the statement appearing in Fleming v. Superior Court, 196 Cal. 344, 349, 238 P. 88, 90, to the effect that in passing the predecessor section of section 751 the Legislature " 'clearly expressed its conviction that the presence of traffic officers actually patrolling the highways, dressed in distinctive uniforms, and in plain sight of all travelers on the highways, would have a most salutary effect in securing the observance of each and all of the regulations imposed upon drivers of vehicles upon the public highways.' " We agree, generally, with that statement. In the instant case the officers were all dressed in uniform. The automobile upon which the speed meter was mounted was properly painted and was parked at the curb in plain view of all persons using the street. The motorcycle used in making the arrest was properly painted and openly patrolling the highway.

For the foregoing reasons the writ is discharged and the prisoner remanded to custody.

BRAY and FRED B. WOOD, JJ., concur.

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133 Cal.App.2d 74

Amanda HUGHES, an Infant, by Mortimer Hughes, her guardian ad litem, and Mortimer Hughes, Plaintiffs and Appellants,

v.

Frank Melvin MacDONALD, Universal Utilities Corporation, a corporation, Defendants and Respondents.

Civ. 16245.

District Court of Appeal, First District, Division 2, California.

May 18, 1955.

Rehearing Denied June 17, 1955.

Hearing Denied July 13, 1955.

Action by infant, by her father as guardian ad litem, and by father against motorist for injuries sustained and expenses incurred when infant came into contact with automobile which motorist had parked on wrong side of street and was driving from curb. The Superior Court, City and County of San Francisco, Robert McWilliams, J., entered judgment upon verdict adverse to plaintiffs, and plaintiffs appealed. The District Court of Appeal, Nourse, P. J., held that question whether motorist had acted in reasonable and prudent manner was for jury.

Judgment affirmed.

1. Automobiles ⚷162(1)

Fact that motorist struck child while driving automobile from curb would not necessarily prove violation of Vehicle Code provision forbidding any one from starting vehicle stopped on highway or backing vehicle on to highway unless or until such movement could be made with reasonable safety. Vehicle Code, § 543.

2. Automobiles 🔑245(8)

In action by infant, by her guardian ad litem, against motorist for injuries sustained when infant came into contact with automobile which motorist had parked on wrong side of street and was driving from curb, question whether motorist had acted in reasonable and prudent manner was for jury. Vehicle Code, §§ 525, 530, 543.

3. Automobiles 🔑245(8)

Even if statute forbidding any one from starting vehicle stopped on highway or from backing vehicle onto highway until such movement can be made with reasonable safety impliedly requires that such vehicle must yield right of way to vehicles or persons moving normally on or across highway, question whether failure to yield was excused under the circumstances was for jury in action for injuries sustained by infant who was struck by automobile which defendant was driving from where it had been parked at curb. Vehicle Code, § 543.

4. Automobiles 🔑242(7)

A violation of Vehicle Code provision forbidding parking on wrong side of road does not cause liability without proof that such violation proximately caused injury to plaintiff. Vehicle Code, § 525

5. Automobiles 🔑245(57)

In action by infant, by her guardian ad litem, against motorist for injuries sustained when infant came into contact with automobile which motorist had parked on wrong side of road and was driving from curb, question whether parking on wrong side of road was proximate cause of injury was for jury. Vehicle Code, § 525.

6. Automobiles 🔑223(2)

One and one-half year old plaintiff, who was injured when she came into contact with automobile, was too young to owe duty of care which would be applicable to pedestrians or persons in general.

7. Trial 🔑296(1)

Material error in instruction on principle of law essential to case is not cured by an inconsistent correct statement in another instruction, since it is ordinarily impossible to determine which of the conflicting rules has been followed by the jury.

8. Trial 🔑295(1)

Conflicting instructions need not lead to a reversal if reasonable construction of the instructions as a whole from the standpoint of their probable effect on jury indicates that it is improbable that jury was misled and most likely that correct instruction preponderated over the incorrect one in mind of jury.

9. Appeal and Error 🔑1064(1)

Where, in action by one and one-half year old infant, by her guardian ad litem, against motorist for injuries sustained when infant came into contact with automobile driven by motorist, duty of care of child was important only for defense of contributory negligence, and jury had been told that such defense did not apply to child, giving of instructions which defined duty of care of pedestrians, of parties, or of persons in general, and which would not be applicable to a one and one-half year old child, did not constitute reversible error.

10. Trial 🔑295(7)

In determining propriety of use of certain words in general instruction on contributory negligence, the instructions would be considered as a whole.

11. Trial 🔑296(4)

In action by one and one-half year old infant, by her guardian ad litem, against motorist for injuries sustained when infant came in contact with automobile driven by motorist, use of words "injured party" or "plaintiff" in general instruction pertaining to contributory negligence was not reversible error on ground that jury could have been misled, in view of fact that jury had been instructed that defense of contributory negligence was not applicable to infant.

12. Trial 🔑241

If statute specifies conduct required under circumstances involved in case, jury must be apprised of said standard by an instruction.

13. Automobiles 🔑169

It is doubtful whether Vehicle Code provision, which forbids any one from starting a vehicle stopped on highway or from backing vehicle onto highway unless such movement can be made with reasonable safety, established any standard more specific than that of care of a reasonably prudent man. Vehicle Code, § 543.

14. Automobiles ⚷246(5)

In action by infant, by her guardian ad litem, against motorist for injuries sustained when infant came into contact with automobile which motorist had parked on wrong side of street and was driving from curb, instructions given on care of persons of ordinary prudence as test for negligence were sufficient.

15. Trial ⚷260(1)

Where other instructions sufficiently cover a statutory duty, it is not necessary to instruct in words of the statute.

16. Automobiles ⚷246(7)

Even if Vehicle Code provision pertaining to starting a vehicle stopped on highway or backing vehicle onto highway in effect requires automobile starting or backing on highway to yield right of way to vehicles or persons moving normally on or across highway, giving of instruction based upon language of such provision, as requested by plaintiff, would not be sufficient without addition of explanations. Vehicle Code, § 543.

17. Appeal and Error ⚷1066
Trial ⚷296(3)

Where, in action for injuries received by one and one-half year old infant, essential issue as to infant was whether motorist had used degree of care required in presence of little children, even if instruction should have been given in language of Vehicle Code provision pertaining to starting and backing vehicles on highway, omission thereof would not require a reversal in view of other instructions given and of fact that dangers of such situation would be clear to any juror. Vehicle Code, § 543; West's Ann.St.Const. art. 6, § 4½.

18. Automobiles ⚷246(22)

Where, in personal injury action, question whether injury had been proximately caused by motorist's negligence was for jury, giving of instruction on unavoidable accident was not error.

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James Martin MacInnis, Nicholas Alaga, Harry P. Glassman, San Francisco, for appellants.

Keith, Creede & Sedgwick, San Francisco, for respondents.

NOURSE, Presiding Justice.

Amanda Hughes, an infant about one and a half years old, brought suit through her father as guardian ad litem for injuries suffered when she came in contact with defendant MacDonald's automobile. Her father, joining in the action, sued for expenses incurred for her treatment. They appeal from a judgment entered on an adverse verdict.

On the morning of the accident MacDonald was driving his car in the course of his employment as a salesman and collector for the other defendant east along the south side of Montana Street, where he had to make a collection from Mrs. Lengyel at No. 71. When in passing he saw her on a lawn to the west of her home near No. 75, the Hughes' home, he made a U-turn at the corner, came back and crossing over from the north side to the south side of the street parked his car in front of the Hughes' home with the left front wheel against the curb and headed against the direction of the traffic. Mrs. Hughes was then with her back to the street cutting grass on a little lawn before her home and according to her Amanda was sitting next to her putting grass into a cardboard box. Three more little children, one of Mrs. Hughes and two of Mrs. Lengyel were playing on the lawns and the sidewalk not directly at the curb. Mrs. Lengyel went to the car and told MacDonald to come back for the collection the next week. While she was speaking to him her youngest boy came to the car and, just when MacDonald was going to start, began tinkering with the lid of the gas cap in back on the rear fender. Mrs. Lengyel, looking to the rear of the car, told the boy to get away because the car was going to start. The boy then ran back and according to MacDonald's testimony Mrs. Lengyel also backed away from the car making a motion back with her arms by her side, which signified to him that the children were clear. He saw children behind her arms, not in front of her and thought he saw the same number of children he had seen when he came. Mrs. Lengyel testified that she did not recall but that she could have made such a motion. MacDonald looked in his rear view mirror and seeing nothing, backed his car about two feet to clear the curb and then moved forward very slowly. After he had moved forward five or six feet he heard an unusual sound. He stopped his car and called to the women, who were back at work on the lawn again. Mrs. Lengyel turned and called out that it was Amanda. She picked up Amanda about five feet out from the sidewalk. Mrs. Hughes had not missed Amanda, she thought the child was next to her. According to her only one or at most two minutes elapsed between MacDonald's arrival and Mrs. Lengyel's exclamation. When MacDonald examined his car he found a slight smudge on the back of the right rear fender towards the bumper. The police report of the accident says that the child "somehow became entangled with the right rear fender or bumper". MacDonald testified that after the accident Mrs. Hughes told him twice that same day that he should not be upset, that it was not his fault.

Appellants contend that the verdict is not supported by the evidence, because MacDonald was negligent as a matter of law, having violated Section 543 of the Vehicle Code, which reads: "No person shall start a vehicle stopped, standing or parked on a highway nor shall any person back a vehicle on a highway unless and until such movement can be made with reasonable safety" and moreover by driving to the left of the road and parking headed against the direction of the traffic in violation of Section 525 Vehicle Code and Section 54 of the Traffic Code of San Francisco. These contentions are without merit.

[1–3] The fact alone that an accident happened does not necessarily prove violation of Section 543 Vehicle Code. With respect to Section 530 of the same code—which requires for overtaking over the left side of the road, among other things, that said left side be free of oncoming traffic for a sufficient distance ahead to permit such overtaking to be completed "without interfering with the safe operation of any vehicle approaching from the opposite direction or any vehicle overtaken"—it was said in M & M Livestock Transport Co. v. California Auto Transport Co., 43 Cal.2d 847, 850, 279 P.2d 13, 15, that said section "does not mean that when passing the conditions must be such that the passer guarantees he may safely pass or that he has necessarily violated the section by failing to complete the maneuver without accident, that is, the question is not entirely one of hindsight. Essentially the passer is required to act in a reasonable and prudent manner under the circumstances". Whether MacDonald acted in such manner under the circumstances of our case remained for the jury. Smith v. Harger, 84 Cal.App.2d 361, 368–369, 191 P.2d 25; Hart v. Briskman, 110 Cal.App.2d 194, 201–202, 242 P.2d 341. Considering among all the circumstances the presence at the car of the mother of some of the children, the warning given by her and the motion she made, the jury could conclude that MacDonald acted as a reasonably prudent man and did not violate Section 543. Even if it were held that Section 543 contains an element of right of way, not clearly expressed, to the effect that a car starting or backing on a highway must yield the right of way to vehicles and persons moving normally on or across said highway, then still the question whether the failure to yield the right of way was excused under the special circumstances of the case was for the jury and the stated facts would support the finding of an excuse. Taylor v. Jackson, 123 Cal.App.2d 199, 266 P.2d 605.

[4, 5] The undeniable violation of Section 525 of the Vehicle Code and Section 54 of the San Francisco Traffic Code does not cause liability without proof that defendant's violation of the statute or ordinance proximately caused the injury. Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, 588, 177 P.2d 279, and the facts stated certainly support a conclusion that

the fact that the car was parked headed against the direction of the traffic did not proximately cause the injury to the child.

[6] Appellants next urge that instructions given by the court which defined the duty of care of pedestrians, of the parties, or of persons in general were erroneous if the jury would apply them to the one and a half year old plaintiff, too young to owe any duty of care. This is correct. Some of said statements were according to their terms necessarily applicable to the child. It is said that "a pedestrian * * * at all times * * * must be vigilant * * *." When the child was the only pedestrian involved, and further that "Plaintiffs and the Defendant MacDonald were both chargeable with the exercise of reasonable care" when of the two plaintiffs the child was one. Respondent urges that the above errors were cured by the following instruction also given: "* * * I instruct you that the law conclusively presumes that a child of the age of the plaintiff child, Amanda Hughes, namely, one year and six months, is incapable of contributory negligence. Hence you need consider the defense of contributory negligence only in respect to the conduct of the plaintiff's parents". Full instructions are then given on possible negligence of the parents and it is clearly expressed that if contributory negligence of the parents were found such would not be a defense against the child and would not bar her recovery.

[7–9] As a rule material error in the instruction on a principle of law essential to the case is not cured by an inconsistent correct statement in another instruction, because ordinarily it is impossible to determine which of the conflicting rules was followed by the jury. However, such conflicting instructions need not lead to a reversal when a reasonable construction of the instructions as a whole from the standpoint of their probable effect on the jury indicates that it is improbable that the jury was misled and most likely that the correct instruction will have preponderated in the mind of the jury over the incorrect ones. Wells v. Lloyd, 21 Cal.2d 452, 458–459, 132 P.2d 471. We have concluded that the latter applies here. The only point for which the duty of care of the child was of importance was for the defense of contributory negligence and the jury was told expressly that that defense did not apply to the child. Compare Finnegan v. Royal Realty Co., 35 Cal.2d 409, 437, 218 P.2d 17. Moreover the rule that a child of one and a half years cannot be negligent because it is unable of taking care of itself or others is so obvious to the lay mind that it is inconceivable that the jury should not have followed the express instruction excluding the defense of contributory negligence as to the child, expressly mentioned by name, but should contrary to said instruction have based such defense on the inapplicable instructions as to duty of care which did not expressly name the child. Dike v. Golden State Co., 125 Cal.App.2d 6, 269 P.2d 619, can be distinguished because in that case no such express instruction excluding contributory negligence of the infant plaintiff because of its age had been given.

[10, 11] Appellants further contend that the use of the words "an injured party" or "plaintiff" in the general instructions on contributory negligence was confusing in connection with the above instruction which excluded contributory negligence of the infant plaintiff. The reasoning followed above is a fortiori applicable to this grievance. The instructions must be considered as a whole and it is then clear that the instructions here complained of give general rules normally governing contributory negligence but which in this case are expressly declared not applicable to the infant plaintiff but only to her parents. In this respect the jury cannot have been misled.

Next appellants complain of the refusal of the court to give certain instructions proposed by them with respect to the affirmative duties imposed by law on the defendant. The court marked said instructions "given in substance". One of these instructions (Plaintiffs' No. 7) stated in substance that a greater degree of care is required of the driver of a vehicle when he knows that small children are present because their conduct and the places they will run to are unpredictable, and further that, if the driver has knowledge of the presence of children, "he may be held to have been responsible for their safety, although it appears that he did not see the injured child in time to prevent the injury." The first part of said instruction was fully covered by another instruction given (Plaintiffs' No. 8). Although the language of the second part of the instruction is literally found in Conroy v. Perez, 64 Cal.App.2d 217, 224, 148 P.2d 680, such language taken from an opinion may not always safely be given as an instruction to a jury. Reagh v. San Francisco Unified School District, 119 Cal.App.2d 65, 73, 259 P.2d 43. The language quoted, which does not mention negligence, could be understood to mean, that knowledge of the presence of children would cause the driver to be strictly liable for injury caused to them and was therefore undesirable. Another instruction, which told the jury in substance that the fact that a driver did not become aware of the presence of a person was no excuse if, by the exercise of ordinary care he could have become timely aware of it, sufficiently stated the idea insofar as it was correct.

[12–16] The other instruction not given stated the text of Section 543 of the Vehicle Code, supra, and rules as to its violation as negligence per se except when excused by the surrounding circumstances. If a statute specifies the conduct required under circumstances involved in the case the jury must be apprised of said standard by instruction. However, it is doubtful whether Section 543, supra, establishes any standard more specific than that of the care of a reasonably prudent man. See 6 Cal.Jur.2d 728; Smith v. Harger, supra, and compare M & M Livestock Transport v. California Auto Transport Co., supra, and Matson Navigation Co. v. Hansen, 9 Cir., 132 F.2d 487–488. Sufficient instructions were given on the care of a person of ordinary prudence as test for negligence. When other instructions sufficiently cover a statutory duty it is not necessary to instruct moreover in the words of the statute, compare Tossman v. Newman, 37 Cal.2d 522, 525, 233 P.2d 1. If Section 543 was intended to provide any additional rule—we suggested a possible element of right of way—then it was not so clearly expressed that it could be understood by a jury without addition of explanations not proposed by appellant.

[17] At any rate, even if the proposed instruction or one in the words of Section 543 only, should have been given the omission would not require a reversal under Article VI, Section 4½ of the state constitution. The essential issue as to the infant plaintiff was whether MacDonald in starting and backing up used the degree of care required under all the circumstances among which the known presence of little children. The dangers of such a situation and the degree of care required must be clear to any juror and instructions could do little good. Moreover good instructions were given on the test of the man of ordinary prudence under all the circumstances, the duty of the operator of a vehicle to keep an intelligent and careful lookout and to become aware of that of which he would become aware by ordinary prudence and on the special care required as to young children. An instruction in the words of Section 543 would not have added anything of practical value.

[18] Finally appellant contends that it was error to give an instruction on unavoidable accident because defendant was guilty of negligence per se and said negligence as a matter of law was the proximate cause of the injury to the infant. We have rejected the factual basis of this contention hereinbefore. It was for the jury to decide whether the injury was proximately caused by negligence of the defendant, and then the giving of such an instruction is no error. Smith v. City and County of San Francisco, 117 Cal.App.2d 749, 751, 256 P.2d 999, and cases there cited.

Judgment affirmed.

KAUFMAN, J., and DRAPER, J. pro tem., concur.

Anthony DI GENOVA, Petitioner and Respondent,

v.

STATE BOARD OF EDUCATION, William L. Blair, Wilber D. Simons, Thomas J. Mellon, Mrs. E. T. Hale, Gilbert H. Jertberg, Joseph P. Loeb, Mrs. Margaret H. Strong, Byron H. Atkinson, Mrs. W. J. Parks and Max J. Osslo, as members constituting the State Board of Education; Roy E. Simpson, Superintendent of Public Instruction and Ex Officio Director of Education of the State of California; Roy E. Simpson, James C. Stone, Jay Davis Conner, Frank M. Wright, Wesley P. Smith and J. Burton Vasche, as Commissioners constituting the Commission of Credentials of the State Board of Education; Herbert Clish, as Superintendent of Schools of the Unified School District of the City and County of San Francisco, State of California; Bert W. Levit, Charles J. Foehn, Mrs. Nell E. Hinckley, Joseph L. Alioto, John G. Levison, Mrs. Clarence Coonan and Charles C. Trowbridge, Jr., as Commissioners constituting the Board of Education of the City and County of San Francisco, State of California, Defendants and Appellants.

Civ. 16261.

District Court of Appeal, First District, Division 1, California.

May 18, 1955.

Hearing Granted July 13, 1955. *

Petitioner brought mandamus proceeding against members of the State Board of Education and others to compel reinstatement of petitioner's teaching credentials, restoration of his teaching position, payment of his salary since separation, and reimbursement of his costs of suit. The Superior Court of the City and County of San Francisco, H. A. Van der Zee, J., entered judgment for petitioner, and members of Board and others appealed. The District Court of Appeal, Fred B. Wood, J., held that statute providing that whenever holder of any credential issued by State Board of Educataion has been convicted of any sex offense as defined in statute, Board shall forthwith suspend the credential, does not authorize Board to deprive teacher, and especially one holding permanent tenure, of his credential to teach, without some sort of charges being filed against him, and without being afforded the right of trial thereon, so that he may defend himself against such charges.

Judgment affirmed.

1. Schools and School Districts ⚷132

Question whether section of the Education Code providing that whenever holder of any credential issued by State Board of Education has been convicted of any sex offense as defined in statute, Board shall suspend the credential, sanctions revocation of a permanent tenure teacher's state credential without a hearing is a question of legislative intent, not of legislative competency. West's Ann.Education Code, §§ 12011.7, 12756.

2. Schools and School Districts ⚷133.6

The Legislature has plenary power over teacher tenure. West's Ann.Education Code, § 13007.

3. Schools and School Districts ⚷132

Courts should not imply legislative intent to deprive a teacher of his license without prior opportunity to be heard, unless court is compelled to do so by plain language of statute.

4. Schools and School Districts ⚷132

The word "forthwith" as used in statute providing that whenever holder of any credential issued by State Board of Education has been convicted of any sex offense as defined in statute, State Board of Education shall "forthwith" suspend the credential, means within a reasonable time or as expeditiously as under the circumstances is reasonably possible, and not in the sense of dispensing with normal notice and hearing requirements. West's Ann.Education Code, §§ 12011.7, 12756.

See publication Words and Phrases, for other judicial constructions and definitions of "Forthwith".

5. Schools and School Districts ⚷132
Statutes ⚷212.1

Where Legislature added statute providing that whenever holder of any credential issued by State Board of Education has been convicted of any sex offense as defined in certain statute, Board shall forthwith suspend the credential, to article on suspension and revocation of state credentials without expressly dispensing with notice and hearing requirements, Legislature would be deemed to have intended that such requirements should apply to permanent employees, especially in view of presumption that the Legislature is aware of judicial interpretation of any statute which it amends. West's Ann.Education Code, § 12756.

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* Opinion vacated 288 P.2d 862.

6. Schools and School Districts ⚷132

Statute providing that whenever holder of any credential issued by State Board of Education has been convicted of any sex offense as defined in statute, Board shall forthwith suspend the credential, does not authorize Board to deprive a teacher, and especially one holding permanent tenure, of his credential to teach, without some sort of charges being filed against him, and without being afforded the right of trial thereon, so that he may defend himself against such charges. West's Ann.Education Code, §§ 12011.5, 12011.7, 12012, 12751–12756, 12752.1, 12753, 12755, 12756, 12776–12785, 12777, 13001.3, 13521–13525, 13529–13556, 14002.3; Pen.Code, §§ 261, subds. 3, 4, 647, subd. 5.

7. Mandamus ⚷167

Where nothing contained in exhibits of defendants amounted to statement that petitioner had been convicted of a sex offense within meaning of statute providing that whenever holder of any credential issued by State Board of Education has been convicted of any sex offense as defined in statute, Board shall forthwith suspend the credential, failure of petitioner in mandamus proceeding to compel reinstatement of his credentials to controvert recitals in exhibits was no admission by petitioner that he had ever been convicted of such offense. West's Ann.Education Code, §§ 12011.7, 12756.

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Edmund G. Brown, Atty. Gen., Richard H. Perry, Deputy Atty. Gen., Dion R. Holm, City Atty., City and County of San Francisco, San Francisco, Irving G. Breyer, San Francisco, of counsel, for appellants.

Walter H. Duane, San Francisco, for respondent.

FRED B. WOOD, Justice.

Petitioner Di Genova held elementary and secondary school credentials issued by the state and had acquired permanent tenure as a teacher in the employ of the defendant school district when the State Board of Education, without giving him a hearing, revoked those credentials upon the ground, assertedly, that he had been convicted of a sex offense as defined in section 12011.7 of the Education Code. Thereupon the local school board discontinued his services as a teacher. The trial court found that the defendant boards acted without jurisdiction and issued a writ of mandamus for reinstatement of Di Genova's credentials, restoration of his teaching position, payment of his salary since separation, and reimbursement of his costs of suit. The state and local boards and officers have appealed.

The main question is whether section 12756 of the Education Code, in the types of cases to which it applies, sanctions the revocation of a permanent tenure teacher's state credentials without a hearing.

[1, 2] It is a question of legislative intent, not of legislative competency. "In California * * * the legislature still has plenary power over teacher tenure, there being no constitutional provisions in any way limiting that power." Taylor v. Board of Education, 31 Cal.App.2d 734, 744, 89 P.2d 148, 153. See also Phelps v. Prussia, 60 Cal.App.2d 732, 741–743, 141 P.2d 440, and Ed.Code, § 13007.

Section 12756 declares that "Whenever the holder of any credential * * * issued by the State Board * * * has been convicted of any sex offense as defined in Section 12011.7, the State Board * * * shall forthwith suspend the credential * * *. If the conviction is reversed and the holder is acquitted * * * in a new trial or the charges * * * are dismissed, the board shall forthwith terminate the suspension of the credential * * *. When the conviction becomes final or when imposition of sentence is suspended the board shall forthwith revoke the credential * * *."

[3] Here there is no express provision for notice and a hearing. Is one implied? Yes, if the "statute contemplates a quasi judicial determination by the administrative agency that there be cause for the revocation". In such a case the statute should be "interpreted to require a hearing." Fascination, Inc., v. Hoover, 39 Cal. 2d 260, 271, 246 P.2d 656, 662. "We should not imply legislative intent to deprive a person of his license without a prior opportunity to be heard unless compelled to do so by the plain language of the statute * * *." Ratliff v. Lampton, 32 Cal.2d 226, 230, 195 P.2d 792, 795, 10 A.L.R.2d 826.

But, say the appellants, there is no "quasi judicial determination" to be made by the board under this statute: Section 12011.7 designates the particular code sections whose violation is cause for suspension or revocation; section 12756 states precisely what events, in a prosecution for violation of any of those code sections, call for suspension, termination of suspension, or revocation of teaching credentials; section 12011.5 defines "conviction"; and section 12012 makes the judicial record sufficient evidence of conviction. Appellants would have us conclude therefrom that state board action in such a case is but a pro forma matter, that it partakes of the quality of a ministerial act, does not rise to the level of a quasi judicial act. We are not persuaded.

Among the offenses defined by section 12011.7 is "any offense committed or attempted in any other state which, if committed or attempted in this State, would have been punishable as one or more of the above-mentioned offenses." It might not be a simple matter in a given case to apply this formula. The determination might be highly judicial in character.

Some of the offenses are defined in terms of the manner of their commission by reference to subdivisions of a code section; e. g., subdivision 3 or 4 of section 261, and subdivision 1 or 2 of section 311 of the Penal Code. Suppose a person is charged, in general terms, of a violation of section 261. This seems possible under sections 950–952 of the Penal Code (see People v. Beesly, 119 Cal.App. 82, 6 P.2d 114, 970, and cases collected in 22 Cal.Jur. 371–373, § 19) at least in the absence of a challenge by the defendant. In such a case the question whether there was a violation of subdivision 3 or 4 of section 261 might not appear from an inspection merely of the records kept by the clerk of the court. Likewise, a record of conviction of violating subdivision 5 of section 647 might not be specific enough for ready determination unless it also showed conviction of being a "lewd" person as distinguished from a merely "idle" or "dissolute" person or an "associate of known thieves". All of them are included in subd. 5 but less than all are within the scope of the title of the statute that added section 12011.7 to the code, "An act * * * relating to persons convicted of *sex* offenses". Stats.1952, 1st Ex.Session, ch. 25, p. 389; emphasis added.

The question whether a given conviction has become final or has resulted in acquittal or dismissal upon or after new trial or appeal may upon occasion entail an extensive search and the exercise of a degree of judgment that renders it no mere pro forma affair.

Then, too, the question of identity is very important, especially to the person immediately concerned. Is the person named in the record of conviction the very person whose credentials the board proposes to suspend or revoke?

We think the function here involved brings this statute within the purview of the rule that we should "not imply legislative intent to deprive a person of his license without a prior opportunity to be heard unless compelled to do so by the plain language of the statute, regardless of whether there is a right to an administrative review after revocation." Ratliff v. Lampton, supra, 32 Cal.2d 226, 230, 195 P.2d 792, 795.

[4] Appellants contend, in effect, that the frequent use of the word "forthwith" in section 12756 is compelling language that

demonstrates such an intent. That is attaching too much significance to "forthwith." "There is no precise definition, so far as time is concerned, of the words 'forthwith' and 'immediately.' In every case the meaning depends upon the circumstances of the case and the act to be performed." Lewis v. Curry, 156 Cal. 93, 101, 103 P. 493, 496. It has been construed to mean "within a reasonable time", United States v. Bell, D.C., 48 F.Supp. 986, 987, 989; Dockter v. Sheridan County, 72 N.D. 607, 10 N.W.2d 485, 489, and " 'as expeditiously as under the circumstances is reasonably possible.' " Williams v. Continental Securities Corporation, 22 Wash.2d 1, 153 P.2d 847, 853. In that sense it has been used in this statute, not in the sense of dispensing with normal notice and hearing requirements.

But, it is argued, we have in section 12756 something more than a mere absence of an express requirement for a hearing. The Legislature has put it into an article which expressly provides for a hearing for certain types of suspensions and revocations (see §§ 12751–12753) but not for certain others (see § 12755), that the latter are of the same type (conviction of violation of certain designated code sections), as those with which section 12756 deals; hence, it is reasonable to infer that the Legislature likewise intended no hearing under section 12756. That assumes too much. It is certain that no hearing is required for a revocation under section 12755? Express requirement of a hearing to remove a board member and the omission of such a requirement for suspension or revocation of a trainer's license (in the California Horse Racing Act), was not deemed indicative of a legislative intent to dispense with a hearing in the latter situation. Carroll v. California Horse Racing Bd., 16 Cal.2d 164, 105 P.2d 110. Moreover, the legislative history of the article in which section 12755 occurs gives added support to the rule applied in the Carroll case. At one time hearings in accordance with the provisions of the Administrative Procedure Act were expressly required for any proceeding conducted under the article in which section 12755 occurs. § 12752 as amended by Stats.1945, ch. 871, p. 1641. In 1949, section 12752.1 was added and section 12752 amended to narrow that requirement down to administrative hearings conducted under sections 12751 and 12752. Stats.1949, ch. 1168, p. 2088. It is a fair inference that the Legislature intended thereby to sanction for a section 12755 proceeding a hearing less formal than that prescribed by the Administrative Procedure Act, but nevertheless a hearing, not the abolition of every vestige of notice and hearing as appellants would infer.

A look at the 1952 chapter which added section 12756 to the code suggests that when considering and enacting into law the bill which became that chapter, ch. 25, Stats. 1952, 1st Ex.Sess., p. 389, the Legislature was not considering the question of hearing or no hearing, notice or no notice, did not have its attention directed to the question whether on this subject of revocation for sex offenses there should be any departure from the customary and time honored requirements for notice and hearing. That chapter did not deal with that subject. It defined "sex offenses", § 12011.7, dealt with proof of conviction, § 12011.5, and then issued mandates to the state board, §§ 12107 and 12756, to county boards, § 12785, and to school district boards, §§ 13001.3 and 14002.3, concerning sex offenders.

Especially significant is the fact that § 12785 (a facsimile of § 12756 except that it applies to county boards and county certificates instead of the state board and state credentials) was put into an article, art. 2, ch. 6, div. 7, §§ 12776–12785, Ed.Code, which contains a declaration that "No [county] certificate shall be revoked or suspended, except upon the written request of its holder, until after a hearing before the county board of education, and then only upon the affirmative vote of at least four members of the board." § 12777. What clearer indication could there be that in enacting chapter 25 of the First Extraordinary Session of 1952 the Legislature harbored no intent to dispense with those elements of notice and hearing that are normally expected and required?

Moreover, the 1952 chapter contained affirmative evidence of an intent not to dispense with notice and hearing requirements when a permanent employee is involved. Although it declared that school district boards shall not "retain in employment" persons who have been convicted of any offense as defined (§ 13001.3 relating to certificated employees), it utilized the existing procedure for dismissal of a permanent tenure certificated employee who is convicted of any of the designated sex crimes. This it did by the following clause of section 12011.5: "The record of such conviction of a sex offense as defined in Section 12011.7 shall be sufficient proof of conviction of a crime involving moral turpitude for the purposes of Article 2 of Chapter 11 of Division 7 [§§ 13521–13560] of this code, relating to the dismissal of permanent employees." In other words, each of the crimes defined as a "sex crime" in section 12011.7 is a "crime involving moral turpitude" as the latter term is used in section 13521, and the dismissal hearing procedure applicable to the latter is applicable to a sex offender who is a permanent tenure employee.

There is yet more in the history of this legislation that supports the view that notice and hearing are required, especially when the credential is held by a teacher who has acquired permanent tenure. Such a person has a valuable right of being continued in his employment, a right which the mere holder of a credential not yet employed, has not acquired. See Fresno City High School Dist. v. De Caristo, 33 Cal.App.2d 666, 672, 92 P.2d 668. In 1943 this court, after a careful analysis of the pertinent statutory law, concluded that it was "the legislative intent that no teacher and especially one holding permanent tenure should be deprived of his credential to teach in any of the public schools in this state without some sort of charges being filed against him, and without being afforded the right of trial thereon, so that he may defend himself against such charges." Matteson v. State Bd. of Education, 57 Cal.App.2d 991, 998, 136 P.2d 120, 124; a petition for a hearing by the Supreme Court was denied. The court was there concerned with a case arising under sections 5.381 and 5.382 of the School Code (now §§ 12752 and 12753 of the Education Code), a denial for cause of an application for the renewal of state credentials. The court concluded that such action was upon a par with suspension or revocation and that when the credential holder had acquired permanent tenure action against him could not be taken without the filing of charges and a hearing thereon.

The rationale of that decision logically embraced a revocation under section 5.384 (now § 12755, Ed.Code), which, though not expressly mentioned in the opinion, occurred in the same article of the School Code as sections 5.381 and 5.382 and now appears in the same article of the Education Code as their successor sections 12752 and 12753. Similarly, the other statutes analyzed in the Matteson case have been continued without substantial change.[1]

[5] So, when the Legislature added section 12756 to the article on suspension and revocation of state credentials without expressly dispensing with notice and hearing requirements, it is a fair inference it intended such requirements to apply to permanent employees; especially in view of the presumption that the Legislature is aware of the judicial interpretation of any statute which it amends. Latham v. Santa Clara County Hospital, 104 Cal.App.2d 336, 339, 231 P.2d 513; 23 Cal.Jur. 795, 796, Statutes § 173.

There is no room left for an inference that the Legislature when enacting chapter 25 of 1952 intended, by indirection, to sanction dismissal of a permanent employee without a hearing through the medium of revoking his credentials without a hearing.

[6] We can but conclude, now as in 1943, that it is "the legislative intent that no teacher and especially one holding permanent tenure should be deprived of his

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[1] §§ 12776–12780 of the Education Code are a continuation of School Code §§ 5.390–5.394 relative to suspension and revocation of county certificates. §§ 13521–13525 and 13529–13556 of the Education Code are a continuation of the provisions of §§ 5.650–5.652 and 5.654 of the School Code relative to dismissal of permanent employees.

credential to teach * * * without some sort of charges being filed against him, and without being afforded the right of trial thereon, so that he may defend himself against such charges." At page 998 of 57 Cal.App.2d, at page 124 of 136 P.2d.

Appellants further claim that the facts are not in dispute and, therefore, the writ should not have issued. It appears to be their contention that their return to the alternative writ alleged that Di Genova was convicted of a sex offense as defined and that he admitted that fact by failing to controvert the allegation by pleading or proof.[2] We need not decide whether in such a case the writ should or should not issue.

The return to the writ in this case did not state that Di Genova had been convicted of a particular offense denounced by the statute. It admitted that the state board revoked the credentials without giving him a hearing and alleged (1) that the board acted "pursuant to the laws of the State of California, and more particularly Section 12011.7 of the Education Code"; (2) that it did "determine in proceedings duly and regularly had therefor that * * * petitioner herein had been convicted of a sex offense as defined in Education Code Section 12011.7"; (3) that it revoked the credentials "pursuant to the authority conferred * * * by Section 12756 of the Education Code"; and (4) that such action "was predicated * * * upon certified copies of records of conviction of the Municipal Court of Los Angeles Judicial District," copies of which were annexed as exhibits and made a part of the return.

The averments in clauses (1), (2) and (3) obviously were mixed statements of law and fact, statements of what the state board did, not what Di Genova had done. Failure to deny that the board "revoked" or "determined" was not an admission that Di Genova was ever "convicted" of anything, especially in view of the facts alleged in the petition and admitted in the return that the board acted without giving him a hearing.

[7] The facts stated in clause (4), above, limited the return to the facts stated in the exhibits mentioned, one of which stated that one Anthony Di Genova pleaded guilty to charges that he had violated sections 41.10 and 41.08 of "Ordinance 77000" (of what county or city, not stated; certainly not a state statute). The other exhibit stated that one Anthony De Genova (observe the "De" in contrast to "Di") pleaded guilty to a charge that he committed "a misdemeanor, to-wit: vagrancy lewd" (without mention of any ordinance or statute). Clearly, nothing contained in these exhibits amounted to a statement that the petitioner herein had been convicted of any sex offense defined in the statute. Failure to deny or otherwise controvert those recitals was no admission by petitioner that he had ever been convicted of any such offense.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

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[2] They cite McClatchy v. Matthews, 135 Cal. 274, 67 P. 134. It holds that affirmative averments of material facts made in the return to an alternative writ of mandamus are deemed admitted if not controverted by pleading or proof as authorized by section 1091 of the Code of Civil Procedure.

133 Cal.App.2d 18

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Manuel MATA, Robert Marquez and Richard Venegas, Defendants and Appellants.

Crim. 5273.

District Court of Appeal, Second District, Division 1, California.

May 16, 1955.

Prosecution for murder. The Superior Court, Los Angeles County, Charles W. Fricke, J., entered convictions of manslaughter and denied motions for new trial. Defendants appealed. The District Court of Appeal, Doran, J., held that where evidence as to cause of death of decedent was in conflict, it was not shown defendants had preconceived plan to attack decedent, and trial court gave detailed instructions on conspiracy, failure to give instruction that mere presence and association of defendants was insufficient to show a conspiracy, was prejudicial error.

Judgment and order reversed and new trial ordered.

See also 280 P.2d 175.

1. Criminal Law ⟹822(1)

Instructions should be read as an entirety, and the effect of specific portions which, standing alone, might be deemed objectionable to a defendant, may be cured and rendered harmless by other statements therein.

2. Criminal Law ⟹811(1), 815(1)

If instructions, taken as a whole, strongly present the theory of the prosecution and minimize that of the defense, or ignore points on which the particular case seems to turn, a jury may and probably will draw the inevitable conclusion that the trial judge is, in effect, suggesting conviction rather than acquittal.

3. Criminal Law ⟹814(1, 3)

Unless a particular instruction fits the evidentiary situation and presents a fair and impartial picture of the issues, it should not be given.

4. Conspiracy ⟹47

A conspiracy may be implied from the surrounding circumstances, but mere association is not enough.

5. Conspiracy ⟹47

While it is proper for a jury to draw reasonable inferences from the evidence, matters such as conspiracy must not be determined by conjecture, guesswork or wishful thinking.

6. Criminal Law ⟹791, 1173(2)

In prosecution for murder, where evidence as to cause of death of decedent was in conflict, it was not shown that defendants had a preconceived plan to attack decedent, and trial court gave detailed instructions on conspiracy, failure to give instruction that mere presence and association of defendants was insufficient to show a conspiracy, was prejudicial error.

7. Assault and Battery ⟹96(9)

In prosecution for murder, where defendants were accused of murder of man who was struck by one of them when he interfered with their attack on another, instructions relating to assault by means of force likely to produce great bodily harm were not incorrect relation to facts of case.

8. Homicide ⟹291

In prosecution for murder, where only usual abstract instructions on proximate cause were given, defendants' theory that decedent's death was an actual and probable consequence of disturbance of peace created by defendants, but was not a result of blow struck by one defendant, was not adequately presented for jury.

9. Criminal Law ⟹633(1)

Defendants charged with murder of man who interfered with their attack upon another man, were entitled to a fair and impartial trial, regardless of their disorderly conduct.

10. Criminal Law ⟹791

Fundamental rights of defendants charged with murder demanded an unbiased presentation to the jury of issues involved, which included the important questions whether any conspiracy existed between them, and whether any one or more of defendants should be found guilty either by reason of conspiracy or for any other reason.

◆

Barry Sullivan, Hornwood & Seltzer, Eleanor V. Jackson, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

DORAN, Justice.

By indictment the appellants were accused of murdering one William D. Cluff on December 6, 1953. Motions to set aside the indictment, and for change of venue, were denied, and on trial before a jury, the appellants were each found guilty of manslaughter. Motions for new trial and applications for probation were denied as to each defendant.

Viewed in the light most favorable to the People, it appears that a U. S. Marine, Private John W. Moore, while waiting at the corner of Seventh and Broadway in Los Angeles for the street line to change, the hour being about 6:20 p. m., was shoved off the curb and struck behind the left ear by some unknown party. Turning around, Private Moore saw the defendants Marquez and Venegas, who "asked me if I had any beef". Moore then backed out into and across Seventh Street, appellants Venegas and Marquez in pursuit,—"I was kicked at and swung at, and I was defending myself". On the way across the street, Private Moore grabbed a "No Left Turn" sign, "but it slipped out of my hand and fell on its side and tripped up these two fellows that were coming towards me". Moore also saw the third defendant Mata but "didn't see him do anything, but I felt it", apparently assuming that Mata was responsible for the blow behind the ear, but didn't see Mata again until Mata was fighting with another man across the street. Other than the initial shove and blow, appellants made no further contact with Private Moore, and no serious injury resulted.

While Private Moore was backing up to building with Venegas and Marquez "coming towards me again, * * * kicking, swinging with their fists", Mr. Cluff, the decedent, aged 56 years, first entered the fray;—"He came up, grabbed one of them by the seat of the pants and coat collar and grabbed him away", saying, "Leave him alone". Moore did not know which of the two men Cluff grabbed, but the man turned and struck at Cluff who slumped to the sidewalk; Moore saw blood on Cluff's face. The record indicates that a large crowd had gathered, that there was much confusion, and considerable diversity of opinion as to the identity of the individual defendants and what each was doing at the time in question.

An autopsy was performed by the Coroner's Chief Autopsy Surgeon Newbarr and a neuro-pathologist, Dr. Courville. The cause of Mr. Cluff's death was given as "massive subarachnoid hemorrhage, precipitated by sudden elevation of blood pressure incident to altercation. Under other conditions: Advanced atherosclerosis of the cerebral blood vessels." There was no fracture of the skull. The deceased's heart was enlarged and the left coronary artery was occluded ninety percent. Dr. Newbarr testified that the traumatic injuries found "were relatively minor", that "The abrasions in the forehead are small * * * and really form no pattern whatsoever"; the abrasions were not contributing causes to Mr. Cluff's death, "strictly from the standpoint of the trauma".

Considering the decedent's previous condition and the altercation, "the exertion, the excitement, the anxiety and the fear might cause, probably would cause a rise in blood pressure and would cause diseased vessels to rupture". Decedent suffered from a severe pathological condition with hypertensive heart disease, and might have a spontaneous brain hemorrhage at any time, from any exertion "running for a street car, a fit of temper". Dr. Newbarr further stated that "whether he was struck, or whether he fell, in my opinion is only incidental because the severity of the trauma is not great enough to have any direct bearing on the rupture of the blood vessel". Similar testimony was given by Dr. Courville to the effect that "emotional excitement, physical stress could very well be responsible and in this case perhaps both".

Appellants complain that the trial court erroneously gave five CALJIC instructions to the jury on the law of conspiracy although "There was no evidence whatsoever of conspiracy on the part of the defendants", or that if such instructions were to be given, "the jury should not have been erroneously instructed concerning the inflicting of a mortal blow where there was no such evidence of any such mortal blow". Also that the jury should have been "exposed" to the language of CALJIC 937a and "told that the mere presence and association of the defendants is insufficient to show a conspiracy".

[1–3] It is a fundamental rule that instructions should be read as an entirety, and that the effect of specific portions which standing alone might be deemed objectionable to a defendant, may be cured and rendered harmless by other statements therein. But this is a rule which, obviously, must work both ways. Therefore, if the instructions, taken as a whole, strongly present the theory of the prosecution and minimize that of the defense, or ignore points on which the particular case seems to turn, a jury may and probably will draw the inevitable conclusion that the trial judge is, in effect, suggesting conviction rather than acquittal. In this, and all other particulars, the so-called CALJIC stereotyped instructions are no more sacrosanct than any others. Unless a particular intruction fits the evidentiary situation and presents a fair and impartial picture of the issues, it should not be given.

This appears to be the situation in the instant case. In view of the evidence as to what occurred when Mr. Cluff died, the somewhat conflicting stories of the eyewitnesses, and the opinions of the autopsy surgeons that death resulted from Mr. Cluff's previous heart and arterial condition rather than from any "mortal blow", all the more care was required to make certain that the jury did not convict these defendants on general principles.

[4] As respondent states, conspiracy may be implied from the surrounding circumstances. Mere association, however, is not enough, and as appellants argue, this should have been made plain to the jury by the giving of CALJIC 937a along with the five extended instructions on conspiracy, if the latter were to be given. The record discloses that the three defendants had been drinking; that one of them, Marquez, stated, "he was looking for a fight, didn't give a damn who it was with"; that two or perhaps three defendants perpetrated an assault on Private Moore; that the decedent took hold of one of the defendants, who then struck at Cluff, whereupon Cluff had a heart attack and died from the excitement. According to Private Moore, one of the defendants, Mata, was then fighting with another man who had Mata down at the time Mr. Cluff died. If this account is true, then Mata could not have been directly connected with the Cluff incident.

[5] The prosecution did not, and obviously could not, contend that the defendants had any preconceived plan to attack Mr. Cluff. It is argued, however, that "the jury could reasonably conclude that the three appellants were associated and acted together, bent on engaging in disorderly conduct and with committing assault upon anyone who sought to restrain them". As before mentioned, the evidence is confusing as to which two defendants were involved in the Cluff episode, as to which defendant struck Private Moore, and as to what each defendant was doing at any given time. While it is proper for a jury to draw reasonable inferences from the evidence, matters such as those mentioned must not be determined by conjecture, guess work or wishful thinking.

[6] The point of all this is that in this confused state of the evidence the trial judge saw fit to give the five detailed instructions on conspiracy, and refused to

give the CALJIC instruction telling the jury that "mere presence and association of the defendants is insufficient to show a conspiracy". Without this explanatory instruction a jury might well assume that a conspiracy actually existed between the three defendants, and might take it for granted that a "mortal blow" had been struck by one defendant, for which the others would thereby automatically become responsible. To present the jury with these assumptions, considering the state of the evidence herein, can be deemed nothing less than prejudicial error.

[7] Other parts of the instructions appear to add to rather than cure the defects noted. For example the giving of such instructions as CALJIC 601 and 603, relating to assault "by means of force likely to produce great bodily injury", were ill fitted to the peculiar facts of this case, and only added further material to the over-all picture of three conspirators, one of whom is assumed to have struck a mortal blow. Instructions, CALJIC, or otherwise, must have correct relation to the facts of the case being tried.

[8] In this connection it is to be noted that the jury was given no concrete instruction presenting the appellants' theory of the case, and no instruction adequately keyed to the evidence. Four instructions attempting to do this, requested by the defendant Mata, were refused. One of these, (Clerks Transcript, page 71) reads: "You are instructed that even if you should find that through excitement, thus induced in the nervous system of a bystander, a hemorrhage was caused in the brain of the bystander; and even if you should find that his death was a natural and probable consequence of such disturbance of the peace in the presence of the deceased; nevertheless, you may not find, on such evidence alone, that the defendants or any of them were guilty of any kind of homicide". In refusing this instruction the trial judge made the notation: "Proximate cause covered by instructions given—the requested instruction is confusing and inept". If not properly phrased, the trial court had the power to modify. It is true that the usual abstract instructions on proximate cause were duly given, but the defendants' theory which was supported by the autopsy surgeons' testimony, was in no adequate manner presented for the jury's consideration.

Appellants also direct attention to the argument of the Deputy District Attorney in stating to the jury that "the delay in this case was caused because Miss Jackson (defendants' attorney) tried every trick that she knew of and every trick available to her to keep that case from going to trial". When the defense objected to the use of the word "trick", the trial court then informed the jury concerning Miss Jackson's petition for a writ of prohibition in the District Court of Appeal for the purpose of determining whether the Grand Jury had enough evidence to return an indictment, and the denial of such petition. Although the trial judge informed the jury, "Now, that has nothing to do with the question of guilt or innocence, but the question as to whether the grand jury acted legally", nevertheless, such a recital informing the jury as to the defendants' previous unsuccessful efforts to obtain release, was uncalled for, and could be taken as indicating that there was sufficient evidence to warrant a conviction, and that the appellate court so believed. In connection with the instructions given and refused, hereinbefore mentioned, such conduct could well be prejudicial.

[9, 10] Regardless of the disorderly conduct of the defendants, and the unfortunate death of Mr. Cluff resulting from intervention as hereinbefore related, each defendant was entitled to a fair and impartial trial. The fundamental rights of the accused parties demanded an unbiased presentation to the jury of the issues involved, which included the important questions whether any conspiracy existed, and whether any one or more of the defendants should be found guilty either by reason of conspiracy or for any other reason.

The peculiar facts of the instant case coupled with the state of the evidence as disclosed by the record, make it all the more necessary to safeguard every constitutional right of the accused.

For the reasons hereinbefore indicated, the judgment and order denying a new trial, are reversed and a new trial ordered.

WHITE, P. J., and DRAPEAU, J., concur.

132 Cal.App.2d 835

Michael KARR, Plaintiff and Respondent,

v.

Chester H. SHERER, Defendant and Appellant.

Civ. 20564.

District Court of Appeal, Second District, Division 2, California.

May 12, 1955.

Action for injuries to a pedestrian struck by defendant's automobile, driven by him, at a street intersection. From a judgment of the Superior Court of Ventura County, Walter J. Fourt, J., on a jury's verdict for plaintiff, defendant appealed. The District Court of Appeal, McComb, J., held that uncontradicted evidence of defendant's violation of statute by overtaking a truck and passing it to right, instead of stopping behind it, after it was stopped at unmarked crosswalk to permit plaintiff to cross roadway, sustained jury's finding of defendant's negligence proximately causing plaintiff's injuries, and that plaintiff was not contributorily negligent as matter of law.

Judgment affirmed.

1. Appeal and Error 🔑930(1)

On appeal from judgment on jury's verdict for plaintiff, evidence must be viewed in light most favorable to plaintiff.

2. Automobiles 🔑244(12, 36)

In action for injuries to pedestrian struck by defendant's automobile, driven by him, in unmarked crosswalk at street intersection, undisputed evidence of defendant's violation of statute by overtaking a truck and passing it to right, instead of stopping behind it, after it was stopped at crosswalk to permit plaintiff to cross roadway, sustained jury's finding of defendant's negligence proximately causing plaintiff's injuries. Vehicle Code, § 560(b).

3. Automobiles 🔑160(4)

Where a pedestrian, struck by automobile passing through unmarked crosswalk at street intersection, was not more than one or two feet outside limits of crosswalk, same rules apply in determining question of automobile driver's negligence as if accident occurred within crosswalk.

4. Automobiles 🔑245(72)

A pedestrian, crossing street in unmarked crosswalk when struck by automobile passing truck to right from its rear after it was stopped at crosswalk to permit pedestrian to cross roadway, was not contributorily negligent as matter of law, as he was entitled to believe that automobile driver would stop behind truck, as required by law. Vehicle Code, § 560(b).

5. Appeal and Error 🔑991

In personal injury suit, judgment on jury's finding for plaintiff on fact question of his contributory negligence may not be disturbed by appellate court.

6. Appeal and Error 🔑1002

Jury's findings on conflicting evidence in plaintiff's favor are binding on District Court of Appeal on appeal from Superior Court's judgment on such findings.

7. Appeal and Error 🔑999(1)
Automobiles 🔑245(72)

In action for injuries to pedestrian, struck by defendant's automobile at street intersection, evidence of plaintiff's conflicting statements as to whether he did or did not attempt to commit suicide raised fact question for determination by jury, whose finding adverse to defendant is binding on appellate court.

◆

Kennedy & Kennedy, Los Angeles, and Edward Henderson, Ventura, for appellant.

John R. Danch, Ventura, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before a jury in an action to recover damages for personal injuries, defendant appeals.

[1] *Facts:** On December 26, 1952, defendant was driving his automobile in a westerly direction on Thompson Boulevard in Ventura, California, just east of its intersection with Hemlock Street. Thompson Boulevard is a four lane highway, with two lanes east bound and two lanes west bound. He was driving about 30 miles per hour.

Plaintiff was crossing Thompson Boulevard from south to north at the intersection. As plaintiff crossed the street a westerly bound pick-up truck stopped in the left hand lane to allow plaintiff to cross the street. Defendant, who had been traveling down Thompson Boulevard, turned into the right hand lane of the westerly bound traffic, passed the pick-up truck, and the right front side of defendant's car hit plaintiff causing him personal injuries. There was no marked crosswalk across Thompson Boulevard.

[2] *Questions:* First: *Was there substantial evidence to sustain the finding of the trial court that defendant was negligent?*

Yes. Section 560(b) of the Vehicle Code, reads:

"(b) (Stopped vehicle not to be overtaken and passed.)

"Whenever any vehicle has stopped at a marked crosswalk or at any unmarked crosswalk at an intersection to permit a pedestrian to cross the roadway the driver of any other vehicle approaching from the rear shall not overtake and pass such stopped vehicle."

In the present case a police officer testified that the point of impact between defendant's car and plaintiff was on the edge of the unmarked crosswalk. It is also uncontradicted that a pick-up truck had stopped at the unmarked crosswalk to permit plaintiff to cross the roadway, and that defendant, disregarding the requirements of section 560(b) of the Vehicle Code, did not stop behind the pick-up truck, but overtook it and passed to the right, striking plaintiff and injuring him.

Clearly violation of the law constituted negligence upon the part of defendant which was the proximate cause of the injury to plaintiff.

[3] There is no merit in defendant's contention that the evidence discloses defendant was hit outside of the limits of the unmarked crosswalk. Where a pedestrian, though not previously within the crosswalk, is struck by a vehicle while it is passing through it, if the pedestrian is not more than one or two feet outside of the limits of the unmarked crosswalk, the same rules are applicable as if the accident had occurred within the crosswalk. (Cf. Nicholas v. Leslie, 7 Cal.App.2d 590, 594 [4], 46 P.2d 761.)

[4, 5] Second: *Was plaintiff contributorily negligent as a matter of law?*

No. Plaintiff was entitled to believe that defendant would obey the law and stop behind the pick-up truck which, had defendant done so, would have prevented the accident.

The jury was thus left to determine as a question of fact whether plaintiff was contributorily negligent. (Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429 [1], 45 P.2d 183.) In view of the findings in plaintiff's favor the judgment may not be disturbed by an appellate court.

[6, 7] The jury's findings upon conflicting evidence in favor of plaintiff on other matters is also binding on this court. For example, conflicting statements made by plaintiff whether he did or did not attempt

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* The evidence is viewed in the light most favorable to plaintiff (respondent) pursuant to the rules set forth in Re Estate of Isenberg, 63 Cal.App.2d 214, 216 [2], 146 P.2d 424.

to commit suicide gave rise to a question of fact for determination by the trial jury, whose finding adverse to defendant is binding upon us.

No error appears in the record.

Affirmed.

MOORE, P. J., and FOX, J., concur.

Frank C. MOSIER and Nancy M. Mosier, Plaintiffs and Appellants,

v.

Dewey MEAD, Roy Ustick, Paul Niman, Richard Cooper and J. Walter Smith, Defendants and Respondents.

Civ. 8537.

District Court of Appeal, Third District, California.

May 16, 1955.

Rehearing Denied June 6, 1955.

Hearing Granted July 13, 1955.*

Action to quiet title to realty. Defendants' cross-complained to quiet title to easement across the property involved and for damages based on alleged interference with such easement. The Superior Court, Stanislaus County, B. C. Hawkins, J., entered decree quieting title in defendants to the easement and plaintiffs appealed. The District Court of Appeal, Finley, J. pro tem, held that fact that county, in time of flood peril, had levee constructed in order to protect highway and adjacent land, without approval of Reclamation Board, which was in violation of statute, did not preclude subsequent grantees of adjacent landowners from obtaining relief in subsequent action to quiet title to easement in such levee.

Judgment affirmed.

1. Waters and Water Courses 🔑158½(1)

Fact that county, in time of flood peril, had levee constructed in order to protect highway and adjacent land, without approval of Reclamation Board, which was in violation of statute, did not preclude subsequent grantees of adjacent landowners from obtaining relief in subsequent action to quiet title to easement in such levee. Water Code, §§ 8710, 8711, 8719, 8720; West's Ann.Civ.Code, § 806.

2. Nuisance 🔑72

Where exercise of easement according to its terms will result in no injury to party to creation of easement not within contemplation of parties at time of creation thereof, and will result in no special injury to party of character sought to be prevented by statute declaring act, thing or condition to be nuisance unless it is also nuisance per se, then public authorities or strangers to transaction who are specially injured by condition created are only ones entitled to seek abatement. West's Ann.Civ.Code, § 3493.

3. Waters and Water Courses 🔑158½(1)

Section of Water Code reciting that construction of levee without Reclamation Board's approval constituted nuisance, allows but does not require Reclamation Board to commence and maintain suit for preventions of violation or abatement thereof as nuisance, and where Reclamation Board had not taken action for period of thirteen years to abate levee so constructed, abutting landowners had no right to extinguish levee easement merely because of violation of statute. Water Code, §§ 8710, 8711, 8719, 8720.

4. Nuisance 🔑66

One cannot gain right by prescription against public to maintain public nuisance.

Sutter, Elledge & Carter, Modesto, for appellant.

Frank B. Collier, Modesto, Daniel E. O'Connell, Turlock, for respondent.

FINLEY, Judge pro tem.

Plaintiffs brought this action to quiet title to certain real property in the county of Stanislaus. Defendants answered, admitting their claim of interest in the realty adverse to the plaintiffs and otherwise denying generally the allegations of the complaint. Defendants also cross-complained, setting forth two causes of action to quiet title to an easement across the subject property, and a third cause of action for compensatory and punitive damages alleging an interference with the easement. Plaintiffs answered the cross-complaint, claiming ownership of the realty in question and otherwise denying generally the claims of defendants. The litigants agreed upon the facts and submitted the matter to the trial court upon a stipulated statement of facts. A decree was issued quieting title in defendants to the easement, from which decree plaintiffs appeal.

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* Opinion vacated 290 P.2d 495.

The agreed facts are:

"1. That the Crows Landing Highway, a County road, passes through and traverses a portion of Stanislaus County in the vicinity of the land described in plaintiffs' complaint;

"2. That defendants and cross-complainants, and each of them, own real property situated in the County of Stanislaus, in the vicinity of said land;

"3. That plaintiffs and cross-defendants are the owners of the real property described in plaintiffs' complaint; subject, however, to the claims of defendants and cross-complainants. The facts in support of said claims are as herein stated;

"4. That in the early part of 1938, at a time when the San Joaquin River was flooded, and flood waters therefrom were threatening great damage to property and the public highway in the vicinity of the real property described in plaintiffs' complaint, cross-complainants and other landowners in the vicinity and/or their predecessors in interest, and the County of Stanislaus, a body politic and corporate, with the knowledge, acquiescence and consent of Laura C. Johnson, who was then the owner of the property described in said complaint, constructed at great expense a levee over and across a portion of said land, known as the Johnson-Carpenter Levee and/or the Johnson Levee, for the purpose of flood control, and to protect the highway of the County of Stanislaus and the property of cross-complainants and/or their predecessors in interest, and other landowners in the vicinity from the flood waters of the San Joaquin River, and cross-complainants claim that they and the County of Stanislaus thereby acquired an easement for said purposes, with the absolute right to maintain said levee for said purposes;

"5. That at the time said levee was constructed C. C. Crowell was County Supervisor of the Supervisorial District in which plaintiffs' said lands were situated. Said Supervisor did not, prior to the construction of said levee, or at any other time, procure the approval of the Board of Supervisors to construct or assist in the construction of said levee. He directed County employees to assist cross-complainants and other landowners in the vicinity in the construction of said levee, and County equipment and employees were employed for several days on the job. Said employees were paid by the County of Stanislaus in the usual way;

"6. That on or about the 14th day of March, 1939, the said Laura C. Johnson filed a claim against the County of Stanislaus for $1,500 for an easement over and across her said land and for damages for constructing said levee thereon. A copy of said claim is attached hereto as Exhibit A and made a part hereof the same as if fully incorporated herein;

"7. That cross-complainants or their predecessors in interest have used and maintained said levee, for said purposes, openly, notoriously and continuously, under claim of right, from the date of its construction to at least January 1, 1951;

"8. That plaintiffs acquired the property described in their complaint on file herein in December, 1947;

"9. That the levee referred to in the cross-complaint on file herein is located within the boundaries of the Sacramento and San Joaquin Drainage District, as set forth and described in Chapter 170, Statutes and Amendments to the Codes of California, 1913, and the Water Code of the State of California, and that the plans of said levee and the maintenance thereof were not approved by the Reclamation Board of the State of California, before or after its construction;

"10. That the County of Stanislaus does not at this time claim an easement over and across plaintiffs' said land for the purposes hereinbefore stated, nor any license or right to maintain the levee constructed thereon;

"11. That said levee is so situated upon the property of plaintiffs herein that it separates the irrigation facilities upon said property from approximately 100 acres of tillable farm land owned by plaintiffs, thus making it necessary for plaintiffs to construct additional irrigation facilities in order to properly farm said 100 acres of real property;

"12. That within two years last past and prior to the filing of this action, plaintiffs and cross-defendants have entered upon said levee and have willfully removed dirt therefrom and have thereby destroyed portions of said levee. That since the commencement of this action plaintiffs and cross-defendants have entered upon said levee and have willfully removed dirt therefrom and have thereby destroyed substantially all of said levee. That if the defendants and cross-complainants own the easement and levee constructed thereon, as alleged in their cross-complaint, they have been damaged; and it is stipulated by the parties hereto that, in lieu of damages, which are difficult to ascertain, the Court may issue mandatory injunction requiring plaintiffs and cross-defendants to rebuild said levee and to place it in as good condition as it was prior to the removal of said dirt therefrom."

Among other things the decree stated that the respondents are owners of an easement in the realty, on which is constructed a levee, for the purpose of flood control and the protection of county highways and property of the respondents and other landowners in the vicinity of the levee, with the right to reconstruct and maintain the levee, as provided by law. As stated by the trial judge in his decision, this included acquisition of the necessary permit required by law to be obtained from the Reclamation Board. The decree provided for the removal and use of dirt from adjoining land where necessary for the proper reconstruction and maintenance of the levee. It also enjoined appellants from claiming any right, title, or interest in the easement adverse to respondents.

Appellants contend (1) that the respondents may not be declared the owners of a license or easement to maintain a levee in violation of a penal statute defining the construction and maintenance of such levee as a criminal offense; (2) that an alleged right in the county of Stanislaus to an easement for the purpose of flood control cannot be relied upon by the respondents either as a defense to appellants' complaint or as a basis for a cross-complaint; (3) that the county of Stanislaus would be prevented from constructing and maintaining the levee in violation of the penal statute; and (4) that the levee is a nuisance, and as such the appellants may abate it.

In support of their first contention appellants cite certain sections of the Water Code which require approval by the Reclamation Board of all plans of levee construction, permission of the board before any work is done, and contain a declaration that a violation of any of the requirements set out in the article is a misdemeanor. Appellants contend that equity will refuse to aid in illegal transactions, and that equity will not aid a party whose claim is based in whole or in party upon a violation by such party of a penal statute.

In support of their first contention appellants cite sections 8710, 8711, 8719 and 8720 of the California Water Code, which sections embody in substance the law as it has stood since 1915. Briefly, section 8710 provides that any plan for the construction and maintenance of any levee on or near the banks of the Sacramento or San Joaquin Rivers must first be approved by the California Reclamation Board. By the terms of section 8711 any plan for such work is void, and no work shall be done unless permission of the board be first obtained. Sections 8719 and 8720 read as follows, in that order:

> "The doing of any act or construction of any work mentioned in this article, or permitting the work to re-

> main after such construction, without the permission of the board and in violation of any of the provisions of this article, is a public nuisance, and the board may commence and maintain suit in the name of the people of the State for the prevention or abatement of the nuisance.
>
> "Any person who does any act contrary to or in violation of any of the provisions of this article is guilty of a misdemeanor."

In the statement of facts it is admitted that the plans of said levee and the maintenance thereof were not approved by the Reclamation Board, either before or after its construction. Appellants maintain that this constitutes an admitted violation of a penal statute by respondents and that since respondents, in seeking to quiet title to an easement, are appealing to equity, Newport v. Hatton, 195 Cal. 132, 231 P. 987; Angus v. Craven, 132 Cal. 691, 64 P. 1091, the trial court committed error in quieting their title since a court of equity should refuse aid when the remedy sought is based upon or involves the violation of a penal statute. A number of cases are cited by appellant which point up the salutary principles by which courts of equity should be guided in proper cases, but we do not find that they apply to the exact situation with which we are here concerned. The trial court did not find that respondents were entitled to maintain or repair the levee without sanction or approval of the Reclamation Board. The decree provides that respondents "* * * were during all the times herein mentioned, and now are, the owners of an easement in, on, over and across the hereinafter described real property, on which is constructed a levee * * *" This is a right which, from all that appears, inured to respondents by implied grant. Civil Code, section 806. After the levee was constructed, the then owner of the real property, Laura C. Johnson, presented her claim to the county of Stanislaus which read in part as follows:

> "For damages for building levee across my ranch and for an easement 200 feet wide running East of Crows Landing Road and 100 feet across north side along highway, being 23 acres, more or less."

Appellants have cited no authority, and we are aware of none, for the proposition that a grant of an interest in real property is invalid because an intended use actually carried out is merely malum prohibitum. Nor can we say that the right in respondents to have their title quieted would be any the more tenuous even though respondents' rights were gained by prescription, for in Hudson v. Dailey, 156 Cal. 617 at page 630, 105 P. 748 at page 754, we find this language:

> "We cannot say that a private prescriptive right to private property may not be obtained by means of acts which may also constitute or cause a public nuisance. The private owner who is injured has a right of action in case of special injury, and such right is barred in the same manner as other actions of like nature. A private owner, so injured, cannot invoke the protection of the public right to abate the nuisance, which is not barred, and thus avoid the effect of the statute of limitations upon his private right of action."

The language just quoted refers to the failure by the defendant in that action to cap certain artesian wells on his property, thus allowing the water to run to waste. Under a statute of 1878 this was declared to constitute a public nuisance, and the owner who allowed such waste was declared to be guilty of a misdemeanor. See also San Joaquin & Kings River Canal & Irrigation Co. v. Egenhoff, 61 Cal.App.2d 82 at pages 91–92, 141 P.2d 939.

In Biber v. O'Brien, 138 Cal.App. 353 at page 358, 32 P.2d 425 at page 428, the court in discussing an alleged violation of the State Housing Act had this to say:

> "The act in question contains no express declaration that structures erected in violation of its provisions shall be deemed nuisances. It does, however, impose penalties for such violations; but the violation of a penal statute does not of itself create a pri-

> vate nuisance. Carter v. Chotiner, 210 Cal. 288, 291 P. 577. Nor does the failure to obtain a license or permit required by law necessarily have that effect."

Appellants filed one brief herein, and the point given major consideration is stated as follows:

> "Coming more directly to the heart of the problem, will this Court, sitting as a *Court of Equity,* sanction and condone the continued commission of a criminal offense? Certainly a quiet title action is historically and presently equitable in nature * * * And a court of equity will refuse to aid in illegal transactions."

In support of this position, appellants cite Domenigoni v. Imperial Live Stock, etc., Co., 189 Cal. 467, where, at page 475, 209 P. 36, at page 39, appears this language, a portion of which is quoted by appellants in their brief:

> "'A court of equity will not allow itself to become a handmaid of iniquity of any kind. It intervenes, not for the sake of the party who is benefited by the intervention, but for the sake of the law itself. It matters not that no objection is made by either party; when the court discovers a fact which indicates that the contract is illegal and ought not to be enforced, it will, of its own motion, instigate an inquiry in relation thereto.'"

The facts of the Domenigoni case are, however, quite different from those with which we are concerned here, and the rationale just quoted is not applicable. In the Domenigoni case the court was asked to cancel and have delivered up certain promissory notes and agreements given by plaintiff to defendant in connection with the purchase of stock in violation of the so-called "Blue Sky Law." Plaintiff's contention was that the notes and agreements, being in violation thereof, were against the public policy and therefore should be declared void. The court found that the entire transaction was subterfuge and an attempt by both parties to circumvent the law, and it therefore refused its aid to either party.

[1] In the present case it does not appear that, in acquiring the easement, the parties conspired in any manner to violate the law, or indeed that any act on the part of either in constructing the levee or otherwise, was known to be in violation of that which was merely a statutory prohibition. Without doubt the parties were, at the time the levee was built, concerned solely with the perfectly normal and laudable desire to protect their property. It is true that ignorance of the law is not an excuse for violating it, but we cannot go so far here as to say that culpability permeated the entire transaction to the point where equity should, for that reason alone, deny relief which otherwise is plainly warranted.

In the case of Perrin v. Mountain View Mausoleum Ass'n, 206 Cal. 669, at page 674, 275 P. 787, at page 788, which was an action brought to restrain the building and operation of a mausoleum, and where the defendants had not only been charged with but also convicted of violating certain ordinances relied upon by plaintiffs in seeking the injunction, the court, after calling attention to sections 3369 and 3479 of the Civil Code, had this to say:

> "Without going into the controverted question as to whether or not a mausoleum is a cemetery within the meaning of the ordinances pleaded by plaintiff, and assuming for the present purposes that it is, we reach a conclusion that the violation of the ordinances alone would not permit plaintiff to secure the relief prayed for and that the complaint has not stated facts with relation to the operation or conduct of the mausoleum which would constitute it a nuisance *per se,* nor has it stated facts which would indicate that plaintiff has suffered some exceptional damage, other than that suffered by the public generally in that community due to the depreciation in value of residence property therein."

See also Stegner v. Bahr & Ledoyen, Inc., 126 Cal.App.2d 220, 272 P.2d 106.

Appellant cites and relies on the case of Smallpage v. Turlock Irrigation Dist., 26 Cal.App.2d 538, 79 P.2d 752, wherein the plaintiff's title was quieted to certain lands over which defendants claimed an easement for a drainage canal and sewage outlet. That case differs from the present one in that here the use actually made of the easement was contemplated by the parties at the time construction of the levee was permitted by Laura C. Johnson, the then owner of the land. No change was ever made in the use contemplated, whereas in the Smallpage case there was such a change. Maintenance of the levee is not a nuisance per se but is classified as a nuisance only because so designated by statute. In the Smallpage case sewage drains were involved which from their very nature could constitute a nuisance per se.

[2, 3] From the tenor of Laura C. Johnson's claim presented to the county of Stanislaus, construction of the levee conferred some benefit at least upon her land. Where the exercise of an easement, according to its terms, will result in no injury to a party to the creation of the easement not within the contemplation of the parties at the time of the creation thereof, and will result in no special injury to a party of the character sought to be prevented by the statute declaring the act, thing or condition to be a nuisance unless it is also a nuisance per se, then the public authorities or strangers to the transaction who are specially injured by the condition created are the only ones entitled to seek abatement. Civil Code, sec. 3493; Frost v. City of Los Angeles, 181 Cal. 22, 183 P. 342, 6 A.L.R. 468; San Joaquin & Kings River Canal & Irrigation Co. v. Egenhoff, 61 Cal.App.2d 82, 141 P.2d 939. In the present case the Legislature, in enacting section 8719 of the Water Code, has created a category of public nuisance by legislative fiat. It has also provided that the Reclamation Board *may* commence and maintain suit for the prevention of a violation or the abatement thereof as a nuisance. Use of the word "may" seems to characterize the provision as permissive, and if so the exercise of the right is optional with the Reclamation Board. It is not made mandatory that all violations be abated by the board or even recognized. The board is undoubtedly privileged to waive or forego exercise of the remedy if it so chooses, and there is no evidence here that plaintiffs are in position to complain that the board has not sought abatement. Although the statute declares a violation of certain provisions thereof to constitute a public nuisance, the end result seems to be that it need not be actually so considered unless so treated by the Reclamation Board. Here apparently the board did not consider this particular levee to be a public nuisance, for, from all that appears, it stood unchallenged by the board for a period of some 13 years. No facts appear which would give to appellants the right to take advantage of that which the board chose to ignore, or which would create in appellants a right to extinguish the easement merely because of the violation of a statute by respondents.

[4] In the Smallpage case there is no indication that the court based its decree quieting plaintiffs' title exclusively or at all upon the rule that one may not, as against the public, acquire an easement by prescription to maintain a public nuisance. That principle was considered in the case primarily in connection with the question as to whether it was error for the trial court to admit evidence as to a public nuisance. It is well settled that one cannot gain a right by prescription against the public to maintain a public nuisance, but the Smallpage case does not stand for the proposition that one cannot gain by prescription a right as against a private individual or private parties to maintain that which is merely, by legislative pronouncement, declared a public nuisance but which is not by nature a nuisance per se. If one has a right of action for the invasion of such a private right and does not seasonably exercise it, the right may be lost by lapse of time the same as in any other case.

In view of our determination that defendants are entitled to their judgment quieting title to the easement in their own right, we deem it unnecessary to discuss the claim by appellants that respondents are attempting to rely on some "super right" in Stanislaus County in connection with the levee. The parties have stipulated that: "The County of Stanislaus does not at this time claim an easement over and across plaintiffs' said land for the purposes [of flood control] hereinbefore stated, nor any license or right to maintain the levee constructed thereon." In the face of this stipulation we cannot see how there would be any valid question concerning a right reposing in the county which would be subject to enforcement by respondents for their own private benefit.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

Hearing granted; CARTER, J., not participating.

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133 Cal.App.2d 91

T. L. CARRUTHERS, Plaintiff and Appellant,

v.

Joseph CUNHA, Individually and doing business as Cunha Transportation Co., et al., Defendants and Respondents.

Civ. 16264.

District Court of Appeal, First District, Division 2, California.

May 18, 1955.

Action to recover for injuries allegedly sustained by plaintiff as result of an intersection collision between his automobile and defendants' truck. The Superior Court, Contra Costa County, Norman A. Gregg, J., entered judgment for defendants and plaintiff appealed. The District Court of Appeal, Draper, J. pro tem., held that question as to whether plaintiff suffered injury proximately resulting from collision was for jury.

Judgment affirmed.

1. Appeal and Error 🔑1001(1)

Judgment will not be reversed on appeal if there is substantial evidence to support verdict on any theory on which it might have been reached.

2. Damages 🔑208(1)

In action for injuries allegedly sustained by plaintiff as result of intersection collision between his automobile and defendants' truck, question as to whether plaintiff suffered injury proximately resulting from collision was for jury.

3. Automobiles 🔑245(44)

In action for injuries allegedly sustained by plaintiff as result of intersection collision between his automobile and defendants' truck, question as to defendants' negligence with respect to control in entering intersection was for jury.

4. Automobiles 🔑245(80)

In action for injuries allegedly sustained by plaintiff as result of intersection collision between his automobile and defendants' truck, question as to whether plaintiff was contributorily negligent in failing to avoid collision by stopping his automobile or by increasing his speed was for jury.

5. Appeal and Error 🔑989

It is not function of appellate court to weigh evidence.

6. Automobiles 🔑246(22)

In action for injuries allegedly sustained by plaintiff as result of intersection collision between his automobile and defendants' truck, instruction on unavoidable accident was not erroneous, where defendants' truck had skidded upon wet pavement, and question whether such was attributable to driver's negligence or to factors beyond his reasonable control was question of fact for jury.

7. Automobiles 🔑246(60)

In automobile accident case, instruction that there was no legal presumption of negligence on part of defendant or of contributory negligence on part of plaintiff was proper.

8. Appeal and Error ⚷1064(1)

In automobile accident case, instruction that court did not mean to imply or suggest that either party involved in accident entered intersection against stop signal was not prejudicial to plaintiff, where there was no dispute that truck did enter against signal and jury could not have found otherwise, and where real question was whether this fact was reasonably justifiable under all circumstances.

9. Trial ⚷296(3)

In automobile accident case, instruction on reasonable man test of negligence rather than statutory standard was not improper, where jury had also been instructed properly upon effect of violations of statute.

10. Automobiles ⚷246(23)

In automobile accident case, instruction on contributory negligence was not improper, where there was room for jury to determine that plaintiff could have avoided collision by exercise of ordinary care after realizing his danger.

11. Automobiles ⚷246(25)

In automobile accident case, instruction that one crossing intersection with stop sign, to whom danger becomes apparent or would be apparent to person of ordinary prudence in same situation, is not excused from exercising ordinary care to avoid collision even though danger is created by one who enters or appears about to enter intersection against stop sign, was not erroneous.

12. Automobiles ⚷246(19, 23)

In automobile accident case, instruction that one cannot go from place of safety into place of danger without using his eyes or ears to see or hear is general instruction, applicable to both parties alike, and was given with general instructions at outset of court's charge to jury, and was not improper.

13. Appeal and Error ⚷1066
Trial ⚷296(3)

In automobile accident case, omission of portion of instruction which was proposed in exact language of California Jury Instructions Civil relating to entering intersection against stop signal was not prejudicial to plaintiff, where editors of such instruction recited that such portion could be omitted leaving short form for use if elaboration was not considered necessary and where other instructions on subject adequately covered ground.

14. Trial ⚷260(7)

In automobile accident case, refusal to instruct that, if evidence showed that party to action conducted himself in violation of statute governing obedience to official traffic signals, such conduct constituted negligence as matter of law, was not error, where court did instruct that violation of any Code sections read to jury constituted negligence per se which raised presumption of negligence which could be overcome by evidence showing that conduct was excusable. Vehicle Code, § 475.

15. Automobiles ⚷246(14)

In automobile accident case, instruction as to circumstances under which violation of statute governing obedience to official traffic signals might be excusable and justifiable, considering all surrounding circumstances, was not erroneous. Vehicle Code, § 475.

16. Trial ⚷133(6)

In automobile accident case, even though some statements made by counsel for defendant may have been improper, prompt admonitions of court in its closing instructions to jury to disregard such remarks and to distinguish between facts testified to by witnesses and statements made by attorneys were adequate to cure any injury.

◆

Nathan Engelberg, Richmond, Claire Engelberg, Richmond, of counsel, for appellant.

Theodore Tamba, San Francisco, F. A. Plank, San Francisco, of counsel, for respondent.

DRAPER, Justice pro tem.

Plaintiff sued for damages for personal injuries allegedly sustained in a truck-automobile collision December 19, 1952. The jury returned a unanimous verdict for defendant, and plaintiff appeals from the judgment on that verdict.

Plaintiff-appellant drove his sedan east on Central Avenue in Richmond. At Eastshore Freeway he stopped for a red signal. When it turned to green he started across the freeway and, when part way across, his right rear fender was struck by respondent's truck, which was northbound on the freeway.

[1] Appellant's principal contention is that the evidence is insufficient to support the verdict. However, "a judgment will not be reversed on appeal if there is substantial evidence to support the verdict on any theory on which it might have been reached." Clement v. State Reclamation Board, 35 Cal.2d 628, 643, 220 P.2d 897, 906. Thus, if there is substantial evidence to support a conclusion that no injury proximately resulted from the collision, or that there was contributory negligence, or that respondent was not negligent, appellant's contention fails.

After careful review of the record, we are satisfied that appellant's contention must fail, not only in one, but in all three of these contentions.

The principal issue raised by the briefs is the question whether appellant sustained any injuries proximately caused by the accident.

There is no direct evidence that appellant was thrown about in his car, or that his body struck any object, at the time of the collision. He testified, however, that his car was thrown out of control by the collision, ran into a bank at the side of the road, and was damaged at the front as well as at the point where the truck struck it.

However, the truck driver and the highway patrolman who investigated the accident denied that the car had struck any bank or suffered any front damage. The driver testified that appellant's car stopped right where it was struck, and was only 8 to 10 inches away from the front of the truck when it stopped, denied that the collision was "a blow" and said "I just slid into him." Appellant testified that the truck stopped "right where it struck" him. The officer did not list either "injury" or "possible injury" in his report, and could recall no complaint of injury by appellant. The driver testified that appellant made no claim of any injury after the accident, although they were together during the 20 minutes before arrival of the officer, and through some time of interview by him. Appellant, after the collision, drove to his place of employment and picked up his check. He did not go to his doctor's office until 2 p. m., about 5 hours after the accident.

Two doctors were called by appellant. They testified that arthritic developments after the accident necessitated an operation on appellant's spine, performed August 20, 1953, and that he suffered great pain and disability over a long period. Both testified that these conditions resulted from the collision. But the doctor who first examined appellant based his testimony connecting the injury with the accident on the assumption that appellant had suffered a "violent injury" and had been "thrown violently" in the collision. The second, a specialist in orthopedics, based his finding connecting injury and accident largely on the statement of the first doctor.

A doctor called by respondent examined appellant January 28, 1953, 40 days after the accident and 16 days after the first examination by appellant's orthopedist. This was well within the period of the alleged objective symptoms of muscle spasm found by appellant's orthopedist. Respondent's witness, also an orthopedist, testified that there was no muscle spasm, no objective symptoms of the asserted injury, no fracture such as was testified to by plaintiff's doctors, and no need for an operation on appellant's back. He testified that all appellant's difficulties resulted from a degenerative type of arthritis long antedating the accident, and that he could find no relation between appellant's condition and the accident. He also testified to a telephone conversation with the doctor who first treated appellant, in which statements contradictory of some of the testimony of that physician were made.

The doctor called by respondent concluded that appellant was a "malingerer", whose injury was "not genuine" but "simulated". Other witnesses testified to appellant's walking without his cane and working in his yard after the injury, in contradiction of his own testimony that he could not walk unaided.

[2] In this state of the evidence, the jury could conclude that plaintiff testified falsely concerning his injuries, and could have concluded that he suffered no injury. Nelson v. Black, 43 Cal.2d 612, 275 P.2d 473. It is to be noted that in the cited case defendant admitted liability, but judgment on the verdict for defendant was affirmed. Here respondent denied liability.

[3] The evidence showed that the driver of respondent's truck, when about 400 feet from the intersection, saw the signal change to yellow. He was then driving at about 40 miles per hour. He began to slow down, using the brakes on the rear wheels and shifting into lower gears. When about 20 feet from the intersection he applied all brakes, to complete his stop, but the vehicle skidded some 5 or 6 feet into the intersection at a speed of 5 to 6 miles an hour. The day was rainy and the pavement wet. There is no direct evidence that the gradual slowing of the truck to a stop was either normal and careful or unusual and lacking due care. Thus the question of negligence clearly was one of fact for the jury, to be decided principally upon inference.

[4] Appellant also asserts that there is no possible basis for a finding of contributory negligence on his part. But there is evidence that appellant was in low gear, traveling 10 to 15 miles per hour, or less, and that he first observed the danger of collision when the truck was 15 feet from him. The collision occurred in the easternmost lane of the freeway. Appellant's car had crossed no more than half the freeway when he observed the danger. There was room for the jury to infer that he could have avoided the collision either by stopping his car or by increasing his speed. It was for the jury to determine whether due care required him to do either of these things, and thus whether he acted negligently. Couchman v. Snelling, 111 Cal. App. 192, 196, 295 P. 845; Donat v. Dillon, 192 Cal. 426, 221 P. 193; Blackmore v. Brennan, 43 Cal.App.2d 280, 287, 110 P.2d 723.

[5] On each of these issues there was much evidence to sustain a verdict for appellant. We have not summarized such evidence here, for it is not the function of an appellate court to weigh the evidence. Where the trial judge, who heard and saw the witnesses, has denied a motion for new trial, there is even less room for us to question the verdict of the jury. Our function ends with the determination that there is substantial evidence to support the verdict. We conclude that there is such evidence as to each of the three issues discussed above. Any one of these would sustain the verdict for respondent.

Appellant claims error in the giving of certain instructions and the refusal to give others.

As to the instructions given, the record on this appeal does not show who proposed any of them. Appellant did not, either by closing brief or on oral argument, deny respondent's assertion that the bulk of these questioned instructions were in fact proposed by appellant. However, on the day following oral argument and submission of this appeal appellant requested augmentation of the record to show who did propose what instructions. We are satisfied that the instructions given were proper, without regard to their source. Therefore we do not delay this case for such augmentation.

[6] Appellant asserts that it was error to instruct on unavoidable accident. But here respondent's truck skidded upon wet pavement. Whether this was attributable to the truck driver's negligence or to factors beyond his reasonable control was, as already pointed out, a question of fact. The instruction really raises the issues of negligence and proximate cause and was proper here. Parker v. Womack, 37 Cal.2d 116, 230 P.2d 823. Here the jury was instructed that "if any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me, and none must

be inferred by you." The questioned instruction was not erroneous.

[7] Appellant urges error in giving an instruction that "In a case as here presented, there is no legal presumption of negligence on the part of the defendant." But he has lifted it from context. The instruction given has a comma, rather than a period, after "defendant", and continues: "or of contributory negligence on the part of the plaintiff. Such matters are facts, which like other material facts alleged by any party, must be proved by the party upon whom rests the burden of proof." Read as a whole, it is but a general instruction which is wholly proper.

[8] The court gave an instruction on the duties of drivers at an intersection controlled by stop and go signals, concluding with the language "In giving you this instruction I do not mean to imply or to suggest that either party involved in the accident in question did enter the intersection * * * against a stop signal * *. Whether or not (this) was done is a question of fact you must decide." Appellant asserts prejudicial error in the giving of the first sentence quoted. On the evidence, the court could well have omitted this disclaimer. However, it is not prejudicial. There was no dispute that the truck did enter against the signal and the jury could not have found otherwise. The real question was whether this act was reasonably justifiable under all the circumstances.

[9] Appellant also complains that the court defined negligence. He says "the jury should not have been instructed on the reasonable man test of negligence, but should have been instructed that the statutory standard governs." This is incomprehensible to us. The jury was instructed properly upon the effect of violations of statute. The very instruction upon this subject proposed by appellant, the refusal of which he assigns as error, uses the term "negligence". Negligence is the basis of appellant's claim, and contributory negligence is pleaded as a defense. Surely it is reasonable, if not essential, to define the term. Appellant does not complain of the accuracy of the definition, but only contends that, because his case is based upon a violation of statute, no definition of negligence should have been given. The position is untenable.

[10] Appellant complains, also, of the instruction upon contributory negligence. As already pointed out, there was room for the jury to determine that appellant could have avoided the collision by the exercise of ordinary care after he realized his danger.

"Whether or not * * * plaintiff, after observing the approach of defendant's car, its position, and the rate of speed it was traveling, and keeping the same within his side vision, was justified in proceeding upon his rightful way across the intersection in advance of defendant presents a question upon which reasonable minds might differ, and was therefore one for the jury to determine." Couchman v. Snelling, supra, 111 Cal.App. 192, 196, 295 P. 845, 847. See also Donat v. Dillon, supra, 192 Cal. 426, 221 P. 193; Blackmore v. Brennan, supra, 43 Cal.App.2d 280, 287, 110 P. 2d 723.

[11] Appellant then complains that the court, after instructing that "one who enters the intersection in response to a 'go' sign may assume that traffic on the cross street will not enter the intersection against a 'stop' sign, and hence is not required before entering or while crossing to make or maintain a lookout for cross traffic that could endanger him only by violating a 'stop' signal", added "However, when danger is apparent to him or would be apparent to a person of ordinary prudence in the same situation, he is not excused from exercising ordinary care to avoid a collision even though the danger is created by one who enters or appears about to enter the intersection against a 'stop signal'."

We see no error in the instruction. A like qualification to a similar instruction was approved in Stickel v. San Diego Elec. Ry. Co., 32 Cal.2d 157, 166, at page 167, 195 P.2d 416, 422; where the court said: "'One may not continue to assume that the law is being observed after knowing or having an opportunity, by the use of reasonable care, to know that it is not being observed.'" See also Connor v. Pacific Greyhound Lines, 104 Cal.App.2d 746, 232 P.2d 500.

[12] Appellant also questions the instruction that "one cannot go from a place of safety into a place of danger without using his eyes or ears to see or hear * *." This is a general instruction, applicable to both parties alike, and was given with the general instructions at the outset of the court's charge to the jury. Appellant cites no authority for his attack, which is without merit.

[13] Appellant complains of the omission of a portion of one instruction. He proposed an instruction in the exact language of California Jury Instructions Civil (3rd ed.) (B.A.J.I.) 141, including the parentheses around the sentence which the editors say is "a portion that may be omitted, leaving a short form for use if the trial judge does not consider elaboration necessary." Obviously, the trial judge accepted this invitation to brevity.

There is nothing to indicate that appellant was prejudiced by the omission. Following the statement that entering an intersection against a signal is not, of itself, conclusive proof of negligence, appellant says the court should have added: "This is so because the controlling device may change to give the stop sign either just as a vehicle is entering the intersection or when it is so close that an attempt to stop suddenly would be futile, or would be more hazardous than crossing the intersection, or would be more liable to result in interference with other traffic. The fact that the law recognizes these possibilities, however, does not justify a driver in approaching an intersection at a careless rate of speed. He, too, is bound to know that the signal, being automatic, will not heed his approach and that it may change before he reaches the intersection. The ordinarily careful driver will adjust his speed to that possibility. Failure to obey a traffic signal may or may not be the proximate result of a negligent speed in approach."

The court did give the remainder of the instruction: "When there is a question whether a driver was negligent in entering an intersection against an automatic stop signal, all the surrounding circumstances should be considered with a view to judging whether his conduct was justifiable, excusable and in the manner of an ordinarily prudent person."

This seems clearly to cover the ground, and to instruct the jury adequately upon the subject. The instruction followed the statement that a driver shall obey the signals, and was followed by an instruction that violation of the code section is presumed to be negligence, unless the presumption is overcome by other evidence. We see no error in directing the jury's attention to "all the surrounding circumstances" rather than emphasizing one of these circumstances. The jury was properly instructed upon this point.

[14] Finally, appellant argues that the court erred in refusing to instruct "If you should find from the evidence that a party to this action conducted himself in violation of section 475 of the California Vehicle Code just read to you, you are instructed that such conduct constituted negligence as a matter of law."

The court did instruct that violation of any of the code sections read to the jury (including sec. 475) constitutes "negligence per se", and raises a presumption of negligence which, however, can be overcome by evidence showing that the conduct was "excusable, justifiable and such as might reasonably have been expected from a person of ordinary prudence." Appellant complains that the instruction given does not refer specifically to section 475. It followed closely the reading of this section and one other. Appellant's complaint in this respect is captious.

[15] He also claims error, however, in the portion of the instruction defining the circumstances under which the violation of the section may be excusable and justifiable. The very case he cites, Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, 177 P.2d 279, is opposed to his view. There the court says, 29 Cal.2d at page 590, 177 P.2d at page 284: "* * * each violation of

a statutory requirement must be considered in connection with the surrounding circumstances. Ordinarily, the excuse relied upon by the violator presents a question of fact for the jury's determination." In Gallup v. Sparks-Mundo Engineering Co., 43 Cal.2d 1, 271 P.2d 34, 38, the Supreme Court approved an instruction stating " 'When there is a question whether a driver was negligent in entering an intersection against an automatic stop signal, all the surrounding circumstances should be considered with a view to judging whether his conduct was justifiable, excusable and in the manner of an ordinarily prudent person.' " This is in substance the instruction given here.

[16] Appellant also asserts misconduct of counsel for respondent. Appellant's brief, by repetition (as much as three times) of the statements objected to, greatly magnifies their importance. The court admonished the jury to disregard each remark to which objection was made, even though appellant did not request such instruction. In his instructions to the jury, the trial judge told the jury "You are cautioned to distinguish carefully between the facts testified to by the witnesses and any statements made by the attorneys during the trial or in their arguments as to what facts have been proved. Such statements are not evidence in the case. * * * If counsel on either side * * * made any statement not supported by the evidence * * * then the court admonishes you to disregard all such statements."

Some statements made by counsel were improper. However, they did occur in the course of questioning two medical witnesses who themselves became quite argumentative. In fact, the doctors so adequately responded to these statements that it is difficult to see that the net result was in any way injurious to appellant. In any event, the prompt admonitions of the court and its closing instructions were adequate to cure any injury. The issue was raised on motion for new trial, and the trial judge, in denying the motion, expressed the view that the doctor "handled himself very well."

Judgment affirmed. The purported appeal from order denying new trial is dismissed.

NOURSE, P. J., and KAUFMAN, J., concur.

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132 Cal.App.2d Supp. 916

Fred CANNON, Plaintiff and Respondent,

v.

Pearl GOBLE, John Goble and Hugh Edwards, Defendants and Appellants.

C. A. 22.

Appellate Department, Superior Court,
San Bernardino County, California.
May 5, 1955.

Action wherein the Municipal Court of San Bernardino Judicial District, Edward P. Fogg, J., rendered judgment, and an appeal was taken. The Superior Court, Appellate Department, Mitchell, J., held that where notice of entry of judgment in Municipal Court was served on October 5, and motion for new trial, made October 9, was heard and denied on November 26, time for appeal expired on December 11, and, where notice of appeal was not filed until December 17, appeal would be dismissed.

Appeal dismissed.

Courts 🔑190(4)

Where notice of entry of judgment in Municipal Court was served on October 5, and motion for new trial, made October 9, was heard and denied on November 26, time for appeal expired on December 11, and where notice of appeal was not filed until December 17, appeal was dismissed. Rules on Appeal from Municipal Courts—Civil Cases—rule 2(a).

◆

C. E. Crowley, Ontario, for appellants.

George W. Vinnedge, Ontario, for respondent.

MITCHELL, Judge.

Rule 2(a) of Municipal Court Civil Appeals provides that notice of appeal must be filed within thirty days from notice of entry of judgment, but not in any event later than sixty days from entry of judgment.

If a motion for new trial is properly made and is denied then the time for filing notice of appeal is extended until fifteen days after entry of the order denying the motion.

On October 5, 1954, notice of entry of judgment was served by mail on counsel for appellant.

Time for appeal would then expire on November 6.

However, on October 9 a notice of intention to move for a new trial was served.

The motion was heard and on November 26, 1954, it was denied.

Time for appeal would expire fifteen days thereafter, to wit, on December 11, 1954.

Notice of appeal was filed on December 17, 1954.

The appeal, therefore, must be dismissed.

COUGHLIN, P. J., and HILLIARD, J., concur.

44 Cal.2d 590

Barbara CROWE and Ellen Lowe, Plaintiffs and Respondents,

v.

Frank W. SACKS, Appellant.

L. A. 23539.

Supreme Court of California.
In Bank.
May 24, 1955.

Personal injury action arising out of automobile accident. The Superior Court, San Bernardino County, Carl B. Hilliard, J., rendered judgment for plaintiffs, and defendants appealed. The Supreme Court, Shenk, J., held that where jury's original verdict in automobile accident case was for an amount in excess of special damages claimed by plaintiffs' counsel in opening statement, trial court's action in ordering jury to reconsider verdict on questions of both liability and damages and in stating that court thought that verdict was grossly inadequate was an invasion of province of jury to determine amounts of damages and, where jury reached higher verdict upon redeliberation, resulted in a miscarriage of justice.

Judgment reversed.

Opinion, 275 P.2d 589, vacated.

1. Trial 🔑318

A verdict must comprehend all issues submitted to jury.

2. Trial 🔑339(1), 340(1)

A verdict which goes beyond issues as stated in instructions on law is not in conformity with instructions and is "insufficient" within statute providing that when verdict is informal or insufficient it may be corrected or jury again sent out. West's Ann.Code Civ.Proc. § 619.

See publication Words and Phrases, for other judicial constructions and definitions of "Insufficient".

3. Trial 🔑340(5)

If verdict is defective in form in respect to a mere matter of computation of liquidated damages, court may, in a proper case, advise jury as to correct amount or insert such amount in verdict. West's Ann. Code Civ.Proc. §§ 618, 619.

4. Damages 🔑208(4)

In action for injuries sustained in automobile accident, questions as to loss of earnings or earning power and pain and suffering were for jury.

5. Appeal and Error 🔑932(1)

It cannot be presumed on appeal that any element of damages was ignored by jury merely because verdict was not for a large sum of money.

6. Trial 🔑339(3)

Where juror disclosed, in colloquy with court, that verdict was a compromise verdict, court had jurisdiction to send jury back for further deliberation with instruction that its determination should not be based upon compromise.

7. Appeal and Error 🔑1170(10)
Trial 🔑339(3)

Where jury's original verdict in automobile accident case was for an amount in excess of special damages claimed by plaintiffs' counsel in opening statement, trial court's action in ordering jury to reconsider verdict on questions of both liability and damages and in stating that court thought that verdict was grossly inadequate was an invasion of province of jury to determine amounts of damages and, where jury reached higher verdict upon redeliberation, resulted in a miscarriage of justice. West's Ann.Code Civ.Proc. §§ 618, 619; Const. art. 6, § 4½.

8. Trial 🔑340(1)

Trial judge should correct verdicts only with caution, and should not throw weight of his influence into deliberations of jury as to matters exclusively within its province.

9. Trial 🔑339(3)

Where jury allows damages so grossly inadequate as to show that it must have disregarded evidence and instructions, jury should be returned for further deliberation under proper instructions.

10. New Trial 🔑75(1)

If trial judge believes that damages are inadequate, proper procedure is to set verdict aside on motion for new trial.

11. New Trial ⚷75(1)

Where plaintiff, if entitled to recover at all, is clearly entitled to a larger amount than allowed by jury, evidence is insufficient to support verdict, and verdict may be set aside on motion for new trial.

12. Judgment ⚷198

Verdict which was not received or entered as verdict of jury was an unrecorded verdict and not sufficient to support a judgment.

◆

Eugene S. Ives, Los Angeles, for appellant.

Parker, Stanbury, Reese & McGee, Los Angeles, for respondents.

SHENK, Justice.

Defendant appeals from a judgment entered upon a jury verdict in favor of plaintiffs Crowe and Lowe in the sums of $8,500 and $11,000 respectively, in a personal injury action arising out of an automobile collision.

The principal error urged on appeal is that the trial court committed prejudicial error (1) in telling the jury after its proposed verdict was brought in (but before it was recorded) that the amounts awarded were "grossly inadequate" and (2) in sending the jury back to redeliberate. Defendant asks that the original verdict (in the amounts of $2,500 and $3,000, respectively) be ordered entered in lieu of the verdict in the sums of $8,500 and $11,000, and that judgment be entered thereon.

On June 28, 1951, a 1951 Ford convertible automobile being driven southerly on Cairo Road by Mrs. Crowe collided with a 1947 Chevrolet Sedan automobile being driven easterly on Two Mile Road by defendant Sacks near Twentynine Palms, California. This is an open intersection in desert country, there was no other traffic, the morning was clear. The only obstructions to visibility were a house located on the northwest corner, set back some 150 feet from each road, and a curve and a dip deep enough to hide a car from sight on Two Mile Road about one-quarter mile west of the intersection. Mrs. Crowe, with her sister Mrs. Lowe as a passenger, was returning to her motel and intended to turn right at Two Mile Road. She looked to the left and to the right for approaching traffic at distances of 100 feet, 50 feet, and again as she entered the intersection. She saw no cars until, just as the rear end of her car cleared the north edge of the intersection, she saw the defendant's car bearing down on her from the west. His left front fender collided with her right front fender, causing her car to spin around and to catapault her and her sister to the ground. The evidence was conflicting as to defendant's speed and as to when he first observed the Ford. His car laid down 86 feet of skid marks before it came to a stop in the sand. The point of impact was about seven feet south and two and one half feet west of the center line of the intersection.

Both plaintiffs were removed by ambulance to a hospital in Twentynine Palms operated by Dr. Ince. He testified that Mrs. Lowe was found to be suffering from a concussion of the brain, shock, two fractures of the pelvis, torn ligaments in the pelvic area, a deep two inch scalp laceration, and with contusions and abrasions of the left hip, shoulder, face and entire body. Mrs. Crowe was also found to be suffering from concussion, abrasions and shock and was in considerable pain, localized in her neck. After six days the plaintiffs were released from the hospital and they returned to Glendale, where they were employed at the Behrens Memorial Hospital.

Mrs. Lowe, a woman in her early fifties, was employed as a bookkeeper at the hospital. She continued her duties at home from her bed or a wheelchair until October 1, 1951, after which she went to the hospital at least part time each day in connection with her employment. She received her full salary, $257 a month. In June 1952 it was discovered that she had a broken back with nerve involvement and that this could have been sustained as a result of the accident on June 28th. There was expert medical evidence that she would suffer with back pain for the rest of her life and that pre-existing heart and menopause conditions may have been severely aggravated by the accident. She testified that she had frequent headaches and backaches as a result of the accident and was unable to work full time.

Mrs. Crowe, a woman in her thirties, was employed as a receptionist and telephone operator at the hospital at a salary of $215 per month for a 40-hour week. Her salary was "docked" for time not worked by her. She returned to work at the hospital on July 10th but the following morning had difficulty getting out of bed and could not move her head at all. She was hospitalized for the next few days, during which time she was taken to surgery and her neck was manipulated under anaesthetic. Thereafter her neck was placed in traction with heavy weights and a pulley attached. For the next month she had to wear a "Nelson collar" during the day to keep her head immobile and thus relieve the pressure on her neck. For five months she had to sleep at night with traction on her neck. Dr. Johnstone testified that she had a luxation of the cervical spine, that is, an injury to the neck which manifested itself as a severe pain in the neck and in the arm; that there was a marked change in her ability to do her work and in her disposition after the accident; that from the fact that she was not completely well after two years there was a serious question whether she would ever completely recover from it, and that she could not get along further without having many severe pains and was advised by the doctors to quit work.

The court instructed the jury as to all of the issues, as to the negligence of each party, proximate cause as to each party, contributory negligence as to each plaintiff, and as to the measure of damages. The jury was instructed that if it found for the plaintiffs or either of them it should award the party so entitled such amount as would compensate her reasonably for all detriment suffered by her of which it found defendant's negligence to be a proximate cause; that in arriving at the amount of the award the jury should determine each of the items of medical treatment given or reasonably certain to be required and given in the future, and the reasonable value of x-rays, nursing care, hospital and ambulance service. The instruction on special damages properly advised the jury that it should consider not only those elements of damage but "also such sums as will compensate her reasonably for any pain, discomfort and anxiety" resulting from the injury, suffered or reasonably certain to be suffered in the future, as well as "such sum * * * as will compensate [her] reasonably for any loss of earning power" and the effect of her injuries upon her future earning power and the present value of the loss so suffered.

After three hours of deliberation the jury returned to the courtroom. The following proceedings, upon which error is predicated, then took place:

> "The Court: Have you reached a verdict?
>
> "The Foreman: We have."

The verdict was handed by the foreman to the bailiff, and by the latter to the judge.

> "The Court: In noting this verdict, ladies and gentlemen, it appears you have determined the issue of liability in favor of the plaintiffs but I do not feel that you have adhered to the law or done your duty in so far as the amount of the verdicts are concerned in this case. I remind you that the special damages approximate the amounts which you have noted on this verdict. That means, of course, you have found there was little or no damage for pain or suffering or further loss of wages, if any. Do you desire to reconsider the verdict, if you do, the Court will return you for further consideration. How many jurors would like to reconsider this verdict?
>
> "A Juror: I would, sir."

A show of hands indicated a majority of the jurors would like to reconsider the verdict.

> "A Juror: What was the objection?
>
> "The Court: * * * The verdict finds in favor of the plaintiffs and each of them * * * but the amounts reported * * * are only an approximation of the special damages sustained by [them]. That means, in my

> opinion, you are obviously compromising the issue of negligence; having found in favor of the plaintiffs on the issue of liability certainly your verdict should be commensurate with the actual damages which you have found to be suffered by the plaintiff and each of them. I think this verdict is grossly inadequate.
>
> "A Juror: This is a compromise verdict.
>
> "The Court: If it is a compromised item then I will return you for further deliberation."

After the jury was returned to the juryroom the attorney for defendant cited the court's remarks as being coercion of jury, and error; that the verdict was admitted to be a compromise; and that the jury might construe the court's remarks as meaning it should reconsider the matter only on the issue of damages. The court then had the jury returned to the courtroom and instructed it to reconsider all of the issues involved, both negligence and damages, and that their determination upon either of those issues should not be based upon a compromise.

About four hours later the jury returned. The foreman replied that they had agreed upon their verdict. The clerk then read the verdict, which found in favor of plaintiff Crowe in the sum of $8,500, and in favor of plaintiff Lowe in the sum of $11,000. Upon a poll of the jury three-fourths of them replied that it was their verdict (9–3) and the verdict was then recorded. Defendant's attorney moved that the court put the amounts of the original verdict into the minutes. The court took the motion under submission, but announced orally that the amounts contained in the first proposed verdict were $2,500 and $3,000 in favor of plaintiffs. Defendant's attorney then cited the court as being in error in resubmitting the case to the jury. The following day by minute order the motion to put the amounts of the original verdict into the minutes, was denied. Motion for new trial was denied. Affidavits of jurors Woolverton and Pergrim were filed in support of motion for new trial. Neither affidavit showed that the verdict was arrived at by lot or by chance or was a quotient verdict.

Defendant argues that it was prejudicial error for the court to have returned the jury to the juryroom for deliberation. Sections 618 and 619 of the Code of Civil Procedure provide the limitations upon the jurisdiction of the trial court after the matter has been submitted to the jury. Section 618 provides that when at least three-fourths of the jury have agreed upon a verdict they must be conducted into court "and the verdict rendered by their foreman." The verdict must be read to the jury by the clerk or by the court and the inquiry made whether it is their verdict. Either party may require the jury to be polled. "If upon such inquiry or polling, more than one-fourth of the jurors disagree thereto, the jury must be sent out again, but if no such disagreement be expressed, the verdict is complete and the jury discharged from the case."

Defendant argues that the first proposed verdict was "rendered" within the meaning of this section when it was handed by the foreman to the bailiff, and by the bailiff to the judge; that the foreman had replied, in response to the court's inquiry, that it was the verdict of the jury; and that there was no expression of any disagreement with the verdict by any juror at such time, and therefore, that the verdict was complete and the jury should have then been discharged and judgment entered upon the verdict.

Section 618 must be construed with section 619. Sparks v. Berntsen, 19 Cal.2d 308, 313, 121 P.2d 497. This provides "When the verdict is announced, if it is informal or insufficient, in not covering the issue submitted, it may be corrected by the jury under the advice of the Court, or the jury may be again sent out." The proper inquiry is, was this verdict "informal" or "insufficient" within the meaning of this section?

[1–3] "Informal" is defined as "defective in form; not in the usual form or manner; contrary to custom or prescribed rule." "Insufficient" is defined as "inadequate for some need, purpose or use." A verdict must comprehend all the issues submitted to the jury. A verdict which goes beyond the issues of the case as stated in the instructions on the law given by the court to the jury, is not in conformity with the instructions and is therefore "insufficient." Instances of this are: where the jury returned a verdict for $14,200 although it had been instructed by the court that the statutory maximum liability was $4,140, Redo y Cia v. First Nat'l Bank, 200 Cal. 161, 252 P. 587; where the verdict included improper items, Prager v. Isreal, 15 Cal.2d 89, 98, 98 P.2d 729; Toon v. Pickwick Stages, 95 Cal.App. 370, 374, 272 P. 797; Conlin v. Emanuel Lewis Inv. Co., 26 Cal.App. 388, 147 P. 472; where the verdict is larger than warranted by the evidence, Megee v. Fasulis, 65 Cal.App.2d 94, 102, 150 P.2d 281; Logan v. Lewis, 35 Cal. App. 663, 666, 170 P. 851. Defects in form of the verdict may render it "informal" or "insufficient", Brown v. Regan, 10 Cal.2d 519, 523, 75 P.2d 1063; Kerrison v. Unger, 135 Cal.App. 607, 611, 27 P.2d 927. If the verdict is defective in form and it is a mere matter of computation of liquidated damages, the court may in a proper case advise the jury as to the correct amount or insert such amount in the verdict, Engelberg v. Sebastiani, 207 Cal. 727, 279 P. 795, when the plaintiff was entitled to interest as a matter of law, the court added interest to amount of verdict.

[4, 5] The jury in the present case was informed that if it found in favor of the plaintiffs or either of them its award should include compensation for pain, discomfort or anxiety or loss of earnings, present or prospective, as found by the jury, in addition to the items of special damage. The bills in evidence as to Mrs. Crowe exceeded $900; as to Mrs. Lowe they exceeded the sum of $1,800. The issues as to loss of earnings or earning power and as to pain and suffering were disputed, and the amount to be awarded as compensation therefor was within the province of the jury to determine. These amounts were unliquidated. It cannot be presumed on appeal that any element of damage is ignored by the jury merely because the verdict is not for a large sum of money. Stein v. United Railroads, 159 Cal. 368, 375, 113 P. 663. The first proposed verdict exceeded the amount of the special damages proved and exceeded the amounts stated by plaintiffs' counsel in his opening statement ($3,000 for Mrs. Crowe, in excess of $2,500 for Mrs. Lowe). It does not appear, therefore, that the jury failed to consider the issues as to compensation to be awarded for loss of wages, or pain and suffering, merely because it awarded smaller sums than might seem proper to the trial court or to a reviewing court. The verdict was not defective in form and if it comprehended all the items of damage contained in the instructions given by the court, regardless of amount, it was not insufficient. If dissatisfied with the amount of the verdict the court could have granted a motion for new trial to the plaintiffs.

The defendant made timely objection to this error. See Brown v. Regan, 10 Cal.2d 519, 524, 75 P.2d 1063; Van Damme v. McGilvray Stone Co., 22 Cal.App. 191, 194, 133 P. 995, holding that defects in form of the verdict may be waived by failure to make timely objection.

On appeal the question is presented whether from an examination of the entire record this error of procedure caused a miscarriage of justice. Const. Art. VI, § 4½; Pray v. Trower Lumber Co., 101 Cal.App. 482, 491, 281 P. 1036.

[6] Where the jury fails to compensate plaintiffs for the special damages indicated by the evidence and, despite the fact that the injuries are shown to be painful, makes no award or allows only a trifling sum for general damages, the only reasonable conclusion is that the jurors compromised the issue of liability. Rose v. Melody Lane, 39 Cal.2d 481, 489, 247 P.2d 335. In the colloquy between the court and the jury, this fact was admitted by a juror, that this was a compromise verdict. The court had jurisdiction to send the jury back for further deliberation and to instruct the jury that its determination upon the issues should not be based upon a compromise, either as to liability or damages. This the trial court did, and if that were all that it did, prejudicial error would not have necessarily followed.

[7] But an additional factor is here present, namely, the statement made by the trial judge that "I think this verdict is grossly inadequate." This language may be

said to have counterbalanced the instructions of the court that the jury was to reconsider all issues and to have, in effect, instructed it that if upon redeliberation it again found for the plaintiffs it must bring in a larger verdict as a matter of law. It was a clear invasion of the province of the jury to determine the amounts of damages to be awarded. The higher verdict reached upon redeliberation, $8,500 as compared to $2,500, and $11,000 as compared to $3,000, is a clear indication that the jury was thus influenced in reaching its final verdict. It was an unwarranted interference with the prerogative of the jury to determine the amounts.

The argument is advanced by plaintiffs that the trial judge retains a salutory supervisory power over the verdict until the jury is discharged and that all the court was here doing was requiring the jury to return a verdict in accordance with the instructions given by the court.

[8, 9] The action of the judge in the correction of verdicts should be taken with caution. He must not throw the weight of his influence into the deliberations of the jury as to matters exclusively within its province. 53 Am.Jur. p. 764; Grant v. State, 33 Fla. 291, 14 So. 757, 23 L.R.A. 723; McCurdy v. Hughes, 63 N.D. 435, 248 N.W. 512, 87 A.L.R. 683. If the jury allows damages so grossly inadequate as to show that it must have disregarded the evidence and the instructions of the court, it should be returned for further deliberation under proper instructions. Ansonia Foundry Co. v. Bethlehem Steel Co., 98 Conn. 501, 120 A. 307.

[10, 11] If the trial judge believes that the damages are inadequate, the proper procedure is to set the verdict aside on motion for new trial. Dorsey v. Barba, 38 Cal.2d 350, 240 P.2d 604. A verdict may be set aside on motion for a new trial for insufficient evidence where plaintiff, if entitled to recover at all, is clearly entitled to a larger amount than allowed by the jury because in such case the evidence is insufficient to support the verdict.

[12] The first verdict was not received or entered as the verdict of the jury. It was an unrecorded verdict and as such not sufficient upon which to enter a judgment. The second verdict must also be deemed insufficient to support a judgment because of the prejudicial effect of the proceedings in the trial court.

The judgment is reversed.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

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44 Cal.2d 565

BUDGET FINANCE PLAN, a California corporation, Plaintiff and Appellant,

v.

SAV-ON FOOD CLUB, Inc., a California corporation, doing business under the firm name and style of Sav-On Food Club, Defendant and Respondent (two cases).

L. A. 23328, 23329.

Supreme Court of California.

In Bank.

May 17, 1955.

Actions, consolidated for trial, on conditional sale contracts by seller's assignee against seller for amounts due under contracts after default. The Superior Court, Los Angeles County, Clarence M. Hanson, J., entered judgments adverse to assignee, and assignee appealed. The Supreme Court, Schauer, J., held that, where conditional sale contract warranted that initial payment had been actually received by seller and that, in event of breach of warranty, waiver of recourse should be void and terms of "with recourse" assignment applicable, seller, in effect, warranted that down payment had been received from buyer, not advanced by seller's own salesman as was the actual fact, and, therefore, seller's assignee could recover from seller amount of unpaid purchase price under the "with recourse" assignment provisions.

Judgments reversed with directions.

Carter, J., dissented in part.

Opinion, 272 P.2d 811, vacated.

1. Sales 🔑475

Where conditional sale contract provided that, upon buyer's default, action could be brought against seller by seller's assignee whether or not repossession had been made and whether action had been commenced against buyer and that there would not be waiver of any rights as to time of repossession, purpose and effect of such provisions was to permit assignor to pursue its remedy of action against seller regardless of what it might do as to its remedies against buyer, but assignor could not have a double recovery.

2. Sales 🔑477(4), 479(11)

Where seller brings action for purchase price of goods sold under conditional sales contract, seller does not pass title to buyer and is not thereafter precluded from repossessing the articles sold, and when seller repossesses article he does not terminate the contract and is not thereafter precluded from bringing action for the selling price.

3. Sales 🔑477(4), 479(11)

Terms of conditional sales contract and other circumstances of case, not mechanical rule as to election of remedies, are determinative of whether action against buyer for purchase price passes title to buyer and precludes subsequent repossession or whether repossession precludes seller from bringing action for purchase price.

4. Sales 🔑475

Terms of conditional sale contract, not abstract rules of law, determine whether seller's assignor can bring action against seller for purchase price after having, without notifying seller, repossessed articles sold.

5. Sales 🔑475

Where, under conditional sale contract, seller had agreed that, upon buyer's default, seller's assignee could bring action against seller independently of whether assignee brought action against buyer and independently of whether assignee repossessed article sold, seller was not "surety" whose liability depended upon liability of principal debtor but was directly liable on the contract, and, therefore, seller was not exonerated by assignee's repossession, without notice to seller, of the article sold. West's Ann.Civ.Code, §§ 2819, 2845, 2849.

6. Sales 🔑475

Under conditional sale contract which provided that, upon default, whether or not the repossession had been made or undertaken, action could be brought by seller's assignee against seller regardless whether action had been commenced against parties to agreement and without waiving rights as to time of repossession, assignee, in repossessing article sold following default, did not waive remedy of action for price against seller.

7. Appeal and Error 🔑1176(1)

Where, on the record, judgment for plaintiff in amount sought was only correct judgment which could be rendered, the Supreme Court would direct its entry.

8. Sales 🔑475

Where conditional sale contract warranted that initial payment had been actually received by seller and that, in event of breach of warranty, waiver of recourse should be void and terms of "with recourse" assignment applicable, seller, in effect warranted that down payment had been received from buyer, not advanced by seller's own salesman as was the actual fact, and, therefore, seller's assignee could recover from seller amount of unpaid purchase price under the "with recourse" assignment provisions.

9. Interest 🔑39(1)

In absence of express contract, law awards interest on money from time it becomes due and payable if such time is certain or can be made certain by calculation. West's Ann.Civ.Code, §§ 3287, 3302.

10. Interest 🔑39(3)

In absence of showing as to time, which is certain or which can be made certain, at which award of money becomes due and payable, and in absence of demand for interest, interest will not be awarded on such money, but interest is to be automatically included from date of judgment. West's Ann.Code Civ.Proc. §§ 682, 1033; West's Ann.Const. art. 20, § 22.

Mario L. Clinco and Edgar J. Melchione, Los Angeles, for appellant.

J. George Bragin, Hollywood, for respondent.

SCHAUER, Justice.

Plaintiff, the assignee of contracts of conditional sale, brought these two actions for money against the assignor-seller, herein called defendant. The actions were tried together. In the first action, referred to by the parties as the "with recourse assignment" case, the parties stipulated that plaintiff have judgment in specified sums on the first and second causes of action and that the sums due on the third and fourth causes of action had been paid in full; plaintiff appeals from the portion of the judgment which decrees that it take nothing on its fifth cause of action. In the second action, referred to by the parties as the "without recourse assignment" case, plaintiff appeals from the judgment that it take nothing. The two appeals do not present common questions of law and, hence, will be separately discussed. We have concluded that the portion of the judgment appealed from in the first case and the judgment in the second case should be reversed with directions to the trial court to enter judgments as hereinafter indicated.

"With Recourse Assignment" Case

Defendant sold a freezer under a conditional sale contract which provided for payment of the price in monthly installments. Defendant assigned all its rights under the contract to plaintiff by an assignment which provided as follows:

Defendant guarantees full performance of the contract. Defendant agrees "that in the event of non-compliance with any of the conditions of said agreement, whether or not repossession has been made or undertaken, suit may be brought by the holder [plaintiff] against [defendant] * * *, whether or not suit has been commenced against the party or parties to said Agreement and without waiving any rights as to time of repossession." Defendant agrees "that in the event of repossession or default by the Purchaser, the entire balance outstanding under said agreement shall become immediately due and payable."

The conditional buyer defaulted. Plaintiff brought this action to recover from defendant the unpaid balance under the contract. After plaintiff instituted this action, it repossessed the freezer without notifying defendant. So far as appears the freezer is still in the possession of plaintiff.

[1] The trial court accepted defendant's contention that by repossessing the freezer without notice to defendant plaintiff elected to waive its other rights against defendant. The express terms of the agreement between plaintiff and defendant negative the tenability of such holding. By the agreement defendant not only assigned to plaintiff its rights against the conditional buyer;[1] it also agreed that should the buyer default plaintiff should have certain rights against defendant. It is agreed that in the event of default by the buyer suit may be brought against defendant "whether or not repossession has been made or undertaken," and "whether or not suit has been commenced against" the buyer, and "without waiving any rights as to time of repossession." The purpose and effect of these provisions is to permit plaintiff to pursue its remedy of suit against defendant, whatever plaintiff may do as to its remedies against the buyer. This is not to say, and plaintiff does not claim, that it can have double recovery, but only that its pursuit of a remedy against the buyer under the conditional sale contract, at a time while the present action was pending, does not preclude it from continuing to prosecute this action against the defendant pursuant to the express terms of the assignment-agreement.

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[1] These rights, as stated in the conditional sale contract, include the right, in the event of default by the buyer, to repossess the property with "the option: (a) To retain all payments previously made by buyer as compensation for the use of said property, and, to declare all interests of the buyer therein terminated, or (b) To sell said chattels * * * and credit the net proceeds of said sale * * * on account of the amounts due hereunder."

[2, 3] Defendant relies upon the asserted general rule that repossession and suit for the price under a conditional sale contract are mutually exclusive remedies and that pursuit of one is a waiver of the other. We are not here concerned with what remedies under the conditional sale contract may be available against the buyer. We may say, however, that it is not, as defendant urges, a rule of universal and automatic application under every conditional sale contract that when the seller brings suit for the purchase price he passes title to the buyer and cannot thereafter repossess, and when the seller repossesses he terminates the contract and cannot thereafter sue for the price. The terms of the contract and the other circumstances of the case, not a mechanical rule as to election of remedies, are determinative. (See Ravizza v. Budd & Quinn, Inc. (1942), 19 Cal.2d 289, 293, 120 P.2d 865; Adams v. Anthony (1918), 178 Cal. 158, 160, 172 P. 609 ["In suing on the notes, while still retaining possession of the automobile, the defendant was merely exercising rights, which, under the agreement, were concurrent and not alternative"]; American-LaFrance Fire Engine Co. v. Bagge (1929), 98 Cal.App. 291, 292, 295, 276 P. 1066 [by the contract "the seller explicitly limited its right, in the event of a failure to receive payment * * *, to repossess itself of the property"]; James v. Allen (1937), 23 Cal.App.2d 206, 207, 72 P.2d 570 ["the contract in this case limits the vendor to his election between two remedies"].) Similarly here it is the contract between plaintiff and defendant (which is more than a mere assignment) which must be looked to in deciding the remedies which plaintiff can pursue against defendant.

Defendant relies upon section 2819 of the Civil Code, which provides, "A surety is exonerated * * * if by any act of the creditor, without the consent of the surety the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended." Defendant says that plaintiff, as creditor, by repossessing the freezer without notice to defendant, impaired the value of the security for the debt, and that if plaintiff had notified defendant, defendant could have required plaintiff creditor to proceed against the principal and would have been exonerated had plaintiff failed to do so (citing Civ. Code, § 2845),[2] or defendant could have paid plaintiff and demanded possession of the security and sold it to indemnify itself (citing Civ.Code, § 2849).[3]

[4, 5] Defendant's attempted application of rules as to suretyship is not relevant. Again it must be said that the terms of the contract between plaintiff and defendant, not abstract rules of law, determine whether plaintiff can proceed as it has done. Under the contract defendant is not a surety, whose liability depends upon the liability of the principal debtor; defendant has agreed that on default of the buyer suit may be brought against it independently of whether plaintiff brings action against the buyer and independently of whether plaintiff repossesses the freezer; defendant's liability on this contract is direct.

[6, 7] At the outset of the trial counsel for defendant stated, "With respect to the fifth cause of action, * * * these defendants will stipulate * * * that there presently is due and owing as the unpaid balance of said contract, $641.55" and that if the trial court determines that defendant is incorrect in its contention that plaintiff cannot recover because it took possession of the freezer "we are willing that your Honor should render a judgment

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[2] Section 2845 provides, "A surety may require his creditor to proceed against the principal, or to pursue any other remedy in his power which the surety can not himself pursue, and which would lighten his burden; and if in such case the creditor neglects to do so, the surety is exonerated to the extent to which he is thereby prejudiced."

[3] Section 2849 provides, "A surety is entitled to the benefit of every security for the performance of the principal obligation held by the creditor, or by a co-surety at the time of entering into the contract of suretyship, or acquired by him afterwards, whether the surety was aware of the security or not."

against the defendant in this amount, $641.55." Plaintiff urges that this court should reverse the judgment for defendant on the fifth cause of action with directions to the trial court to enter judgment for plaintiff in the agreed amount. Since, on the record, a judgment for plaintiff in such amount is the only correct one which could be rendered, we can and should direct its entry.

"Without Recourse Assignment" Case

Defendant seller assigned to plaintiff contracts of conditional sale of freezers which provided, among other things, that "The undersigned [buyer] * * * agrees to pay therefor" a down payment and installments. The agreements of assignment provide, "This Assignment is made without recourse in consideration of the following warranties: * * * That the initial payment shown by the said Agreement [of conditional sale] has been actually received by the undersigned [defendant] * * *"; in the event of breach of warranty "the waiver of recourse * * * shall be void and the terms of the 'with recourse' assignment" quoted supra, 283 P. 2d 696, shall apply.

Before defendant made the assignments it had received the amount of the down payment specified in each conditional sale contract from the salesman who obtained such contract. Each of the buyers defaulted after making none or only one of the specified monthly payments. Plaintiff sued for the balance remaining unpaid. It alleged that the warranties "that the initial payment * * * has been actually received" were not true in that defendant "did not receive the down payment as specified and set out in the conditional sales contract."

Defendant's books contain entries crediting the down payments as made and we assume, in favor of defendant, that payments in such amounts were actually delivered to defendant by the salesmen. But the evidence establishes without contradiction that such payments were not made by the buyers under the contracts; the payments were merely reported by defendant's salesmen, who obtained such contracts, as being made. The salesmen were entitled to commissions greater than the amounts of the down payments; they filled in the contracts to indicate that the down payments had been made and told the buyers to repay them (the salesmen) at the buyers' convenience.[4]

These arrangements by the salesmen resulted in a situation forbidden by Regulation W issued by the Board of Governors of the Federal Reserve System under its authority to exercise consumer credit controls.[5]

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[4] One of the buyers testified that the salesman said that "that down payment was his commission and he had to put it down there so that the finance company would accept it as payment down on the account." Another buyer testified that the salesman said that "it had to be written in there so that the loan company would take it and that I could pay him whenever I had the money to pay him." And another buyer testified that when she told the salesman, "We don't have the down payment now," he replied, "you can pay me the down payment whenever you can and I will fill this in as though you had paid me so they will take the contract."

In oral argument defendant's counsel asserted that "There is a dispute as to who made those payments, and the record will reveal that"; that "there was substantial evidence to support the Court's finding" in the "without recourse" case that the following allegation of the complaint is untrue: "That the warranty made by the defendants was untrue in that they did not receive the down payment as specified and set out in the conditional sales contract." But, questioned further as to whether there was any evidence contradicting the testimony of the buyers that the down payments were not made by them, defendant's counsel stated, "as I recall, the only testimony on that point was that the buyers had stated they had not made the payments. Then there was testimony on behalf of respondents [defendant] that payments were made, books and ledgers were submitted in evidence and testimony was given on that point. Now it appears to me that there was a substantial conflict in that regard."

We cannot agree with defendant's counsel that any inference "to support the Court's finding" can be drawn from the evidence last mentioned (which in substance is that defendant's books and the contracts showed entries of credits to the purported buyers in the amounts of the down payments, not the identity of persons by whom those amounts were paid).

It is plaintiff's position that the sense of the warranties "That the initial payment * * * has been actually received" is that such payments had been made by the buyers. The trial court took the position that "it makes no difference" whether the down payment came in the form of personal credit from the salesmen and cash advanced by them or cash from the buyers.

[8] In ordinary parlance one understands, when a seller says that he has received a payment agreed to be made by a buyer, that he has received it from the buyer, not that it has been advanced by the seller's own salesman. Particularly does one so understand when a federal credit regulation in effect forbids the seller to accept a payment which he knows has been advanced by the salesman. Therefore, the trial court erred in its determination that the seller did not warrant that it had received the down payments from the buyers. Because of the breach of warranty the terms of the "with recourse" assignment became applicable, and plaintiff can recover from defendant the amount of the price which remains unpaid.

In the second action plaintiff introduced evidence as to only three of the five causes of action which it alleged. It asks that the judgment as to those three causes of action be reversed "with instructions to the trial court to enter judgments therein as prayed for." This request is apparently inadvertent, for plaintiff's own evidence shows that the amounts remaining unpaid are less than the amounts prayed for. According to the testimony of defendant's manager, called as a witness by plaintiff, the amount due under the first cause of action was $615.53, under the second cause of action $371.66, and under the fifth cause of action $580.75. The evidence as to the amounts due is not disputed.

[9, 10] For the reasons above stated the portion of the judgment appealed from in the first action (L.A.Superior Court No. 597248) is reversed with directions to the trial court to make appropriate findings of fact and conclusions of law and to enter judgment for plaintiff on its fifth cause of action in the principal amount of $641.55, together with reasonable attorneys' fees in an amount to be fixed by it, together also with interest at the legal rate from the date of judgment until paid;[6] the judgment in the second action (L.A.Superior Court No. 597249) is reversed with direc-

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The "testimony on behalf of respondents that payments were made" and the "books and ledgers * * * submitted in evidence" do not contradict the testimony of the buyers, the only witnesses at the trial who knew whether they had made the down payments.

[5] Regulation W (Title 32A, Code of Federal Regulations, rev. 1951, ch. XV, pp. 2364–2373) provided in pertinent part that on installment sales of freezers there should be a minimum down payment of 15 per cent of the cash price (§ 9); that "No credit complies with the requirements of this regulation if at the time the obligation arises there is any agreement, arrangement, or understanding * * * by which there is to be any evasion or circumvention, or any concealment of any evasion or circumvention, of any requirement of this regulation" (§ 6(h)); and that the seller "shall not extend any credit for financing the purchase * * * if he knows or has reason to know that there is * * * any other credit of any kind extended in connection with the purchase * * * which would bring the total amount of credit extended in connection with such purchase beyond the amount of instalment credit permitted by this regulation" (§ 6 (i)).

[6] Plaintiff has not asked for interest on the amounts due and makes no showing of the time when they became due and payable. Where there is no express contract covering the matter, the law awards interest on money from the time it becomes due and payable if such time is certain or can be made certain by calculation (Civ.Code, §§ 3287, 3302; Pitzer v. Wedel (1946), 73 Cal.App.2d 86, 92–93, 165 P.2d 971; 14 Cal.Jur., Interest, § 5, p. 678). In the absence of a showing as to such time, and in the absence of a demand for interest, there is no occasion to award it. The Constitution and statutes, however, provide for the automatic inclusion of interest from the date of judgment. (Cal.Const. art. XX, § 22 (No. 2); Code Civ.Proc. §§ 682, 1033.)

tions to the trial court to make appropriate findings of fact and conclusions of law and to enter judgment for plaintiff in the principal amount of $615.53 on the first cause of action, $371.66 on the second cause of action, and $580.75 on the fifth cause of action, together with attorneys' fees as to each count in a reasonable amount to be fixed by it, together also with interest at the legal rate from the date of judgment until paid,[6] and that plaintiff take nothing by its third and fourth causes of action.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, and SPENCE, JJ., concur.

CARTER, Justice (concurring and dissenting).

I concur in the reversal of the judgment in the first action (L.A.Superior Court, No. 597248), but I disagree with the views expressed by the majority with respect to the second action (L.A.Superior Court, No. 597249). In the latter action the majority reverses the judgment of the trial court and directs judgment for plaintiff on the ground that the evidence shows without conflict that the buyers under the contracts did not make the down payment and hence the warranty that the down payment had been received by the seller was breached and the assignment became one with recourse. To reach that conclusion the majority relies on the testimony of the buyers that they made no down payment—that the seller's salesman made them for them. It is true the buyers' testimony was uncontradicted by other *testimony* but there is other evidence that the buyers made the down payments. The contracts, signed by the buyers and seller, state that the down payment had been made by the buyers. The seller's books show that the payments were made and it may be inferred that they were made by the buyers for the reason that the buyers were the ones who were to make them. This evidence is amplified by the presumptions that "private transactions have been fair and regular"; "that the ordinary course of business has been followed"; and that things have happened according to the ordinary course of nature and the ordinary habits of life. Code Civ. Proc. § 1963(19), (20), (28). Moreover, there is sufficient from the foregoing for the trial court to have disbelieved the buyers' testimony. There is, therefore, a substantial conflict in the evidence and the finding of the trial court should not be upset nor should this court decide that factual issue as a matter of law by directing the entry of judgments.

In addition to the foregoing, plaintiff's assignee's complaint contains the allegation that "By the terms and conditions of said contract, it was provided that the balance to be paid thereon was the sum of $757.62 after deducting a cash payment of $111.03 made by said" buyers. This is clearly susceptible of the construction that plaintiff admitted the buyers made the down payment.

For the foregoing reasons I would affirm the judgment for defendant in the second action.

44 Cal.2d 559

I. E. S. CORPORATION et al., Petitioners,
v.
SUPERIOR COURT OF COUNTY OF LOS ANGELES et al., Respondents.

Max Gold and Republic Aircraft Parts, Inc., Real Parties in Interest.
L. A. 23536.

Supreme Court of California.
In Bank.
May 10, 1955.

Original mandamus proceeding to require court to set aside order sustaining refusal of defendant in action for breach of contract to answer certain questions in pretrial deposition. The Supreme Court, Traynor, J., held that questions relating to identities of persons who sold goods involved in contract to defendant or from whom he intended to buy, and defendant's knowledge of goods to be sold plaintiffs under contract, and their market values were relevant to questions of whether defendant's representations as to goods to be sold under contract were made without belief in their truth, were relevant in action for breach of contract and should be answered by defendant.

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[6] See Note 6 on page 699.

Writ granted.

1. Discovery ⚷41

In the interest of full disclosure, witness, in a deposition pursuant to discovery statute, must answer all questions seeking nonprivileged information that is material to the subject matter of the pending action. West's Ann.Code Civ.Proc. § 2021, subd. 1.

2. Discovery ⚷41

Although a witness in his deposition taken pursuant to discovery statute cannot block interrogation by contending that it is a fishing expedition or by urging secrecy of his methods in doing business, at the same time the witness need not answer questions that serve no proper purpose or are irrelevant. West's Ann.Code Civ.Proc. §§ 2021, subd. 1, 2065, 2066.

3. Discovery ⚷41

In action for breach of contract for sale of engines where complaint alleged conspiracy by seller and others dealing in war surplus engines, to obtain secret rebates and secret profits, and delivery of inferior type engines, under contract for sale to plaintiffs, defendant's knowledge of engines and their market values, and identity of persons who sold goods to defendant or for whom he intended to buy, were relevant and defendant should have answered pretrial interrogatories seeking such information. West's Ann.Code Civ.Proc. §§ 2021, subd. 1, 2065, 2066; West's Ann.Civ. Code, § 1710, subds. 1, 2, 4.

4. Discovery ⚷42

Question asked defendant in pretrial deposition in action for breach of contract for sale of war surplus engines, if his attorney told him before hearing at which interrogatories were presented, not to name yards or people visited on a trip, involved a privileged communication not within scope of proper interrogation. West's Ann.Code Civ.Proc. §§ 1881, subd. 2, 2021, subd. 1.

5. Discovery ⚷63

Questions asked by plaintiff in pretrial deposition in action for breach of contract for sale of war surplus engines seeking identities of everyone defendant knew on surplus business and everyone he interviewed in Chicago at a certain time were too broad, as plaintiffs could secure information required by limiting inquiry to identity of persons connected with transactions. West's Ann.Code Civ.Proc. § 2021, subd. 1.

6. Mandamus ⚷4(3)

Mandamus was proper remedy for correcting order of court sustaining refusal of defendant in action for breach of contract for sale of war surplus engines to answer pretrial interrogatories proposed by plaintiffs, since appeal from final judgment would not afford adequate remedy for correcting error. West's Ann.Code Civ.Proc. § 2021, subd. 1.

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Combs & Hoose, Lee Combs and Harned Pettus Hoose, Beverly Hills, for petitioners.

No appearance for respondents.

Leo K. Gold, Beverly Hills, for real parties in interest.

TRAYNOR, Justice.

Petitioners,[1] plaintiffs in an action pending in the Superior Court of Los Angeles County, seek a writ of mandate directing respondent court to set aside an order sustaining defendant's refusal to answer certain questions in a pretrial deposition and to enter an order compelling defendant to answer these questions and any other similar questions that may be asked.

The complaint in the pending action alleges that plaintiff[1] entered into a series of contracts and options for the purchase of war surplus engines, machinery, and equipment from defendant in reliance on defendant's representations that he possessed sufficient funds and organizational capacity to perform, that the engines were new and serviceable, and that he would obtain them for plaintiff at below market rates. It is charged that these representations were fraudulent, that plaintiff's former president exceeded his authority in negotiating and signing the contracts on plaintiff's behalf, and that defendant breached the contract by failing to deliver 750 engines. It is also alleged that plaintiff and defendant reduced the contracts and options to a single integrated option, but when plaintiff attempted to acquire certain machinery by exercising a separate and divisible part of the option, defendant refused to perform; that plaintiff issued a notice of rescission as to all contracts and options except those pertaining to certain items of machinery that already had been delivered and accepted; and that although defendant continues to demand payments, plaintiff owes nothing to defendant but is itself entitled to damages because the accepted goods were inferior in quality and higher in price than represented.

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[1] Plaintiffs are two closely related corporations bearing the same name. In both the pleadings and the briefs they are frequently referred to as one corporation and will be so referred to herein.

The complaint also contains extensive allegations concerning a conspiracy by defendant, various sellers of war surplus engines, and plaintiff's former president. It is alleged that "the defendants and each and every one of them did conspire and agree that they would purchase and give option for and purport to sell to the plaintiff certain war surplus and other machinery and equipment at extremely high and unfair prices; that defendants and each of them did further conspire to defraud the plaintiffs by misrepresenting to the plaintiffs the true condition of said machinery and equipment, by obtaining secret rebates and secret profits by reason of the plaintiffs' purchase of said machinery and equipment, by the delivery to the plaintiffs by the defendants and each of them of machinery and equipment of an inferior type which was represented to the plaintiffs as unused machinery or machinery and in good condition (sic), and by doing and conspiring to do each and every one of said acts." The complaint charges that pursuant to the conspiracy, defendant and plaintiff's former president made an extensive buying trip together during which they got in touch with sellers of war surplus machinery and conspired with them to "lure the plaintiffs into numerous purchases of non-existent machinery, inferior machinery, highly overpriced machinery, machinery as to which the defendants and each of them had no right to grant options or to sell, * * * and to extract huge secret profits and rebates from plaintiffs and to sell to plaintiffs inferior and unmerchandiseable machinery at a vast profit." Numerous fictitious persons are joined as defendants, and it is alleged that they are the unknown conspirators who will be served with summons as soon as their identities are divulged. The complaint requests declaratory relief as to the contracts and options between plaintiff and defendant, restitution of deposits paid to defendant, recovery of damages caused by defendant's misrepresentations, and the recovery of secret profits and rebates from defendant and his co-conspirators.

In giving his deposition, defendant answered questions concerning his negotiations with plaintiff's former president, the execution of the integrated option, his delivery of goods to plaintiff and plaintiff's subsequent refusal to pay him or to accept further deliveries. He admitted making the buying trip with plaintiff's former president and said that he had offered to sell him engines that they had inspected together. He refused, however, to reveal from whom, in what manner, and at what prices he had acquired his engines. He was asked about the nature of his business with Green Bros. Trucking Sales Company of Chicago, Illinois, whether he had purchased 650 to 750 engines from them, and whether he had resold these engines to plaintiff, but he refused to answer. Nor would he reveal the identities of any sellers of war surplus machinery with whom he dealt during the buying trip or the nature of his transactions with them, or answer the questions: "Who in it [the surplus business] do you know?" "What other companies besides Green

Brothers did you interview in Chicago?" "Prior to this information that someone else had bought stock in the I. E. S., you had a conversation with Tom Benevides about buying into the company yourself, didn't you?" "By the way, did your lawyer tell you before this hearing, or prior to today, not to name the yards or the people on your trip?" He also refused to answer questions concerning his knowledge of engines and their prices. Asserting that the questions were irrelevant and immaterial, that no foundation for them had been laid, that communications by his counsel were privileged, and that he was not required to reveal the sources of the goods that he sold, defendant refused to answer fifty-five questions. Of these, the superior court ordered him to answer only three.

[1, 2] In the interest of full disclosure, the witness in a deposition taken pursuant to section 2021, subd. 1, of the Code of Civil Procedure must answer all questions seeking nonprivileged information that is material to the subject matter of the pending action. McClatchy Newspapers v. Superior Court, 26 Cal.2d 386, 395, 159 P.2d 944; San Francisco Gas & Electric Co. v. Superior Court, 155 Cal. 30, 34, 99 P. 359; Verdier v. Superior Court, 88 Cal.App.2d 527, 531, 199 P.2d 325; Rossbach v. Superior Court, 43 Cal.App. 729, 731, 185 P. 879; see Holm v. Superior Court, 42 Cal.2d 500, 505, 267 P.2d 1025, 268 P.2d 722; Ahern v. Superior Court, 112 Cal.App.2d 27, 31, 245 P.2d 568; Carnation Co. v. Superior Court, 96 Cal.App.2d 138, 140, 214 P.2d 552, and he cannot block the interrogation by contending that it is a "fishing expedition" or by urging the secrecy of his methods of doing business.[2] At the same time, the taking of a deposition must not be abused, Crocker v. Conrey, 140 Cal. 213, 217, 73 P. 1006, and the witness need not answer questions that serve no proper purpose or are irrelevant. Code Civ.Proc. §§ 2065, 2066; McClatchy Newspapers v. Superior Court, supra, 26 Cal.2d 386, 395, 159 P.2d 944; see Dastagir v. Dastagir, 109 Cal.App.2d 809, 816–820, 241 P.2d 656, and cases and authorities there cited.

[3] In the present case, most of the unanswered questions seek to determine the identities of persons who sold goods to defendant or from whom he intended to buy and defendant's knowledge of engines and their market values. Defendant's knowledge is relevant to the question whether his representations were made without belief, or in the absence of reasonable grounds for belief, in their truth. Civil Code, § 1710, subds. 1, 2. Similarly, plaintiff was entitled to learn the sources of the goods to determine whether they were sold to defendant in the condition and at the prices represented and whether the sellers had conspired with defendant to defraud plaintiff. Moreover, the identity of persons from whom defendant intended to buy is relevant, for if defendant's answers indicated that he had no anticipated source of supply, that fact would tend to prove that he made promises to plaintiff without the intention of performing them. Civil Code, § 1710, subd. 4. Forty-eight of the questions involved seek information of the foregoing kind and therefore must be answered.[3]

[4] Four questions, however, are not within the scope of proper interrogation. On the ground that it was a privileged communication, defendant refused to answer the question, "By the way, did your lawyer tell you before this hearing, or prior to today, not to name the yards or the people on your trip?" Code of Civil Procedure, section 1881, subdivision 2 provides that "An attorney can not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of

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[2] Methods of doing business, other than secret processes, developments, or research, have not been protected from inquiry in deposition proceedings under the Federal Rules of Civil Procedure, 28 U.S.C.A. Moss v. Aetna Standard Engineering Co., D.C., 8 F.R.D. 323; see 59 Yale L.J. 117, 42 Calif.L.R. 829.

[3] As numbered in Exhibit B of plaintiff's petition, the questions that must be answered are 1–5, 7–10, 12–19, 21–48, and 50–55.

professional employment", and it is settled that the privilege cannot be defeated by attempting to elicit the privileged communications from the client instead of the attorney. City and County of San Francisco v. Superior Court, 37 Cal.2d 227, 236, 231 P.2d 26, 25 A.L.R.2d 1418, and cases cited.

[5] On the grounds that they were irrelevant and immaterial, defendant refused to answer the following questions: "Prior to this information that someone else had bought stock in the I. E. S., you had a conversation with Tom Benavides about buying into the company yourself, didn't you?" "What other companies besides Green Brothers did you interview in Chicago?" "Who in it [the surplus business] do you know?" Whether or not defendant had a conversation about buying stock in plaintiff has no bearing on the invalidity of the contracts, breaches of contract, misrepresentations, or conspiracies alleged in the complaint. The questions seeking the identities of everyone defendant knew in the surplus business and everyone he interviewed in Chicago were too broad. It is not improbable that defendant knew and interviewed people who had no connection with his transactions with plaintiff, and the identity of such persons would be irrelevant. In this respect plaintiff may secure all the information to which it is entitled by limiting its inquiry to the identity of persons who were connected with the transactions that are the subject matter of the action.

[6] Since an appeal from the final judgment would not afford an adequate remedy for correcting the order of respondent court sustaining defendant's refusal to answer, mandamus is the proper remedy. McClatchy Newspapers v. Superior Court, supra, 26 Cal.2d 386, 392, 159 P.2d 944. Let a writ of mandate issue directing respondent to set aside its order and to make the necessary orders to enable completion of the deposition in accord with the views expressed herein.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concur.

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44 Cal.2d 574

Henry Miller BOWLES et al., Petitioners,
v.
The SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al., Respondents;

George W. Nickel, Jr., et al., Real Parties in Interest.

George W. NICKEL et al., Petitioners,
v.
The SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al., Respondents;

George W. Nickel, Jr., et al., Real Parties in Interest.

S. F. 19122, 19123.

Supreme Court of California.
In Bank.
May 19, 1955.

Rehearing Denied June 16, 1955.

Proceeding for writs of prohibition and mandamus with respect to action by some remaindermen against trustees for accounting and other relief with respect to trust estate, income of which was payable to three life tenants and corpus of which was to be shared by children of two life tenants or children's issue. The Supreme Court, Gibson, C. J., held that where there were no issues concerning conflicting rights among different groups of beneficiaries and no questions regarding personal claims to any of trust property and where all beneficiaries had identical interests in appointment of receiver and change in trustees, life tenants and other remaindermen were not indispensable parties.

Alternative writs of prohibition discharged, peremptory writ denied.

Opinion 276 P.2d 168, vacated.

1. Prohibition ⚿3(1, 5)

Writ of prohibition is not available where there is plain, speedy and adequate remedy in ordinary course of law, and in absence of special circumstances, right to immediate review by appeal is considered an adequate remedy. West's Ann.Code Civ.Proc. § 1103.

2. Appeal and Error 🔑78(2)

Order denying request for leave to file complaint in intervention is appealable on theory that denial is final determination of litigation as to parties seeking to intervene. West's Ann.Code Civ.Proc. § 963.

3. Prohibition 🔑34

Even though existence of rights to immediate appeal from order denying request for leave to file complaint in intervention constituted adequate remedy, Supreme Court was not required to dismiss proceeding for writ of prohibition with respect to action by some remaindermen against trustees for accounting and other relief with respect to trust estate, where District Court of Appeal had issued alternative writs, considered and determined matter on merits, and granted peremptory writ of prohibition, and where to refrain from deciding whether court had exceeded jurisdiction in granting writ would hinder and delay rather than serve interests of justice.

4. Parties 🔑18, 29

Where persons are so interested in controversy that they should normally be made parties in order to enable court to do complete justice, but their interests are separable from rest, they are necessary but not indispensable parties. West's Ann.Code Civ.Proc. § 389.

5. Parties 🔑18, 29

One may be indispensable party if his interest in subject-matter of controversy is of such nature that final decree cannot be rendered between other parties to suit without inevitably affecting that interest. West's Ann.Code Civ.Proc. § 389.

6. Appeal and Error 🔑1036(3)
Parties 🔑79, 82
Prohibition 🔑10(2)

Failure to join necessary parties is error, reversible on appeal, but unless absent person is also an indispensable party, error does not go to jurisdiction of court and will not warrant issuance of prohibition. West's Ann.Code Civ.Proc. § 389.

7. Receivers 🔑34

Where appointment of receiver in trust proceeding did not adversely affect any interest of beneficiaries in trust property, but, to contrary, was necessary to protect property which undoubtedly would have been lost if court had refused to take such step, court had jurisdiction to appoint such receiver without ordering joinder of other parties.

8. Trusts 🔑167

Presence of all beneficiaries of trust is not indispensable to removal of trustee.

9. Trusts 🔑162

Superior court has jurisdiction to accept tendered resignations of trustees of trust without first ordering that other persons be joined as parties.

10. Trusts 🔑167

Beneficiary has no right to compel retention of a trustee who is unfit.

11. Trusts 🔑169(1, 3)

Courts have power to appoint new trustees in case of vacancy, and, in absence of statute to contrary, it is not necessary to exercise of this jurisdiction that beneficiaries of trust be joined in proceeding or notified in advance of court's action.

12. Trusts 🔑169(1)

Superior court had power to appoint new trustees to fill vacancies created by resignation of prior trustees.

13. Trusts 🔑169(3)

Trust beneficiaries, having participated in hearing set for appointment of new trustees, without objection on ground of lack of notice, could not subsequently assert that court exceeded its jurisdiction in making substitutionary trustee appointments. West's Ann.Civ.Code, § 2287; Probate Code, §§ 1125, 1126.

14. Trusts 🔑366(1)

Where a number of persons have undetermined interests in trust fund and one of them, acting adversely to others, seeks to recover whole, to fix his share, or recover a portion claimed by him, other persons are indispensable parties.

15. Trusts 🔑167

Where, in trustee removal action, there were no issues concerning conflicting rights among different groups of beneficiaries and no questions regarding personal claims to any of trust property and where all beneficiaries had identical interests in appointment of receiver and change in trustees, life tenants and other remaindermen were not indispensable parties.

16. Parties ⚷10

Represented parties are parties in legal effect and need not be brought in as formal parties.

17. Parties ⚷11, 12

Class suit statute authorizes representative suit even though it is practicable to join all parties if those to be represented are many and have a common or general interest in questions presented by complaint. West' Ann.Code Civ.Proc. § 382.

18. Trusts ⚷167, 305, 366(2)

One of beneficiaries may properly maintain a representative action on behalf of others with respect to such matters as appointing receiver, removing trustees, compelling an accounting and impressing trust upon property purchased with trust money.

19. Parties ⚷11

Representative suit is not permissible unless there is a community of interest between members of class with respect to questions of law and fact involved, and determination of whether particular plaintiff can fairly protect rights of group he purports to represent is necessarily dependent upon facts and circumstances of each case.

20. Trusts ⚷159, 173

No beneficiary has right to have a particular person selected to serve as trustee, and no trustee can properly act for only some of beneficiaries, but he must represent all of them or he cannot properly represent any of them.

21. Trusts ⚷159

Every beneficiary is entitled to trustees who are capable and impartial and who will faithfully execute trust in accordance with its terms, and these interests are common to all beneficiaries.

22. Receivers ⚷34
Trusts ⚷167

Where question relating to appointment of receiver and change of trustees were of common and general interest to beneficiaries, and remaining matters which gave rise to conflicts in interest were either outside issues set forth or were removed by amendment, all requirements of class suit were present, including existence of a community of interest between represented parties and persons representing them, and beneficiaries seeking to intervene were in effect parties to preceedings although not formally named as such.

23. Parties ⚷38

Even though represented parties may intervene and become formal parties in order to participate in proceedings and protect their interests, right to intervene is statutory. West's Ann.Code Civ.Proc. § 387.

24. Parties ⚷46

In interests of orderly procedure, person should be allowed to intervene only if he takes position on pleadings in accordance with requirements of statute governing intervention, and court has power to deny permission to intervene to any applicant failing to comply with provisions of such statute. West's Ann.Code Civ. Proc. § 387.

25. Trusts ⚷257, 305

Proposed complaints in intervention by trust beneficiaries in action by some remaindermen against trustees for accounting and other relief with respect to trust estate, which did not meet requirements of statute governing intervention in that such complaints did not allege that applicants joined with plaintiffs or united with defendants or demanded anything adversely to both plaintiffs and defendants, court was not under duty to permit offered pleading to be filed. West's Ann.Code Civ.Proc. § 387.

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John Francis Neylan, Palo Alto, and John F. Duff, San Francisco, for petitioners Bowles and others.

Reginald L. Vaughan, Varnum Paul and Vaughan, Paul & Lyons, San Francisco, for petitioners Nickel and others.

Morse Erskine, San Francisco, for respondents.

C. Ray Robinson, T. Keister Greer, San Francisco, William B. Boone, Merced, Earl F. Hedlund, San Francisco, and Herman F. Selvin, Los Angeles, for real parties in interest.

GIBSON, Chief Justice.

Some of the beneficiaries of a trust established by Henry Miller brought a suit for removal of the trustees and for additional relief. Respondent court appointed a receiver, accepted the resignations of two trustees, removed the third trustee and appointed successor trustees. This proceeding was then commenced by other beneficiaries to prohibit further steps from being taken in that action and to have the orders already made declared null and void.

Under the terms of the trust, the income was payable for life to Henry Miller and then for life to his daughter and son-in-law, Nellie Miller Nickel and J. Leroy Nickel. After their deaths the income became payable to their three children, George W. Nickel, J. Leroy Nickel, Jr., and Beatrice Nickel Morse, who are life beneficiaries. Upon the death of a life beneficiary his share of the income is to be paid to his issue, and upon the death of the last surviving life beneficiary the trust is to terminate and the corpus, with certain exceptions, is to be distributed to the "descendants born in lawful wedlock" of Nellie Miller Nickel and her husband, J. Leroy Nickel. To differentiate between the classes of beneficiaries, we shall use the terms "life beneficiaries" and "remaindermen." Life beneficiary George W. Nickel had four children, hereafter called the Nickel remaindermen, and fifteen grandchildren. Beatrice Nickel Morse had three children, hereafter called the Bowles remaindermen, and six grandchildren. J. Leroy Nickel, Jr., had no children.[1] The trustees were J. Leroy Nickel,

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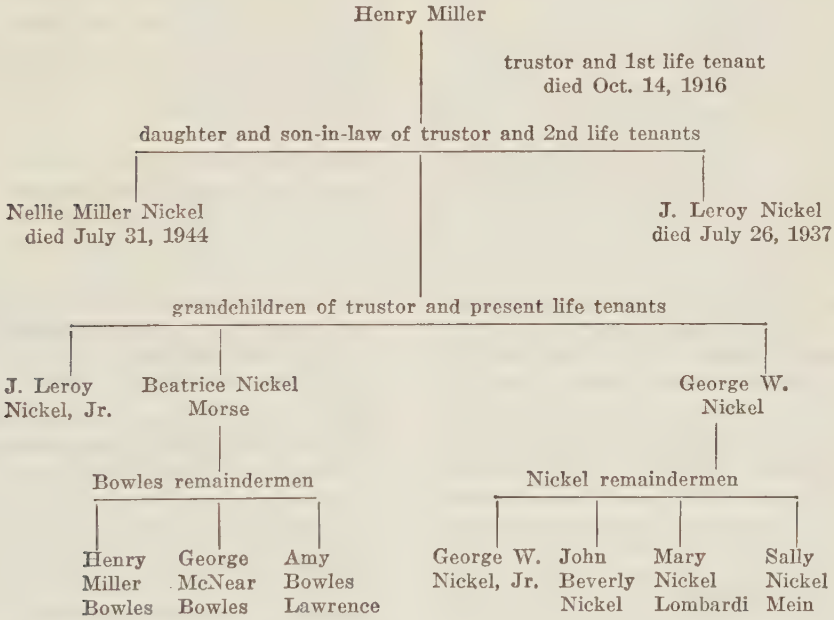
[1] The following chart shows the beneficiaries of the Henry Miller trust from April 17, 1913, the date of its creation, to June 13, 1954, the date the Nickel remaindermen filed their action:


Henry Miller
trustor and 1st life tenant
died Oct. 14, 1916
daughter and son-in-law of trustor and 2nd life tenants
Nellie Miller Nickel
died July 31, 1944
J. Leroy Nickel
died July 26, 1937
grandchildren of trustor and present life tenants
J. Leroy Nickel, Jr.
Beatrice Nickel Morse
George W. Nickel
Bowles remaindermen
Nickel remaindermen
Henry Miller Bowles
George McNear Bowles
Amy Bowles Lawrence
George W. Nickel, Jr.
John Beverly Nickel
Mary Nickel Lombardi
Sally Nickel Mein

After commencement of the trustee removal action remainderman John Beverly Nickel died leaving two children who will be entitled to the share their father would have received.

Jr., one of the life beneficiaries, J. E. Woolley and A. R. Olsen.

The trustee removal action was brought by three of the Nickel remaindermen, George W. Nickel, Jr., Mary Nickel Lombardi and John Beverly Nickel. Sally Nickel Mein later joined the other Nickel remaindermen as a party plaintiff. The present proceedings were commenced by two of the life beneficiaries, George W. Nickel and Beatrice Nickel Morse, and by the Bowles remaindermen, Henry Miller Bowles, George McNear Bowles and Amy Bowles Lawrence.

The complaint in the removal action was filed on June 13, 1954, by the Nickel remaindermen "as beneficiaries of the trust * * * who sue in their own behalf, and in behalf of all other persons who have a beneficial interest in said trust." They alleged that defendant trustees were guilty of fraud and mismanagement, that the trust, as well as certain corporations in which the trust owned most of the stock, had been defrauded by the acts of C. E. Houchin and others, that the trustees had failed and refused to present claims against the estate of Houchin following his death or to take steps to recover trust and corporate properties, and that claims against the Houchin estate would be barred by the statute of limitations unless presented by June 16.[2] The complaint prayed for the appointment of a receiver with authority to file such claims, for the removal of defendant trustees and the appointment of new trustees, for an accounting by the trustees and an order surcharging them in the amounts found due from them to the trust, and for an order directing J. Leroy Nickel, Jr., to return to the trust all income which he had received as a life tenant. While the present proceedings were pending, the Nickel remaindermen amended their complaint by deleting the portion of the prayer which requested that an accounting be had, that the old trustees be surcharged in the amounts due from them and that J. Leroy Nickel, Jr., return to the trust all income received by him as life beneficiary.

On June 13 the superior court issued an ex parte order appointing M. Mitchell Bourquin as receiver with authority to file claims on behalf of the trust, and the trustees were ordered to show cause why they should not be removed and new trustees appointed. On June 15, the return day, J. Leroy Nickel, Jr., and A. R. Olsen resigned as trustees. The third trustee, J. E. Woolley, was removed by the court on the ground that there was a conflict in interest, since he was a trustee of a trust declared in Houchin's will and attorney for Houchin's executor. The receiver was appointed as temporary trustee, and the hearing on the appointment of successor trustees was then continued to June 30.

When the hearing was resumed the petitioning life beneficiaries and the Bowles remaindermen presented complaints in intervention and requested leave to file them.[3]

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[2] The principal asset of the Henry Miller trust is the entire capital stock of defendant Miller & Lux Incorporated. Among the properties of that corporation are: over eighty per cent of the capital stock of defendant San Joaquin Canal Company, which has assets in excess of $4,000,000; over eighty-five per cent of the capital stock of defendant Buena Vista Associates Incorporated, which owns 23,000 acres of farming land in Kern County; and approximately 13,000 acres of productive farm lands as well as stocks, bonds and other securities of the minimum value of $5,500,000.

[3] The life beneficiaries' complaint stated their interest in the "proper and competent management" of the trust "to the end that the greatest possible income will be received therefrom," and in the appointment of "impartial and competent" trustees and requested leave "to intervene and thereafter participate in the matter in litigation * * * as their interests may appear or take such action and file such pleadings as they deem necessary to preserve the corpus of the trust and the distribution of its income."

The Bowles "complaint in intervention" stated that defendants' answers had not been filed, that the Bowles remaindermen were "unable" to "join with plaintiffs" for lack of information with regard to the matters alleged in plaintiffs' complaint, and that they, as beneficiaries, sought to intervene because "in common with the other beneficiaries" they have an interest "in having the administration of the trust investigated and

The court informed petitioners that their applications to intervene would be acted upon at a later date. The Bowles remaindermen then requested the court to appoint Henry Miller Bowles as trustee. The petitioning life beneficiaries suggested the appointment of a corporate trustee and two unbiased individuals, and they offered the names of several banks and a number of persons. J. Leroy Nickel, Jr., concurred in these suggestions. The court stated that the appointments would be made "today," that no one having a direct interest in the trust would be selected and that three completely disinterested persons would be appointed. The court asked if any other counsel wished to be heard and, upon receiving no response, appointed M. Mitchell Bourquin, Louis Ferrari and Jesse H. Steinhart as trustees. None of these persons was among those suggested by petitioners.

The court-appointed trustees assumed administration of the trust and, as holders of the stock of Miller & Lux Incorporated, participated in stockholders' meetings at which changes were made in the board of directors. On authorization of the directors, a contract was entered into with C. Ray Robinson, who was counsel for the Nickel remaindermen, employing him as attorney for the corporation in the investigation and prosecution of claims against the persons who were named in the trustee removal action as having defrauded the trust.

Pursuant to directions from the court to report at the earliest possible moment on the status of the administration of the trust, the trustees filed a report on July 30, and a hearing was had on August 2. The life beneficiaries and the Bowles remaindermen were present. A second complaint in intervention was offered by the Bowles remaindermen, and they made a motion that they be joined as necessary and indispensable parties.[4] The court stated that it would not entertain a petition or ex parte motion at that time, that the previous applications to intervene had been denied and that any subsequent motion for leave to intervene should come up "regularly, on notice and not ex parte." The report of the trustees was approved.

The present proceedings were thereafter commenced, and the District Court of Appeal issued alternative writs of prohibition, followed later by a peremptory writ. A hearing in this court was then granted.

Claims were filed by the receiver against the Houchin estate on June 15, and thereafter a suit based on them was commenced by Miller & Lux Incorporated in the United States District Court. Subsequently, Miller & Lux Incorporated, the new trustees and the Nickel remaindermen entered into an agreement not to sue the Houchin estate or the Houchin executors, who agreed in return that Miller & Lux Incorporated should receive more than two million dollars in cash together with property having a value of several million dollars.

[1, 2] We are confronted at the outset with the question of whether petitioners may use the writ of prohibition to determine if the trial court exceeded its jurisdiction in refusing to permit them to intervene as formal, named parties in the action. The writ, of course, is not available where there is a plain, speedy and adequate remedy in the ordinary course of law, Code Civ.Proc. § 1103, and in the absence of special circumstances the right to an immediate review by appeal is considered an adequate remedy. Phelan v. Superior Court, 35 Cal.2d 363, 370, 217 P.2d 951. Although section 963 of the Code of Civil Procedure, which designates appealable orders and judgments in civil cases, does not specifically list an order denying a request for leave to file a complaint in intervention, such an order has long been held appealable on the theory that

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the entire matter reviewed to the end that their interests as such beneficiaries in said trust, and the assets thereof, will be fully and adequately protected in all respects."

[4] The Second Bowles complaint declined to join with plaintiffs but stated that it demanded "adversely to defendants" a determination of the matters alleged in plaintiffs' complaint, if and when defendants should file an answer. It also demanded "adversely to defendants" that the trust should not be charged with the fees or costs arising out of the contract entered into between the new trustees and C. Ray Robinson.

the denial is a final determination of the litigation as to the party seeking to intervene. Stich v. Goldner, 1869, 38 Cal. 608, 610; Dollenmayer v. Pryor, 150 Cal. 1, 3, 87 P. 616; Braun v. Brown, 13 Cal.2d 130, 133, 87 P.2d 1009; see People v. Pfeiffer, 59 Cal. 89. None of the cited cases involved attempted intervention by a person who was, or was claimed to be, a member of a class on whose behalf an action was being prosecuted as a representative suit, but we see no valid reason why the right of appeal should not be afforded to any petitioner who is denied the right to intervene and thus become an active participant in the litigation.

[3] While the existence of the right to an immediate appeal may constitute an adequate remedy, we are not required to dismiss the proceedings under the circumstances present here. The District Court of Appeal issued alternative writs, considered and determined the matter on the merits and granted a peremptory writ of prohibition. It was, of course, the duty of that court before issuing an alternative writ to determine whether petitioners had another plain, speedy and adequate remedy in the ordinary course of law. Even though we may disagree with the determination of the District Court of Appeal as to the existence of another adequate remedy, it does not follow that we must refuse to allow the use of the writ to test the jurisdiction of the trial court. A final determination of the merits of this controversy at the earliest possible date is of great importance to all the parties, and it would hinder and delay rather than serve the interests of justice if we were, at this stage of the proceedings, to refrain from deciding whether the trial court has acted in excess of its jurisdiction.

[4, 5] Petitioners assert that their presence as formal or named parties was indispensable to a determination of the issues raised by the complaint and, therefore, that respondent court exceeded its jurisdiction in appointing a receiver, removing a trustee, selecting new trustees in the place of the one who was removed and the two who resigned, and denying petitioners leave to intervene. Section 389 of the Code of Civil Procedure provides that "when a complete determination of the controversy can not be had without the presence of other parties, the court must then order them to be brought in * * *." As pointed out in Bank of California Nat. Ass'n v. Superior Court, 16 Cal.2d 516, 521, 106 P.2d 879, in applying this section, a distinction has been drawn between necessary and indispensable parties. Where persons are so interested in the controversy that they should normally be made parties in order to enable the court to do complete justice, but their interests are separable from the rest, they are necessary but not indispensable parties. On the other hand, one may be an indispensable party if his interest in the subject matter of the controversy is of such a nature that a final decree cannot be rendered between the other parties to the suit without inevitably affecting that interest. For example, where one person seeks to establish the amount of his share in certain property or in a particular trust fund, other persons with similar interests are indispensable parties.

[6] Under section 389, it is error, reversible on appeal, to fail to join a necessary party, but unless the absent person is also an indispensable party, the error does not go to the jurisdiction of the court and will not warrant the issuance of prohibition. Bank of California Nat. Ass'n v. Superior Court, 16 Cal.2d 516, 525-526, 106 P.2d 879; see Harrington v. Evans, 99 Cal.App.2d 269, 271, 221 P.2d 696. In the present case there is no question that petitioners are proper parties, and they may even be necessary parties, but they failed to avail themselves of the remedy of appeal and applied instead for prohibition. It becomes necessary, therefore, for us to consider if they are indispensable parties. It may be noted in this connection that, since this is not a collateral attack upon the order of the court, we are not faced with the question of whether the court lacked jurisdiction in the fundamental sense, but rather with the problem of whether the court acted in excess of its jurisdiction as that term is used in determining whether prohibition and certiorari are proper remedies. See Abelleira v. District Court of Appeal, 17 Cal.2d 280, 287–291, 109 P.2d 942, 132 A.L.R. 715.

[7] Upon presentation of the complaint the court had jurisdiction to appoint a receiver without ordering the joinder of other parties. The appointment did not adversely affect any interest of the beneficiaries in the trust property but, to the contrary, was necessary to protect property which undoubtedly would have been lost if the court had refused to take this step. The claims against the Houchin estate would have been barred by the statute of limitations unless filed within three days, and the court was faced with the necessity of taking immediate action to preserve this portion of the trust property. The importance of the trial court's action is indicated by the fact that the filing of claims against the Houchin estate and the bringing of suit thereon in the federal court produced the agreement for settlement by which Miller & Lux Incorporated would receive over two million dollars in cash together with property valued at several million dollars.

[8–10] Likewise, the presence of all the beneficiaries of a trust is not indispensable to the removal of a trustee. Wesson v. Crain, 8 Cir., 165 F.2d 6, 9–10; In re Marshall's Will, 78 Ohio App. 1, 65 N.E.2d 523, 525; Moody v. Branson, Okl., 136 P.2d 925, 927 [denying collateral attack upon removal order]. There can be no question that respondent court had jurisdiction to accept the tendered resignations of the two trustees without first ordering that other persons be joined as parties. The record shows that the third trustee, because of his admitted relationship with the Houchin estate, had interests which were so conflicting with his duties as trustee that his removal was clearly required. A beneficiary has no right to compel the retention of a trustee who is unfit, see Wesson v. Crain, 8 Cir., 165 F.2d 6, 9, and under the circumstances presented here the court had authority to remove the third trustee.

Once the positions of all trustees were vacant, the court was, of course, required to make provision for the care of the trust estate, and it had power to designate the receiver to act as temporary trustee pending appointment of new trustees.

[11, 12] Under traditional equity practice the courts have power to appoint new trustees in case of vacancy, and, in the absence of a statute to the contrary, it is not necessary to the exercise of this jurisdiction that the beneficiaries of the trust be joined in the proceeding or notified in advance of the court's action. See Dyer v. Leach, 91 Cal. 191, 193–194, 27 P. 598; Sanders v. Hall, 10 Cir., 74 F.2d 399, 404–405, certiorari denied 295 U.S. 739, 55 S.Ct. 653, 79 L.Ed. 1686; Freeman v. Prendergast, 94 Ga. 369, 21 S.E. 837, 839 et seq.; Moody v. Branson, Okl., 136 P.2d 925, 927; Bransford Realty Co. v. Andrews, 128 Tenn. 725, 164 S.W. 1175, 1177–1178. While the cited decisions involved collateral attack on prior orders, their language supports our conclusion that the court in the present case had power to make the appointments and that it did not act in excess of its jurisdiction as that term is used in determining whether certiorari or prohibition may be issued. See Abelleira v. District Court of Appeal, 17 Cal.2d 280, 288 et seq., 109 P.2d 942, 132 A.L.R. 715; Howard v. Superior Court, 25 Cal.2d 784, 787 et seq., 154 P.2d 849. In the Dyer case, 91 Cal. at pages 193–194, 27 P. at page 599, it was pointed out that the theory of the law is that upon a vacancy in the position of trustee "the trust vests in the court, and, in the absence of a statutory provision, notice is not necessary to confer jurisdiction." The court quoted from a New York decision, Milbank v. Crane, 25 How.Prac. 193, to the effect that the jurisdiction in such a case is "'a quasi jurisdiction in rem, a power over the trust, and is not acquired by the service of process * * *.'" See also Sanders v. Hall, 10 Cir., 74 F.2d 399, 404–405; Bransford Realty Co. v. Andrews, 128 Tenn. 725, 164 S.W. 1175, 1177–1178.

[13] Our statutes contain no express requirement for notice to beneficiaries of a hearing for the appointment of new trustees, but petitioners argue that the provision regarding nominees in section 2287 of the Civil Code indicates a legislative intent that such notice be given. Section 2287 provides that the superior court may appoint a trustee whenever there is a vacancy and that "Other things being equal, the court shall give preference to the nominee of beneficiaries of the trust who are over fourteen years of age." As we have seen,

the courts traditionally have had power to appoint a successor trustee without giving notice to the beneficiaries, and we are of the view that if the Legislature had intended to restrict this power it would have done so by a specific provision rather than by leaving the matter to inference. It may be noted that, in the case of *testamentary* trusts, where the Legislature intended to require notice of hearing of the appointment of successor trustees, it made explicit provision therefor. Prob.Code, §§ 1125, 1126. Moreover, petitioners were present at the hearing set for the appointment of new trustees, and, after obtaining permission from the court, they suggested various persons and corporations as successor trustees. Having thus participated in the hearing, without objection on the ground of lack of notice, petitioners are in no position to assert that the court exceeded its jurisdiction in making the appointments.

[14, 15] The cases of First Nat. Trust & Sav. Bank of San Diego v. Superior Court, 19 Cal.2d 409, 414, 121 P.2d 729; Mitau v. Roddan, 149 Cal. 1, 6–8, 84 P. 145, 6 L.R.A.,N.S., 275; O'Connor v. Irvine, 74 Cal. 435, 443, 16 P. 236, and McPherson v. Parker, 30 Cal. 455, 457, relied on by petitioners, involved conflicting rights among beneficiaries or between them and the trustees. Accordingly, they come within the rule stated in Bank of California Nat. Ass'n v. Superior Court, 16 Cal.2d 516, 521, 106 P.2d 879, that where a number of persons have undetermined interests in a trust fund and one of them, acting adversely to the others, seeks to recover the whole, to fix his share, or recover a portion claimed by him, the other persons are indispensable parties. In the trustee removal action, however, there were no issues concerning conflicting rights among the different groups of beneficiaries and no questions regarding personal claims to any of the trust property. As we shall see, all beneficiaries of the trust had identical interests in the appointment of a receiver and the change in trustees. The amendment of the complaint in the trustee removal action operated to eliminate all issues relating to accounting by the former trustees and to return of income received by J. Leroy Nickel, Jr. The other matters urged by petitioners as showing a conflict among the beneficiaries, such as the details of prosecuting and financing the suit against the Houchin estate, are not within the issues raised by the complaint, and any objections petitioners may have as to these matters may be raised in appropriate proceedings. Likewise, in view of the amendment withdrawing the demand for an accounting, the federal cases cited by petitioners in which the plaintiff sought to compel the trustee to account for property do not support their claim that they are indispensable parties. See Baird v. Peoples Bank & Trust Co., 3 Cir., 120 F.2d 1001, 136 A.L.R. 693; Franz v. Buder, 8 Cir., 11 F.2d 854; Talbutt v. Security Trust Co., D.C., 22 F.Supp. 241.

[16] An alternative reason for rejecting the claim that the trial court exceeded its jurisdiction in failing to join petitioners as indispensable parties is that they are represented parties; hence they are parties in legal effect and need not be brought in as formal parties. Rosicrucian Fellowship v. Rosicrucian, etc., Church, 39 Cal.2d 121, 139–140, 245 P.2d 481; Moore v. Bowes, 8 Cal.2d 162, 165–166, 64 P.2d 423. The principle applies to those who are indispensable to a complete determination of the controversy as well as to one who is merely a proper or necessary party, and we are of the view that the trustee removal action is a proper representative suit.

[17] Section 382 of the Code of Civil Procedure provides that when a question "is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the Court, one or more may sue or defend for the benefit of all." The statute authorizes a representative suit even though it is practicable to join all the parties if those to be represented are "many" and have a common or general interest in the questions presented by the complaint. Jellen v. O'Brien, 89 Cal.App. 505, 509, 264 P. 1115; see Carey v. Brown, 58 Cal. 180, 183; Weaver v. Pasadena Tournament of Roses, 32 Cal.2d 833, 837, 198 P.2d 514; Parker v. Bowron, 40 Cal.2d 344, 352, 254 P.2d 6; 2 Witkin, California Procedure (1954), 1081. The term "many" in the

statute is indefinite and clearly is sufficiently broad to cover all the various beneficiaries of the Henry Miller trust.

[18, 19] It is settled that one of the beneficiaries may properly maintain a representative action on behalf of the others with respect to such matters as appointing a receiver, removing trustees, compelling an accounting and impressing a trust upon property purchased with trust money. Baumann v. Bedford, 18 Cal.2d 366, 371–372, 115 P.2d 437; Goes v. Perry, 18 Cal.2d 373, 379, 115 P.2d 441; Moore v. Bowes, 8 Cal.2d 162, 166, 64 P.2d 423; Farmers' & Merchants' Nat. Bank of Los Angeles v. Peterson, 5 Cal.2d 601, 605, 55 P.2d 867; see Peterson v. Donelley, 33 Cal.App.2d 133, 136–137, 91 P.2d 123. Petitioners contend that this rule is not applicable here because, they assert, there is no community of interest between the life beneficiaries and the remaindermen since the former desire a trust administration which produces a maximum of income and the latter would be benefited by the preservation and enlargement of the corpus of the trust estate. A representative suit is not permissible unless there is a community of interest between the members of the class with respect to the questions of law and fact involved, Parker v. Bowron, 40 Cal.2d 344, 352, 254 P.2d 6; Weaver v. Pasadena Tournament of Roses, 32 Cal.2d 833, 837–838, 198 P.2d 514, and a determination of whether a particular plaintiff can fairly protect the rights of the group he purports to represent is necessarily dependent upon the facts and circumstances of each case.

[20, 21] Although there may be divergent interests between the groups with respect to certain matters not involved here, there is a community of interest among all the beneficiaries as to the issues embraced in the trustee removal action. It was to the advantage of all the beneficiaries to obtain the immediate appointment of a receiver in order to present claims against the Houchin estate, and no valid objection could be made to the removal of the trustee who had conflicting duties. The same facts and legal principles will determine the qualifications of a trustee regardless of the individual desires or preferences of the beneficiaries. No beneficiary has the right to have a particular person selected to serve as trustee, and no trustee can properly act for only some of the beneficiaries—he must represent all of them or he cannot properly represent any of them. Every beneficiary is entitled to trustees who are capable and impartial and who will faithfully execute the trust in accordance with its terms, and these interests are common to all the beneficiaries.

[22] It thus appears that the questions relating to appointment of a receiver and change of trustees were of common and general interest, and the remaining matters which assertedly gave rise to conflicts in interest were either outside the issues set forth in the original complaint or were removed by amendment. All the requirements of a class suit were present, including the existence of a "community of interest" between the represented parties and the persons representing them. It follows therefore, that petitioners were in effect parties to the proceedings in the superior court although not formally named as such.

[23, 24] The trial court did not exceed its jurisdiction in denying petitioners leave to intervene under the provisions of section 387 of the Code of Civil Procedure.[5]

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[5] Section 387 of the Code of Civil Procedure reads as follows: "At any time before trial, any person, who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant, and is made by complaint, setting forth the grounds upon which the intervention rests, filed by leave of the court and served upon the parties to the action or

While it is true that represented parties may intervene and become formal parties in order to participate in the proceedings and protect their interests, the right to intervene is statutory. See Lindsay-Strathmore Irr. Dist. v. Superior Court, 182 Cal. 315, 326, 187 P. 1056; Chase v. Evoy, 58 Cal. 348, 355; In re Yokohama Specie Bank, 86 Cal.App.2d 545, 554, 195 P.2d 555; Fallon v. Superior Court, 33 Cal.App.2d 48, 51, 90 P.2d 858. In the interests of orderly procedure, a person should be allowed to intervene only if he takes a position on the pleadings in accordance with the requirements of section 387, and a court clearly has power to deny permission to intervene to any applicant failing to comply with the provisions of the statute.

[25] The proposed complaints in intervention presented by petitioners on June 30 did not meet the requirements of section 387, since it was not alleged that the applicants joined with plaintiffs or united with defendants or demanded anything adversely to both plaintiffs and defendants. When the second complaint in intervention of the Bowles remaindermen was offered during the hearing of the trustees' report on August 2, the court stated that it would not, at that time, consider an application for leave to intervene and that any subsequent motion for such leave should be made on notice. The court was not required to interrupt the hearing in order to consider the proposed pleading, and, in the absence of any showing by petitioners that they made a proper request for intervention, the court was not under a duty to permit the offered pleading to be filed.

The alternative writs of prohibition are discharged, and a peremptory writ is denied.

SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

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132 Cal.App.2d 840

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
Manuel Franklin O'DONNELL, Defendant and Appellant.
Cr. 5321.

District Court of Appeal, Second District, Division 2, California.
May 12, 1955.

Defendant was prosecuted for perjury and from a judgment of the Superior Court of Los Angeles County, and order denying a motion for new trial, Leroy Dawson, J., the defendant appeals. The District Court of Appeal, Fox, J., held that where the evidence convicting defendant was circumstantial and not direct, the conviction was required to be reversed.

Judgment and order reversed.

1. Perjury ⚿34(1)

In prosecution for perjury, direct as distinguished from circumstantial evidence of the falsity of defendant's testimony is required from at least one witness. Pen. Code, §§ 118, 1103a; West's Ann.Code Civ.Proc. § 1968.

2. Perjury ⚿33(1)

Circumstantial evidence alone is not sufficient to support a conviction of perjury. Pen.Code, §§ 118, 1103a; West's Ann.Code Civ.Proc. § 1968.

3. Perjury ⚿33(1)

The requirement respecting the quantum of evidence to support a conviction of perjury is satisfied, if independent of any inculpatory circumstances shown, there exists direct evidence of a state of facts contrary to that sworn to by the accused or incompatible or physically inconsistent with his evidence. Pen.Code, §§ 118, 1103a; West's Ann.Code Civ.Proc. § 1968.

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proceeding who have not appeared, and upon the attorneys of the parties who have appeared, who may answer or demur to it within ten days from the service thereof, if served within the county wherein said action is pending, or within thirty days if served elsewhere."

4. Perjury ⚷33(1)

In prosecution for perjury for falsely testifying that while defendant was an inmate of the Long Beach City Jail he witnessed alleged abuse of another by police officers, evidence did not meet the requirements necessary to sustain conviction where the people relied on the Long Beach Jail record showing no record of defendant's presence there on the crucial dates and the Los Angeles County Jail records showing defendant was booked there and his release from sheriff's custody about the crucial dates. Pen.Code, §§ 118, 1103a; West's Ann.Code Civ.Proc. §§ 1831, 1832, 1968.

5. Perjury ⚷33(1)

Fact that evidence supporting perjury conviction is documentary does not dispense with requirement that it be direct. Pen. Code, §§ 118, 1103a; West's Ann.Code Civ. Proc. § 1968.

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Thomas D. Griffin and William T. Pillsbury, Long Beach, for appellant.

Edmund G. Brown, Atty. Gen., James C. Maupin, Deputy Atty. Gen., for respondent.

FOX, Justice.

Defendant was charged with the offense of perjury [1] in an information containing two counts. Count I charged that he subscribed and swore to the truth of a false affidavit in support of a motion for a new trial in the case of People v. MacCagnan, (No. 160110). In Count II, he was charged with having knowingly given false testimony at the hearing on the motion for a new trial in the MacCagnan case. After trial by jury, defendant was found guilty as charged in each count. A motion for a new trial was denied. Probation was granted. Defendant appeals from the judgment and the order denying his motion for a new trial.

Defendant's present predicament stems from his participation in the proceedings for a new trial initiated by one MacCagnan, who had been found guilty of unlawful possession of narcotics. In support of MacCagnan's motion for a new trial, there was filed a sworn affidavit executed by defendant on March 25, 1954. On the following day, defendant testified under oath in the course of the hearing on the motion. So far as is here germane, the essence both of defendant's affidavit and his testimony is that either on the seventh or eighth day of June, 1953, he was an inmate of the Long Beach City Jail and witnessed MacCagnan being booked and searched by police officers; that while this was taking place, he observed the officers strike MacCagnan; that later MacCagnan was placed in the tank occupied by defendant, whereupon he helped make him comfortable and cleaned up some blood on MacCagnan's forehead and coveralls.

In prosecuting the action, the People sought to establish the falsity of the above statements by showing that on June 7th or 8th, 1953, the dates defendant swore he was an inmate of the Long Beach City Jail, he was in fact incarcerated in the Los Angeles County Jail. To that end, the contents of certain official records were introduced in evidence initially to show that defendant was not in the Long Beach City Jail between May 13, 1953, and June 18, 1953. Sergeant Sweet testified that in 1953 he was Chief Jailor for the Long Beach Police Department and was responsible for supervision both of the jail and the preparation of its records. He testified that the jail register contained an entry showing that defendant was "received in the jail at 11:25 p. m. on five, twelve, fifty-three * * and that he was sent to court on five, thirteen, fifty-three and sentenced to 30 days in the County Jail.[2] He stated the register further disclosed that "on five, thirteen, fifty-three the prisoner was released to the Sheriff." Sgt. Sweet testified that according to the register, defendant was next received in the Long Beach jail on "six, eighteen, fifty-three." He was sent to court the following day and sentenced to 30 days in the Long Beach jail. Despite this 30 day sentence, the only release date subsequently shown on the register was October 8, 1953, four months later. Under cross-examination with reference to this matter, Sgt. Sweet testified: "I know beyond a shadow of a doubt that no man has spent four months in the Long Beach jail on a 30-day sentence. If it shows four months lapse, I know he wasn't in custody all that time." Sgt. Sweet testified that he had no independent recollection of the period between May 13 and June 18, 1953, and that he was not testifying from any personal knowledge with respect to defendant's alleged nonpresence in the Long Beach jail during that particular time. The following testimony by Sgt. Sweet in response to questions propounded by defendant's counsel is worthy of note:

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[1] Penal Code, section 118, reads: "Every person who, having taken an oath that he will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which such an oath may by law be administered, willfully and contrary to such oath, states as true any material matter which he knows to be false, is guilty of perjury."

[2] According to the transcript of a docket entry of the Municipal Court of the Long Beach Judicial District, Judge Wallace ordered defendant committed to the Los Angeles County Jail on May 13, 1953.

"Q. You testified in direct examination, sometimes a prisoner is held under the same booking number, I said—I think you said for accommodation purposes, is that correct? A. Yes, sir.

"Q. Sometimes the man goes out, after being given a booking number, and for some reason he is brought to court, or he is taken to Los Angeles, or for some other reason, and then he comes back, and you rebook him or give him another booking number? A. That is true.

"Q. So it is possible for a person to be away from your jail and come back and still have the same booking number? A. That is true."

None of Sgt. Sweet's nine assistants assigned to handling the jail routine was called to testify.

William Eastwood, a Deputy Sheriff of Los Angeles County, testified he had transported defendant from the Long Beach jail to the Los Angeles County Jail on May 13, 1953, at which time he booked him there. He testified that very shortly thereafter he transported defendant back to Long Beach. He did not remember the exact date, but stated that defendant "came back down to the Superior Court." He testified that after having brought him to the County jail on May 13, 1953, he could "remember taking him back [to Long Beach] quite a few times" without being able to fix the exact dates. Rex Kent, another Los Angeles County Deputy Sheriff, testified from official records in his possession. These records indicate that defendant was booked in the Los Angeles County Jail on May 13, 1953, and that he was released from custody on June 12, 1953. Kent testified that he had no personal knowledge regarding the information appearing in the records. He stated that under the system of record keeping followed at the county jail, if a prisoner leaves the jail out of the custody of a sheriff, he is rebooked on his return to the jail. If he leaves the jail in the custody of a sheriff, he is not rebooked on his return, since he is regarded as having at all times been in custody. This matter was elaborated as follows: "Mr. Griffin (defendant's counsel): He was in custody from May 13th to June 12th. That's what your records indicate? A. They indicate that he was in custody of the Sheriff between those dates. Q. They don't indicate that he was in Los Angeles all that period? A. No, that wouldn't be necessary * * * The Court: In your job, custody, the man may be several places in the County, but he is still in custody, and that is what you are responsible for? A. That is all we are responsible for."

From the foregoing it is clear that the case against defendant was predicated on documentary evidence purporting to show that on May 13, 1953, he was booked at the Los Angeles County Jail, that from that date until June 12, 1953, defendant was in the custody of the Sheriff of Los Angeles County, and that there was no record that defendant was an inmate of the Long Beach City Jail during that period of time. Therefore, in support of the judgment, it is argued that the evidence is sufficient to show a state of facts inconsistent with defendant's sworn statements. On the other hand, defendant contends, in addition to his claim that he was prejudiced by the exclusion of proffered evidence bearing on specific intent and by the giving of certain instructions, that the evidence was legally insufficient to uphold a conviction for perjury under the strict requirements of the pertinent statutes.[3] That contention is sustained by the California cases prescribing the quantum of evidence required to make out the offense of perjury.

[1–3] In prosecutions for perjury, the falsity of the sworn statements of the defendant must be evidenced by the testimony of two independent witnesses or by one witness and corroborating circumstances. Pen.Code, sec. 1103a; Code of Civ. Proc., sec. 1968. It is firmly settled in this state that *direct*, as distinguished from circumstantial, evidence of the falsity of defendant's testimony is required from at least one witness. People v. Wells, 103 Cal. 631, 37 P. 529; People v. Porter, 104 Cal. 415, 418, 38 P. 88; People v. Maxwell, 118 Cal. 50, 50 P. 18; People v. Dixon, 99 Cal.App.2d 94, 96, 221 P.2d 198. These cases, to which may be added People v. Burcham, 69 Cal.App. 614, 619, 620, 232 P. 149, and People v. Follette, 74 Cal.App. 178, 201, 240 P. 502, also lay down the corrollary proposition that circumstantial evidence alone is not sufficient to support a conviction of perjury.[4] True it is that there has been growing dissatisfaction with the somewhat anomalous and technical rules of evidence hedging about a prosecution for perjury, and several jurisdictions permit proof of perjury upon circumstantial evidence alone, if thereby guilt is established by the degree of persuasion required for other criminal offenses. Marvel v. State, 3 W.W. Harr., Del., 110, 131 A. 317, 42 A.L.R. 1058; State v. Cerfoglio, 46 Nev. 332, 205 P. 791, 213 P. 102, 27 A.L.R. 848; Wolford v. Commonwealth, 218 Ky. 420, 291 S.W. 366. Nevertheless, the California rule represents the view prevailing in the majority of American jurisdictions. See Annotations 15 A.L.R. 634; 27 A.L.R. 857; 42 A.L.R. 1063. Whether or not this quantitative rule of evidence is anachronistic, or has outlived its usefulness, it is deeply implanted in the common law tradition of protecting an honestly mistaken witness from undue harassment from vengeful persons, and was designed to render convictions for perjury more difficult to obtain than is the case with most other crimes. Weiler v. United States, 323 U.S. 606, 609, 65 S.Ct. 548, 89 L.Ed. 495. "Perjury requires a higher measure of proof than any other crime known to the law, treason alone excepted." People v. DeMartini, 50 Cal.App. 109, 112, 194 P. 506, 508. As stated in People v. Wells, supra, 103 Cal. at page 632, 37 P. 529: "In other words, the law prescribes a different rule of evidence in this class of cases, both as to the kind and amount, as compared to the great majority of violations of the law. The rule is different as to the kind of evidence, for positive evidence is absolutely necessary, and circumstantial evidence alone is never sufficient. Again, for nearly all violations of the law the evidence of one credible witness is sufficient to support a conviction, but in prosecutions for perjury the rule is clearly to the contrary." This does not mean, of course, that there need be direct evidence of a witness who has testified to the falsity of the statements sworn to by the accused. People v. Chadwick, 4 Cal. App. 63, 70, 87 P. 384, 389; People v. Follette, 74 Cal.App. 178, 201, 240 P. 502. The requirement respecting the quantum of evidence is satisfied if, independent of any inculpatory circumstances shown, there exists direct evidence of a state of facts contrary to that sworn to by the accused, or incompatible or physically inconsistent with his evidence. People v. Porter, 104 Cal. 415, 417, 38 P. 88; People v. Casanova, 54 Cal. App. 439, 443, 202 P. 45; People v. Chadwick, supra. But this is the irreducible minimum, as is clearly pointed out in People v. Wells, 103 Cal. 631, 37 P. 529. In the Wells case, the facts were that one Dillwood had been on trial on a charge of stealing a cow, the cow having been found in Dillwood's barn about 11:00 o'clock a. m., and having been stolen some miles away the night before. Defendant was a witness in Dillwood's interest and testified that about 8:00 a. m. of the same morning he saw this cow upon a public highway going toward Dillwood's house, and that he then saw Dillwood drive the cow into his barn, the while stating that the cow was not his cow. Defendant was charged with perjury based on this testimony. The court stated, 103 Cal. at page 632, 37 P. 529: "As we have already suggested, in order that the evidence may be sufficient, there must be positive testimony to a contrary state of facts from that sworn to by the defendant at the previous trial. For instance, to support the charge of perjury as to the alleged false statement of defendant that he met the cow at the time stated upon this particular public highway, it was necessary to produce the positive testimony of one witness at least that such meeting did not take place, as that the defendant was not at that time at that place, or that the cow was not there; and the same rule is equally applicable to the remaining portions of the alleged false testimony. The corroborating circumstances disclosed by the record are sufficiently established, but the one witness to furnish the positive testimony of the commission of the perjury was not produced at the trial. The record discloses no witness who testifies that the aforesaid meeting between the defendant and the cow did not take place. The falsity of defendant's statements as to the alleged meeting may well be termed the '*corpus delicti*,' and in cases like the present the *corpus delicti* must be proven by the positive evidence of at least one witness. The defendant's testimony given in the grand larceny case, and as set out in the information, is only proven to be false by incidents and circumstances occurring at other times and places; and, while such evidence in a case of the present character is proper as furnishing the corroborating circumstances required by the section of the Code we have quoted, it in no sense takes the place of the positive and direct evidence of one witness as to the *corpus delicti* demanded by the statute."

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[3] Penal Code sec. 1103a reads: "Perjury must be proved by the testimony of two witnesses, or of one witness and corroborating circumstances."

[4] A number of jurisdictions recognize two exceptions to the rule that circumstantial evidence is insufficient to support a conviction of perjury. One is where the accused has sworn to a matter whose falsity is not, by its nature, susceptible of direct proof. People v. Doody, 172 N. Y. 165, 64 N.E. 807; State v. Wilhelm, 114 Kan. 349, 219 P. 510; State v. Faulkner, 175 Mo. 546, 75 S.W. 116. The other is where the falsity may be shown by documents emanating from the accused, or treated by him as containing evidence of the fact in dispute. United States v. Wood, 14 Pet. 430, 10 L.Ed. 527; Radomsky v. United States, 9 Cir., 180 F.2d 781.

Viewed in the light of the criteria in the foregoing decisions, it is clear that the evidence in this case is insufficient to meet the special requirements in perjury cases, since it contains not a scintilla of direct evidence regarding the fact here in dispute. The case made out against defendant rests wholly on circumstantial evidence. A brief examination of the essential distinction between direct and circumstantial evidence leads inevitably to this conclusion. "Direct evidence is that which proves the fact in dispute, directly, without an inference or presumption, and which in itself, if true, conclusively establishes that fact. * * *" Code Civ.Proc., sec. 1831. Circumstantial evidence is that which tends to establish the fact to be proved by proving another fact or circumstance which raises a reasonable inference or presumption of the existence of the fact in issue. Code Civ.Proc., sec. 1832. Bearing this distinction in mind, and cognizant that abstract propositions of law require pragmatic interpretations, we perceive no evidence in this case tending to show the falsity of defendant's statements which may, in any sense, be characterized as direct. Not one witness testified directly to the fact that, to his knowledge, defendant was not in the Long Beach City Jail on June 7th or June 8th, 1953. In a practical sense, this could also have been established by the direct testimony of a single witness that on those dates defendant was actually in the Los Angeles County Jail, or elsewhere. This would be, for all practical purposes, direct testimony that defendant was not then in the Long Beach City Jail, in view of the physical impossibility of his being simultaneously in two places. However, no such testimony was adduced, though it was susceptible of direct proof.

[4, 5] Instead, the People relied primarily on two items of documentary evidence:

(1) the Long Beach jail register showing no record of defendant's presence there on the crucial dates, and (2) the Los Angeles County Jail records, showing defendant was booked there on May 13, 1953, and his release from the Sheriff's custody dated June 12, 1953.[5] While evidence of this nature is strongly persuasive and would unquestionably support a conviction for most offenses other than perjury, it does not meet the particular requirements demanded to sustain a perjury conviction. For simply because the evidence is documentary does not dispense with the requirement that it also be direct. People v. Maxwell, 118 Cal. 50, 54, 50 P. 18; Radomsky v. United States, 9 Cir., 180 F.2d 781, 783. And in this element the evidence is fatally deficient. The mere fact that the Long Beach jail register does not list defendant's presence there on June 7th or June 8th is not direct evidence that he was not there on those days. It merely gives rise to a reasonable inference, based on the presumed regularity, reliability and objectivity of the register, that had defendant been there his presence would have been recorded in that place. Thus, though it be accepted as true that there is no record of defendant's presence in the Long Beach jail on the dates in question, this does not directly establish that he was not there, nor is it irreconcilable with the possibility of his having been there. In brief, only by indulging in an inference based on a collateral circumstance may proof of defendant's nonpresence there be established. Though of high probative value, such evidence was circumstantial.[6]

Similarly, the documentary evidence that between May 13th and June 12th, 1953, defendant was in the custody of the Sheriff of Los Angeles is not such evidence as, in the language of section 1831 of the Code of Civil Procedure, "proves the fact in dispute, directly, without an inference or presumption, and which in itself, if true, conclusively establishes that fact." Conceding the truth of the record, it does not directly negative the fact in dispute nor is it directly irreconcilable with defendant's statement under oath. Such evidence was merely a species of indirect or circumstantial evidence which would have been of value in corroborating any direct testimony that on June 7th or 8th defendant was not in the Long Beach jail, or that he was in the County jail, or in any other specific place. At most, it raises an inference that defendant was not in the Long Beach jail, or that he was very likely in some other place in the Sheriff's custody. But it is not *direct* testimony of a state of facts contrary to that sworn to by defendant or inconsistent and incompatible with his testimony that he was in the Long Beach jail during a time when the documents indicated he was in the Sheriff's custody. People v. Maxwell, supra; People v. Wells, supra; People v. Porter, supra; People v. Burcham, supra. For example, the evidence shows that defendant was taken by Deputy Sheriff Eastwood to Long Beach on one occasion after his booking on May 13, 1953, in the County Jail, yet this is not reflected in the documents produced by the Sheriff. Further, it was pointed out by Deputy Sheriff Kent that a prisoner might be anywhere in the County while still technically in the Sheriff's custody, which is all the record purported to show. The People's case resting entirely on circumstantial evidence, it is legally insufficient to support the conviction. Under the authorities cited, such conclusion is ineluctable if the distinction between direct and circumstantial evidence is to be meaningfully preserved and if the immemorial standard of proof in perjury cases is to be maintained, regardless of the compelling force of the circumstantial evidence produced. People v. Wells, supra; People v. Porter, supra; People v. Maxwell, supra; People v. Burcham, supra; Radomsky v. United States, supra; United States v. Nessenbaum, 3 Cir., 205 F.2d 93.

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[5] We assume only for purposes of this opinion, without deciding the point, that this type of documentary evidence, although not emanating from the accused, may be of the kind contemplated by section 1103a of the Penal Code, which states "Perjury must be proved by the testimony of two *witnesses*, or of one *witness* and corroborating circumstances." (Emphasis added.) In United States v. Palese, 3 Cir., 133 F.2d 600, 602, the court stated: "It has also been held that the production of documentary or written testimony springing from the defendant himself may take the place of a living witness. * * * " See also People v. Maxwell, 118 Cal. 50, 53–54, 50 P. 18; United States v. Nessenbaum, 3 Cir., 205 F.2d 93; Radomsky v. United States, 9 Cir., 180 F.2d 781; Phair v. United States, 3 Cir., 60 F. 2d 953, 954. In the view we take, it is unnecessary to pass on this question.

[6] We may observe, parenthetically, that the Long Beach jail records showed also that defendant was sentenced on June 18, 1953, to 30 days in jail. His release date appears as October 8, 1953. This would give rise, reasonably, to an inference that defendant was in jail almost four months. Yet Sgt. Sweet himself disputed this possibility, testifying that no one, to his knowledge, spent four months in his jail on a 30-day sentence. This merely serves to remind of the ever-present danger inherent in evidence circumstantially deduced from records normally deserving of the presumption of regularity and reliability.

The three cases cited by the People turn on the existence of direct testimony by at least one witness, adequately corroborated. In People v. Chadwick, 4 Cal.App. 63, 87 P. 384, 387, 389, the question was whether defendant had written certain telegrams before or after his arrest. A witness testified directly that defendant had the telegrams in his possession at the time of his arrest. The court stated: "These facts do not depend upon inference or presumption, but were directly testified to by Pender and * * * directly established the physical fact that the telegrams were written before the arrest of the defendant." In People v. Pustau, 39 Cal.App.2d 407, 103 P.2d 224, defendant testified falsely before the grand jury that he and another person had never discussed the transfer of a drainage district. This was *directly* refuted by a witness who was corroborated by a second witness, 39 Cal.App.2d at page 416, 103 P.2d 224. In People v. Kriton, 73 Cal.App.2d 184, 166 P.2d 45, the question was whether defendant had bought two books in a department store on December 14, 1943, or whether they were pilfered. A store detective testified directly to the fact that defendant removed the books surreptitiously without paying. This was corroborated by the fact that no sales tags were made out to defendant on December 14th, but a sales tag was made out on December 17, 1943, for the sale of such books, three days after defendant was arrested for the theft. In all of the above cases, the vital element of direct evidence, so conspicuously lacking in the instant case, was there present.

The judgment and order are reversed.

McCOMB, J., concurs.

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133 Cal.App.2d 116

E. M. LOW, Plaintiff and Appellant,

v.

WOODWARD OIL COMPANY, LTD., a corporation, et al., Defendants.

Woodward Oil Company, Ltd., a corporation, Respondent.

Civ. 20632.

District Court of Appeal, Second District, Division 2, California.

May 18, 1955.

Quiet title action. From adverse judgment of the Superior Court, Los Angeles County, James G. Whyte, J., the plaintiff appealed. The District Court of Appeal, Fox, J., held that where material portions of affidavit, which was filed in support of defendant's motion to dismiss plaintiff's quiet title action, referred to various documents, none of which were attached to the affidavit, from which affiant deduced that title to disputed property was vested in defendant, statement of legal effect of those documents was a mere conclusion of law as to very matter in issue and would be incompetent as evidence, and affidavit was insufficient.

Judgment reversed.

1. Judgment 🔑185.2(5)

Where material portions of affidavit, which was filed in support of defendant's motion to dismiss plaintiff's quiet title action, referred to various documents, none of which were attached to affidavit, from which affiant deduced that title to disputed property was vested in defendant, statement of legal effect of those documents was a mere conclusion of law as to very matter in issue and would be incompetent as evidence, and affidavit was insufficient. West's Ann.Code Civ.Proc. § 437c.

2. Judgment ⚿185(4)

Where material portion of affidavit, which was filed in support of defendant's motion to dismiss plaintiff's quiet title action, referred to various documents, none of which were attached to affidavit, and there was no showing of loss of documents or other circumstances which would excuse production either of original or authenticated copies, affiant could not give competent testimony to contents of documents and affidavit was insufficient. West's Ann. Code Civ.Proc. § 437c.

3. Judgment ⚿186

Validity of summary judgment is to be determined by sufficiency of affidavits considered upon hearing of motion for summary judgment. West's Ann.Code Civ. Proc. § 437c.

4. Judgment ⚿186

Where defendant's notice of second motion for summary judgment recited that motion was based upon defendant's verified answer and upon affidavit of a certain person, affidavit filed by another person in support of first motion for summary judgment was not before court and could not be considered in ruling on second motion.

5. Judgment ⚿185(4)

Even if affidavit filed in support of first motion for summary judgment was before court in passing on second motion for summary judgment, exhibit attached to affidavit was not competent evidence to which affiant could testify when it was neither verified nor certified. West's Ann. Code Civ.Proc. § 437c.

T. G. Dalton, Los Angeles, for appellant.

Robt. E. Rosskopf, Beverly Hills, James A. Flanagan, Los Angeles, for respondent.

FOX, Justice.

This is an appeal from a summary judgment dismissing plaintiff's complaint and decreeing that defendant is the owner of certain real property and that plaintiff had no right, title or interest therein.

Plaintiff commenced the instant action to quiet title to real property on May 19, 1953. The property involved comprised five lots in Los Angeles County. Defendant Woodward Oil Company's answer denied plaintiff's ownership, asserted its own title, and interposed as an affirmative defense a final judgment entered on December 2, 1952, in Case No. 573851. It is alleged that by the judgment in Case No. 573851 defendant's title to the property here in question was quieted against the defendants therein, namely, Amelia I. Frey, Irvin R. Deist (also known as John Deist and J. Deist), Irvin R. Deist, Trustee, Irvin R. Deist as Administrator of the Estate of Ida A. Deist, deceased, and Alice Maud Deist. No copy of the judgment was appended to the answer.

Defendant moved for a summary judgment on February 11, 1954. One of its affidavits in support of the motion was executed by James A. Flanagan, secretary of defendant company. An unauthenticated copy of the judgment in Case No. 573851 was attached as an exhibit to Flanagan's affidavit. Plaintiff and one I. R. Deist filed counter-affidavits. Defendant's motion was denied on February 24, 1954.

On March 31, 1954, defendant filed a new notice of motion for a summary judgment. This notice recites that the motion was based on defendant's verified answer "and upon the affidavit of George L. Marinoff, copy of which is served and filed herewith." Plaintiff filed an affidavit executed by I. R. Deist in opposition to the motion. The motion was heard on these two affidavits on April 13, 1954, and granted two days later. The judgment of the court quieting title in defendant was filed on May 5, 1954. It recites, in part, that plaintiff having made no appearance though an affidavit was filed in her behalf "and it appearing to the court from an examination of the affidavits filed in support of and in opposition *to said motion,* that the action of plaintiff has no merit and that no triable issue of fact is presented by said affidavits," the motion for summary judgment was accordingly granted. (Italics added.)

It is immediately apparent that in passing upon defendant's motion, the court had before it only the respective affidavits of Marinoff and Deist. Defendant's notice of motion indicates that it is based solely on the affidavit filed by Marinoff.[1] The judgment of the court recites that it was made upon examination of the affidavits filed in support of, and opposition to "said motion," namely that of March 31, 1955. We will proceed, therefore, to a scrutiny of these affidavits to determine the propriety of the adjudication below.

Turning first to the Marinoff affidavit in support of defendant's motion, it is there averred that affiant was engaged in the business of abstracting and searching titles; that at defendant's request, he searched the official records of the County Recorder of Los Angeles County in March, 1954, for the purpose of ascertaining the record ownership of the real property referred to in plaintiff's complaint and for the purpose of particularly ascertaining whether any documents appeared of record purporting to convey any interest in that property to plaintiff; and that following such search, affiant "found that title to said lots is vested in [defendant]" by virtue of the following instruments, identified with respect to their location in official records: an Administrator's Deed executed by DeWitt Adkins, administrator of the Estate of William J. Farrow, deceased; an Order Confirming Sale of Real Property in the Estate of William J. Farrow, deceased; Quitclaim Deeds from Cecil B. Clanny and Gertrude Farrow and a Decree Quieting Title. No copies of these documents were submitted with the affidavit.

Marinoff's affidavit further states: "There did not appear of record in said official records any documents purporting to reflect any interest in said real property in E. M. Low, except only the following:

"A document entitled a Deed, dated April 28, 1937, and recorded May 1, 1937, in Book 14898 at page 292, Official Records, wherein I. R. Deist, as grantor, purported to convey to Ida A. Deist, as grantee, in words substantially as follows: 'All real property in the County of Los Angeles, State of California, then owned by the said I. R. Deist, or in which the said I. R. Deist may in any way be interested or connected.' [S]aid deed did not describe any particular property.

"A document entitled a Deed, dated January 20, 1933, and recorded August 15, 1940, in Book 17704, at page 333, Official Records, wherein Ida A. Deist, as Grantor, purported to convey to E. M. Low, as Grantee, in substantially the following words: 'All the right, title and interest of the said grantor in and to all property situated in the State of California, then of record in the name of said grantor or in which the said grantor may in anywise be connected and all real property of which the said grantor may thereafter become possessed, situated in the County of Los Angeles, or in any other county in said State of California, excepting property in which the grantor resides, being Lot 9, in Block 4, West Adams Heights Tract, and known by street and number as 2250 South Western Avenue, Los Angeles, California.' Said deed did not describe any other property but said Lot 9 above described." The affidavit closes with the statement that "the foregoing facts are within the personal knowledge of affiant and affiant, if sworn as a witness, can testify competently thereto."

The opposing affidavit of I. R. Deist alleged that on April 9, 1934, defendant executed a writing to affiant in affiant's presence. The writing was attached as an exhibit, is addressed to I. R. Deist, and purports to confirm an oral agreement regarding the purchase of a half interest in certain lots, including the five mentioned in plaintiff's complaint. The writing states, in substance, that if defendant is successful in its bid to purchase the lots from the Estate of W. J. Farrell (sic), it will convey to I. R. Deist the interest so purchased in certain of the lots, including those here involved, in consideration of Deist's joining all of his lots into the Howard Townsite Community Oil Lease.

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[1] While the notice of motion recites also that it was based upon defendant's verified answer, such pleading serves only to define the issues before the court on the motion for summary judgment. The efficacy of the motion, however, depends on the sufficiency of the affidavits filed in support thereof. Code Civ.Proc. § 437c; McComsey v. Leaf, 36 Cal.App.2d 132, 97 P.2d 242. It is well established that deficiencies in the affidavits may not be supplied by a resort to the pleadings. Coyne v. Krempels, 36 Cal.2d 257, 262, 263, 223 P.2d 244; Kimber v. Jones, 122 Cal.App.2d 914, 918, 265 P.2d 922.

Deist further affirmed that "he knows to his knowledge" that two of the documents referred to in the Marinoff affidavit, the deed dated April 28, 1937, from I. R. Deist, to Ida H. Deist, and the deed dated January 20, 1933, from Ida A. Deist to plaintiff herein, were executed and delivered; that the order confirming sale dated April 18, 1934, made in the Estate of William J. Farrow, deceased, directing the administrator to convey the land referred to herein to defendant, and pursuant to which the administrator's deed to defendant set forth in Marinoff's affidavit was executed, recited that the Estate of William J. Farrow owned a one-half interest therein with John Deist; that affiant and said John Deist were the same person, as found by the decree rendered in Case No. 573851 of the Los Angeles Superior Court entitled "Woodward Oil Co. Ltd. v. Amelia I. Frey, et al."; and that by a decree entered on August 6, 1947, in Case No. 529657 of the Superior Court of Los Angeles County, entitled "Woodward Oil Co. Ltd. v. Gertrude Farrow, et al.," it was adjudicated that the plaintiff was the owner of an undivided one-half interest in the real property set forth in plaintiff's complaint.

Plaintiff contends that the affidavit in support of defendant's motion was insufficient to meet the requirement of section 437c of the Code of Civil Procedure; hence the judgment is insupportable. This is clearly correct.

Section 437c provides, *inter alia,* that if it is claimed an action has no merit, the defendant may notice a motion, supported by the affidavit of some person having knowledge of the facts, that the complaint be dismissed. In referring to the contents of the affidavits in behalf of a moving defendant, the second paragraph of that section provides, in its material portion: "The affidavit * * * in support of the motion must contain *facts* sufficient to entitle * * defendant to a judgment in the action, and the facts stated therein shall be within the *personal knowledge of the affiant,* and shall be set forth *with particularity,* and each affidavit shall show affirmatively that affiant, *if sworn as a witness can testify competently thereto.*" (Emphasis added.)

[1-3] It is manifest that the crucial requirement last quoted—that the affidavit in support of a motion for summary judgment by defendant shall show facts within the personal knowledge of the affiant which affiant can testify to competently as a witness—has not been satisfied by the Marinoff affidavit. The material portions of that affidavit refer to various documents, none of which are attached to the affidavit, from which the affiant deduces that title to the disputed property is vested in defendant. This statement of the legal effect of those documents is, of course, a mere conclusion of law as to the very matter here in issue, and would be incompetent as evidence. Cowan Oil & R. Co. v. Miley P. Corp., 112 Cal.App.Supp. 773, 780, 295 P. 504; Weichman v. Vetri, 100 Cal.App.2d 177, 179, 223 P.2d 288. Furthermore, there being no showing of the loss of the instruments referred to, or other circumstances which would excuse production either of the original or authenticated copies, affiant could not give competent testimony even to the contents of said documents. Under such circumstances, where the affidavit of a movant depends upon written documents, his affidavit is insufficient unless there is attached thereto the original documents, or a verified or certified copy of such instruments. Gardenswartz v. Equitable etc. Soc., 23 Cal.App.2d Supp. 745, 750, 68 P.2d 322. The validity of a summary judgment pursuant to section 437c is to be determined by the sufficiency of the affidavits considered upon the hearing of the motion. Kimber v. Jones, 122 Cal.App.2d 914, 918, 265 P.2d 922; McComsey v. Leaf, 36 Cal.App.2d 132, 133, 97 P.2d 242. The Marinoff affi-

davit, departing utterly from compliance with section 437c, is thus completely lacking in any exposition of *evidentiary facts* sufficient to entitle defendant to a judgment in the action. Coyne v. Krempels, 36 Cal.2d 257, 261, 223 P.2d 244; Kimber v. Jones, supra.

[4, 5] Defendant asserts that the affidavit of James A. Flanagan filed in support of the first motion for summary judgment set forth by exhibit a true copy of the final decree previously alluded to quieting title in favor of defendant. It argues this document was before the court. The fallacy of this argument is two-fold: (1) The motion before the court was not based upon the Flanagan affidavit and its exhibit, as appears from defendant's notice of motion and the court's judgment; and (2) in any event, said exhibit was neither verified nor certified and as such was not competent evidence to which Flanagan could testify but pure hearsay. Gardenswartz v. Equitable etc. Soc., supra. Defendant also suggests that the trial court could take judicial notice of the judgment in Case No. 573851, which defendant urged in bar of plaintiff's action in its answer, upon the motion for summary judgment. Whether or not it is proper for the court to take judicial notice of the record in another case between other parties upon motion for summary judgment is an intricate question which we need not here pass upon. For it is clear that the doctrine of judicial notice played no part in the determination of this matter. From defendant's notice of motion, it is clear that he was predicating his case entirely on such purported facts as were contained in the Marinoff affidavit. The court in its judgment unequivocally manifested that its decision was based solely upon the contents of the affidavits submitted in support of the motion then before it, which is the proper foundation for an adjudication under section 437c. Coyne v. Krempels, supra, 36 Cal.2d at page 261, 223 P.2d 244; Kimber v. Jones, supra, 122 Cal.App.2d at page 918, 265 P.2d 922; McComsey v. Leaf, supra, 36 Cal.App.2d at page 133, 97 P.2d 242. Defendant does not profess in its brief, nor does the record before us disclose, that the contents of the file in the prior case was examined by the trial court, nor was it brought to the court's attention in any competent manner by the Marinoff affidavit. As has been shown, that affidavit departed entirely from any legitimate compliance with section 437c, being replete with hearsay, conclusions, and personal opinion and bringing no essential evidentiary facts before the court. The court having plainly relied upon the affidavits before it in reaching its decision, and defendant's affidavit being palpably inadequate to support the judgment in its favor, that judgment cannot stand.

The judgment is reversed.

McCOMB, Acting P. J., concurs.

132 Cal.App.2d 821

RECORD MACHINE & TOOL COMPANY, a Corporation, Plaintiff and Respondent,

v.

PAGEMAN HOLDING CORPORATION, a Corporation, Defendant and Appellant.

Civ. 20693.

District Court of Appeal, Second District,
Division 2, California.

May 11, 1955.

Declaratory judgment action by buyer against seller under conditional sales contract, relating to realty, personalty, and patents and for declaration of rights under contract, and determination of amount due, and for damages for breach by seller. The Superior Court, Los Angeles County, Leon T. David, J., entered judgment in favor of buyer and seller appealed. The District Court of Appeal, Moore, P. J., held that trial court's finding that buyer was entitled to award of $12,000 for loss of exclusive manufacturing right under patent, which finding was made under direction of Supreme Court's order, on prior appeal in action, requiring trial court to find effect of seller's inability to give good title to such patent, was supported by substantial evidence.

Judgment affirmed.

1. Declaratory Judgment ⚷347

In action for declaratory judgment by buyer against seller under conditional sales contract, relating to realty, personalty, and patents, and for declaration of rights under contract, and determination of amount due, and for damages for breach by seller, trial court's finding that buyer was entitled to award of $12,000 for loss of exclusive manufacturing right under patent, which finding was made under direction of Supreme Court's order, on prior appeal in action, requiring trial court to find effect of seller's inability to give good title to such patent, was supported by substantial evidence.

2. Sales ⚷442(1)

Where buyer had suffered substantial damages by seller's failure to deliver a part of property included in his contract of sale, the uncertainty in evidence relating to amount of damages sustained is relatively unimportant.

3. Appeal and Error ⚷1013

Even where amount of damages suffered by buyer because of seller's failure to deliver a part of property included in his contract of sale is entirely difficult of ascertainment, the sum to be awarded is a question for the court in the exercise of its sound discretion and will not be disturbed on appeal on showing of substantial evidence of the wrong.

4. Damages ⚷184

While actual amount of damages from breach of a contract may not be susceptible of exact proof, the law will not permit one whose act has resulted in loss to another to escape liability on that account, and will require only that best evidence be adduced of which the nature of case is capable.

5. Appeal and Error ⚷151(1)

One not aggrieved by judgment has no right of appeal. West's Ann.Code Civ.Proc. § 938.

6. Appeal and Error ⚷877(2)

Defendant corporation could not complain of trial court's finding that corporation was alter ego of certain specified persons, where corporation did not make it appear how it had been injured by such holding.

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Max Tendler, Los Angeles, for appellant.

Montgomery G. Rice, Los Angeles, for respondent.

MOORE, Presiding Justice.

This is a second appeal. Record Machine & Tool Co. v. Pageman Holding Corporation, 42 Cal.2d 227, 266 P.2d 1.

The question for decision is whether the court's award of $12,000 as the amount of damage suffered by respondent by virtue of appellant's not having transferred to respondent a certain patent on a bit used in drilling for oil is excessive. It was the only item of several properties included in the agreement to sell and convey which appellant could not deliver.

In April 1947 appellant agreed to assign five United States Letters Patent and to convey certain real and personal properties to respondent for the sum of $100,000 on terms and conditions detailed in a conditional sales contract. On August 23, 1951, respondent tendered, at the place specified in the agreement of sale, the total unpaid balance, to wit, $26,549.18, and its demand that appellant perform the agreement by depositing the necessary instruments of title in escrow for delivery concurrently with appellant's receipt of the last mentioned sum, the total amount tendered under the conditional sales contract. Appellant refused such tender and refused to perform the contract or to deliver any title paper conveying any of the properties to be conveyed to respondent, although respondent was able and willing to perform according to its tender. The court found that respondent performed all the conditions required of it by the sales agreement and that the tender was valid and immediately vested in respondent title to all the properties to be conveyed. Appellant did not convey one of the patents, No. 2,133,022, herein designated as 022, and was unable to do so. In an action for specific performance of the sales agreement, the trial court adjudged that respondent was entitled to performance, but failed to find the amount that should have been credited on the purchase price of $100,000 by reason of appellant's failure to convey patent 022. On appeal the judgment was reversed with directions to "render the same judgment heretofore given, but in addition, shall ascertain and declare the rights of the parties with respect to the payment of the unpaid balance of the purchase price, if any, under the contract, and the effect thereon of defendant's inability to give good title to the patent it does not own." Upon a retrial, the court found that $12,000 was the amount to which respondent was entitled by reason of appellant's inability to convey patent 022. The ensuing judgment is now here on appeal.

[1] Appellant contends that the finding of $12,000 as the value of respondent's loss for not receiving an exclusive license to manufacture under patent 022 is not supported by, and is contrary to the evidence; that such award did not comply with the Supreme Court's order; that the patent had only a nominal value and that the court's finding was purely speculative. In its opening brief, appellant states the correct issue, to wit, in what amount should damages be awarded for failure to deliver an exclusive license to manufacture rotary drills. Appellant attempts to show that the actual patent 022 unincumbered was not worth the award. The Supreme Court's order required the trial court to find "*the effect* thereon of defendant's inability to give good title to the patent it does not own." The court order says nothing about the actual value of the rotary drills under the patent. *Effect* is defined by Webster's Dictionary as meaning "consequence" or "result." The consequence or result to the respondent is its loss of the exclusive right to operate under the patent, not the amount of damages suffered by reason of appellant's having made or not made so many rotary drills under patent 002. At the trial, the evidence showed that the rotary drill in question is being produced by a rival company under the patent 022 by due and sufficient assignment as a result of which it could not be transferred, with clear title to respondent. It was proved that the drill in question has a (1) single axis; (2) requires less weight in operation and therefore makes a straighter hole; (3) is more economical to repair; (4) runs longer than the average drill; (5) and the demand for such drill is world wide. Substantial evidence was adduced to the effect that grave injury occurred from the breach of the contract by the appellant.

[2-4] The question of damages that might have been suffered by respondent's having been deprived of the profits from sales of rotary drills was not the issue. It would have been purely speculative. But the loss of exclusive rights of operation and manufacture is substantial. It is the accepted rule of law that where a buyer has suffered substantial damages by the seller's failure to deliver a part of the property included in his contract of sale, the uncertainty in the evidence relating to the amount of damages sustained is relatively unimportant. Monroe v. Owens, 76 Cal.App.2d 23, 30, 172 P.2d 110. Even where the amount is entirely difficult of ascertainment, the sum to be awarded is a question for the court in the exercise of its sound discretion and will not be disturbed on appeal on the showing of substantial evidence of the wrong. " 'While the actual amount of damages from the breach of a contract may not be susceptible of exact proof, the law does not permit one whose act has resulted in loss to another to escape liability on this account. * * *' The law requires 'only that the best evidence be adduced of which the nature of the case is capable.' " Pye v. Eagle Lake Lumber Co., 66 Cal.App. 584, 590, 227 P. 193, 195; Hacker Pipe & Supply Co. v. Chapman Valve Manufacturing Co., 17 Cal.App.2d 265, 271, 61 P.2d 944. The question of whether the patent had only a nominal value or was worth $12,000 as awarded by the court is immaterial in the face of the substantial evidence pointing to the loss of the exclusive rights of production, and by appellant's failure to deliver such rights to the detriment of respondent who had relied on the valid assignment and a clear title.

[5, 6] Appellant contends that the court erred in ruling that the Pageman Holding Corporation was the alter ego of Rudolph Pageman, and his wife Caroline. Appellant

contends that because they were not parties to this action in their individual capacities, such a judgment cannot be rendered.

In no way has appellant proved how it has been injured by such holding. In the previous trial, Pageman stated, "We are the corporation, I am and my wife." This clearly points out that the corporation was in truth the alter ego of the Pagemans, however, regardless of this finding, "one not aggrieved by a judgment has no right of appeal." Nicholas v. Nicholas, 110 Cal.App. 2d 349, 353, 242 P.2d 679, 681; Code Civ. Proc. § 938. It is sufficient answer to the appellants' contention to say that this is of no concern to them. They are entitled to complain only of such matters as injuriously affect them. De Arman v. Connelly, 134 Cal.App 173, 181, 25 P.2d 24.

The trial court with the facts at hand has effectually carried out the direction of the Supreme Court. It is a fair presumption that the Supreme Court would not have burdened the trial court with the task of fixing token damages. The high court recognized that respondent had been deprived of a substantial right and by their decision amended the situation.

The judgment is affirmed.

McCOMB and FOX, JJ., concur.

133 Cal.App.2d 179

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Vincent Joseph LAMB, Defendant and Appellant.

Cr. 5274.

District Court of Appeal, Second District, Division 2, California.

May 23, 1955.

Rehearing Denied June 6, 1955.

Hearing Denied June 22, 1955.

Defendant was convicted of forging check to cheat hotel and bank and of grand theft. The Supreme Court, Los Angeles County, Ralph K. Pierson, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Moore, P. J., held that evidence was sufficient to sustain conviction.

Judgment affirmed.

1. False Pretenses 🔑49(1)
Forgery 🔑44(1)

In prosecution for forging check to cheat hotel and bank, and for grand theft, evidence was sufficient to sustain conviction. Pen.Code, § 470.

2. Criminal Law 🔑1168(2)

In prosecution for forging check to cheat hotel and bank and for grand theft, court's denial of defendant's motion to exclude witnesses did not constitute error requiring reversal, where no reason was given for motion to exclude witnesses, where discussion preceding motion did not relate in slightest degree to theft or fictitious check, and where there was no showing of prejudice suffered by defendant on account of such ruling.

3. Criminal Law 🔑369(2)

In prosecution for forging check to cheat hotel and bank and for grand theft, evidence by deputy sheriff that defendant was prisoner in county jail shortly before instant crimes were committed was not prejudicial to defendant, and was competent to disprove representation defendant had made to gain confidence of his victims.

4. Criminal Law 🔑369(2)

Relevant evidence in criminal case is not excluded merely by reason of its disclosure of other offenses by accused.

5. Criminal Law 🔑382

If by reasonable inference pertinent evidence in criminal case tends logically to establish any fact material to issue of guilt of defendant, it is properly admitted.

6. Criminal Law 🔑598(6)

In prosecution for forging check to cheat hotel and bank and for grand theft, denial of defendant's request for more time to procure other witnesses was proper, in view of defendant's neglect for 11 days to attempt to serve his witnesses and where there was no proof that defendant was prejudiced by such ruling.

7. Criminal Law ⚷641(1)

Any person accused of crime has right to defend himself, but such right does not entitle him to abuse patience of court or to infringe upon rights of others.

8. Criminal Law ⚷1172(1)

In prosecution for forging check to cheat hotel and bank and for grand theft, instruction which defined and explained all three forms of theft was not prejudicial to defendant.

9. Criminal Law ⚷576(4), 1144(7)

In prosecution for forging check to cheat hotel and bank and for grand theft, lapse of 80-day period before trial did not require that action be dismissed, where defendant had twice moved court during that period for continuance and where, inasmuch as record was destitute of statements as to reasons for delay, it was presumed that court acted at request of defendant in postponing trial to time subsequent to expiration of 60-day limit prescribed by statute. West's Ann.Civ.Code Proc. § 1963, subd. 15; Pen.Code, § 1382, subd. 2.

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Morris Lavine, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Defendant was convicted of having forged a fictitious name on a bank check for the purpose of cheating a hotel and a bank, Penal Code, § 470, and of having committed grand theft by feloniously taking a diamond ring of the value of $1,500 from one Frank Alten. By this appeal, he seeks a reversal on the grounds of insufficiency of the evidence to sustain the judgment, errors in the conduct of the trial, and misdirection of the jury.

The Evidence is Sufficient

About one month prior to the events about to be narrated, appellant had been released from the Los Angeles County Jail where he had been confined for over two years pursuant to conviction for a misdemeanor. About the time of his departure from that institution, his wife, June Lamb, had made the acquaintance of one James G. Law who worked in a responsible position and also wrote dramatic productions. He and Mrs. Law invited appellant and his wife to dine with them at home on Christmas Day, 1953. Mrs. Lamb introduced her husband as having just arrived from Chicago. The latter stated that he was an agent and representative with headquarters in Chicago and was in Los Angeles to obtain a television show for a group who were in California. Law replied that he had spent his life in show business and "was currently a free-lance writer." On the following day appellant returned to the Law home, examined some of Law's productions and departed with the promise that he might be interested in one entitled: "The Crossword Puzzle of the Air," hereinafter referred to as *"Crossword."* Some days subsequently, appellant returned and asked Law to rewrite and extend the Crossword. After he had made such revision, he delivered the script to appellant on January 4, 1954, in the belief that all appellant had said was true. By telephonic reports to Law appellant inspired him to believe he was a genuine agent of talent and success and finally on January 11 stated that he had sold the play, had a check "for $2500 for a 30-day-option of the show"; that the sale price was $428,000—17½ per cent of which "would come to Law as creator of the show and that the option money should be divided between the two"; that Ken Murray had agreed to act as Master of Ceremonies in the show. He named other prominent persons with whom he pretended to have connections. Such communications were apparently continued until appellant finally made the acquaintance of Mr. Alten.

Appellant had no money as he stalked the streets of cities seeking a buyer for the Crossword. Late in the evening of early January 1954, Alten was assisting a friend who operated a bar in Pasadena. Appellant, accompanied by a woman whom he introduced as his wife, and himself as Mr. O'Shea, told Alten his wife had just arrived from Ireland; that he was an actor's agent; that he had a drama which he would likely sell to a friend. Alten inspected the document and said that he had a show that was good but believed the Crossword was better. Appellant told Alten that if he succeeded in selling his own, he might sell Alten's also. About 12:30 a. m., appellant returned to the bar with the same woman and informed Alten he had sold the Crossword and had been celebrating.

On January 21, appellant, representing himself as Mr. O'Shea, telephoned Alten and asked him to come at once to the Statler Hotel; stated they had placed the Crossword; that Ken Murray would be Master of Ceremonies and appellant would desire Alten to work with Murray as comic relief. Alten visited appellant at the hotel and was asked to read the Crossword; said that Alten's Irish dialect was impressive and would be the comic relief with Ken Murray; that he would have to be Alten's agent and that he would ask the producer for $1,000 a week as salary for Alten. Commencing with that interview, appellant continued throughout the day pretending they would visit Ken Murray at the Beverly Wilshire Hotel; stated that he was a guest at a large hotel; examined Alten's drama and the names of actors; pretended to be eager to employ certain actresses; offered to lend Alten $500 to buy better clothes; asked Alten to stop at any branch of his bank so that he might ascertain whether a draft he had received for the show had cleared; reported that the draft had been honored and there was money enough to pay the performers. By the time they reached the Alten home, Mr. Alten was convinced of the successful character of appellant. The latter continued his pretenses by dialing several numbers and conducting his conversations with pretended persons of high artistic rank. He pretended to employ Miss Ford and other girls at $250 a week for 39 weeks and asked them to meet him at a Glendale Studio for rehearsal on the morrow. He would take Alten to see Murray but for the fact that "Ken was drunk and was negotiating with Bing Crosby Enterprises."

As they left Alten's office, appellant asked Alten to find a person who would cash a check. He took appellant to a nearby liquor store and asked a Mr. Mitchell to cash the check which appellant wrote for $100. The merchant gave appellant $75 and promised the balance on the following day. Pursuant to appellant's request, Alten drove him to the Ambassador Hotel and to the Brown Derby where he said he had learned from his wife that his horses had lost and wished to check in at the Knickerbocker under the name of Danny Walsh.

After appellant had done some telephoning he became involved in an argument with the clerk and stated that he had a client with him and complained that the hotel was embarrassing him and he would not stand for such treatment. Thereupon, appellant asked Alten for the loan of his $1,500 diamond ring so that he might "put on a flash." Alten loaned the ring, appellant dressed, adorned himself with the diamond, accompanied Alten to the desk clerk; protested the abuse of himself by the hotel's having cut off his long distance calls; threw down $25 on the desk but never returned the diamond to Alten. He induced Alten to lend him his watch also. By false promises and subterfuges and pretenses as to his business transactions and connections appellant kept Mr. and Mrs. Alten on his hook. He returned the watch to Mrs. Alten, but the diamond ring was never seen until the police recovered it from a pawnbroker to whom appellant had pledged it for a loan of $100. Although the check he gave Mr. Mitchell was worthless, appellant called and collected the balance of $25.

The People proved by a bank official that the Bank of America never had an account with Vincent O'Shea, the name appellant had affixed to the $100 check and that he had not made any arrangement for credit at such bank. Also, the witness McGinnis, room clerk at the Knickerbocker Hotel, testified that the check for $50 given by appellant as partial payment of his hotel bill was signed Vincent J. Walsh; that appellant then declared that it was good. But an officer of the branch bank on which it was drawn testified that his branch at 160 East Colorado Street had never had an account with Vincent J.

Walsh and that there was no branch of the Bank of America at 130 East Colorado.

[1] Contrary to the statements of appellant made to Law and Alten, competent witnesses testified that appellant was unknown to Ken Murray and had not talked with him over the telephone concerning the Crossword; that attorney Bautzer had never been retained by appellant for a program known as The Crossword Puzzle of the Air. In fact, the representations of appellant that he was an actor's agent just arrived from Chicago; that he had sold the Crossword for $428,000, of Law's getting 17½ per cent thereof; of appellant's receipt of $2,500 for a 30-day option, of Law's getting one half of same, were, so far as evidence is concerned nothing more than the ravings of a man in a delirium. None of it was proved to be true. Withal, appellant at the trial spurned the witness stand. He called an array of witnesses but none of them gave testimony to disprove that appellant had stolen the diamond from Alten or that he had uttered the fictitious check. The evidence was sufficient.

Rulings of the Court

[2] Appellant assigns as prejudicial the court's denial of his motion to exclude the witnesses. The motion came early in the second day of the trial and at the conclusion of a session outside the presence of the jury. No reason was given for the motion to exclude the witnesses. The trial judge was in a position to know whether justice might be defeated if the witnesses were not excluded and it is presumed that if he had discerned that appellant might suffer prejudice by a denial of the motion the court would have granted it. The discussion preceding the motion was concerning the identity of a woman who had accompanied appellant to the bar where Alten worked. It did not relate in the slightest degree to the theft of the diamond ring or to the fictitious check presented to the bank by appellant. Inasmuch as no showing is made that the court abused its discretion, the judgment will not be disturbed. People v. Lariscy, 14 Cal.2d 30, 32, 92 P.2d 638; People v. Boyden, 116 Cal.App.2d 278, 283, 253 P.2d 773. At any rate, no showing of prejudice suffered by appellant on account of the court's ruling is made.

[3–5] Notwithstanding the noisy acclaim appellant made for himself as an actor's agent "just arrived from Chicago" whereby he furthered his scheme to gain the confidence of Mr. Alten and possession of his valuables, he deems himself aggrieved at the prosecution's proving by a deputy sheriff that appellant was a prisoner in the county jail from November 1951 to December 22, 1953. Appellant contends that by admitting such evidence, proof of another crime was made, to his prejudice. The fact is that by his representation that he was an agent from the east he gained the confidence of Mr. Law and thereby gained possession of the Crossword drama and gained Alten's confidence and his diamond and his endorsement of the $100 fictitious check. The deputy's testimony was competent to disprove the representations appellant had made to gain the confidence of his victims. Relevant evidence is not excluded merely by reason of its disclosure of other offenses by the accused. If by reasonable inference, pertinent evidence tends logically to establish any fact material to the issue of guilt of the defendant it is properly admitted. People v. Peete, 28 Cal.2d 306, 315, 169 P.2d 924. After appellant had stipulated the proof to be correct the court advised the jury that such testimony was offered "only for the purpose of negativing statements" made by appellant to Alten and Law.

[6, 7] Appellant makes a disjointed statement about his request for a clerk's transcript, a special request for all the testimony in open court and in the judge's chambers; his motion to augment the record, his refusal of the Public Defender's office; the appointment of Mr. Brill, a member thereof, over his objection to act in an advisory capacity; his having numerous witnesses supoenaed and the failure of the Sheriff to serve them, his desire for more time to bring in other witnesses; Mr. Brill's reason for not having a subpoena issued for Mr. Hunt; the court's reason for not allowing more time to get such witnesses was that defendant has had every opportunity

during the eleven days of trial to have served them—just what grievance appellant means to spell out by such statements is not made clear. The record reveals that appellant conducted his defense, with the assistance of the Public Defender; had a fair trial and the court was indulgent. The denial of his request for more time to procure other witnesses was correct in view of appellant's neglect for eleven days to attempt to serve his witnesses. On April 26, 1954, the court told appellant that the trial would commence on May 6. It did begin on May 10 and the People did not rest until May 21. Not only was the court's ruling correct, but it was generous toward appellant. Litigants who are ignorant of both law and procedure and are, consequently, of little value to the courts in clarifying issues presented by the pleadings, are real impediments to the proper administration of justice. Having lost confidence in themselves they trust no one else. They should be advised that a court cannot pin gold medals on their lapels merely because they obstruct procedure or belatedly plead for time to do, or have done, such menial tasks as having their witnesses subpoenaed. Of course, any person accused of crime has the right to defend himself but that right does not entitle him to abuse the patience of courts or to infringe upon the rights of others. See People v. Chessman, 38 Cal.2d 166, 174, 238 P.2d 1001; People v. Dorman, 28 Cal.2d 846, 852, 172 P.2d 686. There is not proof that appellant was prejudiced by the court's ruling. People v. Boyce, 99 Cal.App.2d 439, 445, 221 P.2d 1011.

No Prejudice Caused by Instructions

[8] Appellant assigns as prejudicial the court's instruction distinguishing the forms of theft. All three were defined and explained. He says that despite the rulings in People v. Jones, 61 Cal.App.2d 608, 143 P.2d 726, and People v. Waxman, 114 Cal.App.2d 399, 250 P.2d 339, it is a reasonable assumption from the evidence that the jury could have found some proof of false pretenses, of embezzlement and of trick and device "which, standing alone, would not support a conviction, but taken together could have supported a conviction under the evidence. The distinctions between these types of theft are real and not artificial. Now, the problem submitted to the jury was whether appellant had committed grand theft. It is not error to omit the last paragraph of Caljic form 231 which requires the jurors to agree as to which of the three forms of theft was committed. People v. Waxman, supra. The other instructions relating to the forms of theft were illuminating to the jury. They were not confined to a consideration of the one instruction only but were properly advised as to the issues generally and were required to have the concurrence of all twelve jurors.

[9] In his closing brief appellant raises for the first time that because the information was filed February 15, 1954, and the trial was not held until May 6, and, therefore, eighty days had elapsed, before the trial, the action should be dismissed under section 1382, subdivision 2, of the Penal Code.[1] However, subdivision 2 refers only to those cases in which the trial had not been continued on the application of the accused. In the first place, defendant twice moved the court for continuance to a subsequent date for him to plead. In the second place, inasmuch as the record is destitute of statements as to the reasons for the delays, it is presumed that the court acted at the request of appellant in postponing the trial to a time subsequent to the expiration of sixty days from the date of the filing of the information. Code Civ.Proc. § 1963, subd. 15. The record contains nothing to contradict such presumption.

The judgment and the order denying the motion for a new trial are affirmed.

McCOMB and FOX, JJ., concur.

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[1] Penal Code § 1382 reads:

"The court, unless good cause to the contrary is shown, must order the action to be dismissed in the following cases:

* * *

"2. If a defendant, whose trial has not been postponed upon his application, is not brought to trial in a superior court within 60 days after the finding of the indictment, or filing of the information, or in case a new trial is to be had following an appeal from the superior court within 60 days after the filing of the remittitur in the trial court."

133 Cal.App.2d 127

OAKDALE IRRIGATION DISTRICT and South San Joaquin Irrigation District, Petitioners,

v.

COUNTY OF CALAVERAS, Board of Supervisors of the County of Calaveras, Donald M. Cuneo, William Wells, A. J. Gianelli, Frank A. Crespi, and John D. Huston, constituting the members of said Board of Supervisors, George G. Braddock, Assessor of said County, Percy S. Peek, Tax Collector of said County, John Squellati, Auditor of said County, and Joseph S. Huberty, District Attorney of said County, Respondents.

Civ. 8653.

District Court of Appeal, Third District, California.

May 18, 1955.

Rehearing Denied June 16, 1955.

Hearing Denied July 13, 1955.

Mandamus proceeding to compel county to cancel county taxes levied against irrigation districts' land which had been included within boundaries of each district. The District Court of Appeal, Van Dyke, P. J., held that, where two irrigation districts jointly owned certain land, such land could be included within each of such owning districts by inclusion proceedings, and, therefore, county taxes levied against such land would be void.

Peremptory writ of mandate issued.

1. Evidence ⚷25

It is commonly known that irrigation districts often, in order to perform their function to provide water for lands within their boundaries, must expend huge sums of money in erecting great dams upon streams flowing down from the mountains, and that, on many occasions, such undertakings are beyond financial ability of a single district.

2. Waters and Water Courses ⚷226

Land which is within boundaries of a city may be included within irrigation district boundaries, even though both city and district may have the same purposes in common. West's Ann.Const. art. 11, § 13; art. 13, § 1; Water Code, §§ 34075, 34076.

3. Waters and Water Courses ⚷226

Realty, which was jointly owned by two irrigation districts, could be included within each of the owning districts by inclusion proceedings brought by each district. Water Code, § 26901; West's Ann. Const. art. 11, § 13; art. 13, § 1.

4. Waters and Water Courses ⚷226

Where two irrigation districts jointly owned certain realty, such realty from each district was, in limited sense, held in trust for benefit of district's landowners, but inclusion proceedings, by which each district included all of such jointly owned realty within its boundaries, did not constitute a violation of such trust in view of fact that there was not any conveyance or transfer of the realty involved, and the realty remained subject to the same ownership and subject to the same control and operation as it had before the inclusions. Water Code, § 26901; West's Ann.Const. art. 11, § 13; art. 13, § 1.

5. Taxation ⚷217

Even if irrigation district was authorized to include realty only, not an appropriative water right, county would not be able to tax such water right, since, if water right did not constitute land, it would fall under general exemption declared in the constitution and not within exception to such exemption under which county sought to tax water rights. Water Code, §§ 22228, 23100, 26901, 34075, 34076; West's Ann. Const. art. 13, § 1.

6. Waters and Water Courses ⚷226

Water code provisions pertaining to conditions to inclusion of land within irrigation district and to release of burdens, obligations, or liabilities on land of county water district because of inclusion in irrigation district refer exclusively to proceedings by lands owned by individuals as sought to be included within an irrigation district when already within boundaries of a water district and, therefore, are not applicable to inclusion by irrigation districts of their jointly owned land within their boundaries. Water Code, §§ 30090–30092.

7. Taxation ⚷217

Water code provision that lands, which are included within irrigation district and which were within county water district could continue to be in all respects part of county water district would not render such land subject to further taxations by water district in view of general exemption from taxation declared by constitution. Water Code, § 30092; West's Ann.Const. art. 13, § 1.

8. Waters and Water Courses ⚿226

Legislature, with its plenary power over irrigation districts, could have added land jointly owned by two such districts to the districts by direct legislation and could have dispensed with requirements as to irrigability and the like, and, therefore, if there was a defect in manner in which such districts have proceeded to include such land within their boundaries, legislature could validate such inclusion proceedings and has done so by six acts. St.1949, pp. 1508, 1511; St.1951, pp. 1882, 3404; St.1953, pp. 2655, 3680.

9. Waters and Water Courses ⚿226

Upon failure to follow mode created by legislature for inclusion of land within irrigation districts, legislature could, by ratifying that which was done, validate the inclusion proceedings notwithstanding defects in such proceedings. St.1949, pp. 1508, 1511; St.1951, pp. 1882, 3404; St. 1953, pp. 2655, 3680.

10. Mandamus ⚿3(5)

Fact that irrigation districts could have paid, under protest, county taxes levied on irrigation districts' property and then brought action to recover them would not afford basis for denial of writ of mandamus to compel county to cancel such taxes.

11. Taxation ⚿217

Where two irrigation districts jointly owned certain land, such land could be included within each of such owning districts by inclusion proceedings, and, therefore, county taxes levied against such land would be void. Water Code, §§ 22228, 23100, 26901, 30090–30092, 34075, 34076; West's Ann.Const. art. 11, § 13; art. 13, § 1.

◆

McDonough, Schwartz, Allen & Teichert, Martin McDonough, Sacramento, for intervener.

Minasian & Minasian, Oroville, for Oakdale Irr. Dist.

Rutherford, Jacobs, Cavalero & Dietrich, Stockton, for South San Joaquin Irr. Dist.

Joseph Huberty, Dist. Atty. and Virgil M. Airola, Sp. Counsel, San Andreas, for respondents.

VAN DYKE, Presiding Justice.

Petition for writ of mandate to compel the respondent County of Calaveras to cancel as null and void county taxes levied against property of petitioners for the fiscal years 1948–1949 to 1953–1954, inclusive, aggregating $65,031.23, plus penalties and interest. It is the claim of petitioners that the taxed property, jointly owned by them, is exempt from taxation imposed by the respondent county by reason of its having been included in both districts by proceedings taken to that end. It is the contention of the respondent county that these inclusion proceedings did not, for various reasons advanced by it, result in the exemption of said jointly owned property.

The facts presented in the petition for the writ have been stipulated and the matter has been submitted to the court for decision upon issues of law alone. From those stipulated facts the following appears: Petitioners are irrigation districts organized under existing California statute law. Petitioners were, as of the first Monday in March of the year 1948, and for a long time prior thereto had been, joint owners in fee simple, and in possession, of certain real property and the improvements thereon situate in the respondent county. This property consists of Melones Reservoir on the Stanislaus River, lands surrounding the reservoir, the dam, and various water rights, all of which are located approximately one-half in Calaveras County and the other half in Tuolumne County, the county line dividing said two counties being the approximate center of the river. on December 18, 1947, the directors of the South San Joaquin district adopted a resolution "with respect to all land owned jointly by the Oakdale Irrigation District and the South San Joaquin Irrigation District and located outside of their boundaries, for the inclusion of such land within the boundaries of both the Oakdale Irrigation District and the South San Joaquin Irrigation District." On the same day the Board of Directors of the Oakdale Irrigation District adopted a like resolution as to the same property. It is apparent that the two districts intended by the proceedings so initiated to accomplish a result whereby as to each district all properties it owned jointly with the other district should be included within the boundaries of *both.* The South San Joaquin district proceeded without interruption to complete inclusion proceedings as prescribed by the Water Code and the proceedings terminated with appropriate orders of inclusion. The proceedings were completed prior to March 1, 1948. Like proceedings were completed by the Oakdale district, but were interrupted by a writ of mandate issued from the Supreme Court at the instance of the counties of Calaveras and Tuolumne. The court enjoined the inclusion of said lands within the Oakdale district until determination of the mandamus proceedings. On August 30, 1948 the Supreme Court discharged the writ, County of Calaveras v. Oakdale Irrigation District, 32 Cal.2d 890, 196 P.2d 927, and thereafter and on September 6, 1948 the Oakdale district completed the inclusion proceedings.

A number of the legal issues discussed in the briefs of respondent have been heretofore decided by the Supreme Court in County of Mariposa v. Merced Irrigation District, 32 Cal.2d 467, 196 P.2d 920, in County of Calaveras v. Oakdale Irrigation District, supra, and in County of Tuolumne v. Oakdale Irrigation District, 32 Cal.2d 891, 196 P.2d 927.

In the Mariposa case the Supreme Court ruled as follows: That Water Code Section 26901, as amended in 1947, authorizes the inclusion of land in an irrigation district on a petition by the "owner" of the land, regardless of whether it can be irrigated, and also authorizes a district itself to petition to include its own land within such district; that such authorization and action taken thereunder does not violate the provisions of Article XIII, section 1, of the Constitution, excepting from tax exemption lands and improvements of a municipal corporation lying outside the corporate boundaries; that Article XIII, section 1, of the Constitution, as amended in 1914, does not mean that property located outside the boundaries of an irrigation district at the time of acquisition by the district continues to be taxable, after being included within the boundaries of the district; that a county does not have a vested right to tax property of irrigation districts, and that it is only an exception in the Constitution, Article XIII, section 1, that makes some of such district property taxable; that the constitutional provision itself contemplates the power of an irrigation district to annex additional area and thus incidentally achieve tax exemption; that the statutes authorizing the inclusion of additional land within an irrigation district's boundaries do not unlawfully delegate power to the district directors to affect county financial affairs in violation of Constitution Article XI, section 13, since the effect that such boundary change has upon taxation by the county is only one incidental result that happens to flow from the inclusion; that said statutes which permit such a district to file a petition, authorized by its own directors, for inclusion within its own boundaries of land owned by it, and also to determine the petition, are not subject to objection by the county on the ground that they violate the separation of powers doctrine, although the district is thereby granted powers to exercise both executive and judicial functions, and that the separation of powers provision of the Constitution does not apply to local governments as distinguished from departments of the state government. In connection with the foregoing, the decision in County of Mariposa v. Merced Irrigation District, supra, dealt with inclusion proceedings identical in kind and character with those with which we are here concerned, save only that the instant case presents a situation where property owned jointly by two districts is attempted to be brought within the boundaries of both districts by simultaneous action of the two districts.

In examining respondent county's contentions that even though a single district, as Merced district, could by its own petition to itself, granted by itself, include noncontiguous and non-irrigable lands owned by it within its boundaries and thus achieve exemption from county taxation, yet proceedings whereby as in this case two districts attempt to include jointly-owned properties in both are void, it is well to keep in mind that when County of Mariposa v. Merced Irrigation District was pending in the Supreme Court there was also pending therein the other two cases above referred to, that is, County of Calaveras v. Oakdale Irrigation District and County of Tuolumne v. Oakdale Irrigation District. County of Mariposa v. Merced Irrigation District was decided on August 30, 1948, and on the same day, with respect to County of Calaveras v. Oakdale Irrigation District, the court declared [32 Cal.2d 890, 196 P.2d 927]: "This case involves the same questions presented in County of Mariposa v. Merced Irrigation District, 32 Cal.2d 467, 196 P.2d 920, and is controlled thereby. Therefore the petition for a peremptory writ of mandate is denied, and the alternative writ is discharged." The same disposition on the same date and in identical language was made of County of Tuolumne v. Oakdale Irrigation District. In both of those cases the same inclusion proceedings which are here under attack were there attacked by respondent county.

[1] One searches in vain for any practical or political reason why any distinction should be made with respect to exemption from taxation of property jointly owned by irrigation districts. The legislature, as held by the Supreme Court in the Mariposa case, has constitutionally authorized such districts to avoid taxation by including noncontiguous and non-irrigable severally owned lands within the boundaries of the owner district. If exemption from taxation is justifiable and desirable in the one case it is equally justifiable and desirable in the other. The Constitution itself lays down the broad principle that the property of the state and of the various governmental agencies of the state ought not to be taxed. Article XIII, section 1, declares that all property in the state, except as otherwise in the Constitution provided, should be taxed in proportion to its value, but that property belonging to the state or to any county, city and county or municipal corporation (irrigation districts are municipal corporations) within the state shall be exempt from taxation. Having laid down this broad general policy exempting such state and state agency owned property from taxation, it states an exception to this general policy of exemption. Land, and land only, with improvements thereon not constructed by counties or municipal corporations, located outside the municipal boundaries, and subject to taxation when acquired, is excepted from the general policy of exempting all state owned and state agency owned property from taxation. When the legislature, acting constitutionally, as the Supreme Court declared it did, offered an opportunity to irrigation districts to avoid taxation by including theretofore taxable property within their boundaries, it must have considered that such avoidance of taxation was on the whole a beneficial and proper achievement. One sees no reason why jointly owned property of the districts cannot equally, and by the proceedings taken by petitioners herein, achieve the same beneficial exemption. It is commonly known that such districts often, in order to perform their functions and provide water to the lands within their boundaries, must expend huge sums of money in erecting great dams upon streams flowing down from the mountains and that on many occasions such undertakings are beyond the financial ability of a single district. In recognition of this situation the legislature, exercising its plenary power over the affairs of such districts, has provided that they may cooperate and join in the ownership and management of water projects. Section 23100 of the Water Code provides that:

> "A district may make and perform any agreement with the United States, any State, county, district of any kind, public corporation, any person, or any number of them for the joint acquisition, disposition, or operation of any property of a kind which might be acquired by the district."

Section 22228 of the Water Code provides that:

> "A district may contract to perform and perform any agreement with any number of persons or public corpora-

> tions or agencies for the exchange, transfer, or delivery to or by either or both parties of any water right or water."

Melones Dam on the Stanislaus River and its reservoir and diverting canals and delivery system are jointly owned by the Oakdale and the South San Joaquin districts. It must be said that the legislature could expressly provide for inclusion of jointly owned property within the boundaries of the owning districts and we think it would do violence to the purpose and the intent of the legislative enactments we have been discussing to hold that these enactments did not fairly embrace within their purpose and intent and, therefore, within their provisions, property owned jointly by irrigation districts.

Respondent county argues that the general rule laid down in Petition of Sanitary Board of East Fruitvale Sanitary District, 158 Cal. 453, 457, 111 P. 368, 370, ought to be here applied. That rule was there stated as follows:

> "It is a well-settled doctrine that 'there cannot be at the same time, within the same territory, two distinct municipal corporations, exercising the same powers, jurisdiction and privileges.'"

However, the same case declared:

> "These rules do not rest upon any theory of constitutional limitation. In the absence of any constitutional restriction, the Legislature has absolute power over the organization, the dissolution, the extent, the powers, and the liabilities of municipal and other public corporations established as agencies of the state for purposes of local government. In re Madera Irrigation District, 92 Cal. 296, 28 P. 272, 675, 14 L.R.A. 755, 27 Am.St.Rep. 106. What shall be the effect of the enlargement or diminution of the boundaries of such corporations, or of the consolidation of two into one, or of the annexation of the territory of one to another, *is a question to be answered by a determination of the legislative intent.*" (Emphasis added.)

Far from there being any constitutional limitation in respect of the simultaneous inclusion in two irrigation districts of land jointly owned by them, the Constitution has itself declared, art. XI, sec. 13, Const., that:

> "* * * the Legislature shall have power to provide for the supervision, regulation and conduct, in such manner as it may determine, of the affairs of irrigation districts * * *."

[2, 3] Very often land is included within the boundaries of several state agencies. Thus land within the boundaries of a city may be included within the boundaries of an irrigation district, notwithstanding both the city and the district have many of the same purposes in common. La Mesa Homes Co. v. La Mesa, etc., Irrigation District, 173 Cal. 121, 125, 159 P. 593; see also Pixley v. Saunders, 168 Cal. 152, 141 P. 815. In Galt County Water District v. Evans, 10 Cal.App.2d 116, 51 P.2d 202, it was held that the annexation by the Sacramento Municipal Utility District of the Galt County Water District did not preclude the latter district from the exercise of the power to incur a bonded indebtedness granted by the County Water District Act. The Legislature has expressly provided in section 34075 of the Water Code that lands within a water district may be included within an irrigation district; and section 34077 of the same code provides that such inclusion shall not release the included land from any of the burdens, obligations or liability of the water district; and that such lands shall in all respects continue to be a part of the water district. Indeed, it is hard to escape the conclusion, since the subject legislation was enacted shortly after the Supreme Court held in Rock Creek Water District v. County of Calaveras, 29 Cal.2d 7, 172 P.2d 863, that irrigation districts were municipal corporations and that property outside their boundaries might be taxed if taxable when acquired, that the legislation was enacted in direct response to that holding and that its main purpose was to provide a means whereby irrigation districts could place their properties under the protection of the general tax exemption provisions of Article XIII, section 1, of the Constitution.

As we have noted, the Supreme Court in the Mariposa case, supra, declared that the legislation was properly enacted and did no violence to the constitutional provisions for taxing non-included properties of municipal corporations. In view of these considerations, we hold that jointly owned property could be included within the owning districts by the procedure followed by petitioners in the instant case.

[4] Respondent county contends that the lands of an irrigation district are held by and subject to a public trust for the benefit of the district's landowners and that the inclusion of the jointly owned lands within both owning districts would be the subjection of the trust property to non-trustee control; that such inclusion amounted to a partial transfer in violation of the trust. These contentions we cannot sustain. That the property of such districts is in a limited sense held in trust for the benefit of the district's landowners could not and need not be disputed; that the inclusion proceedings here taken constituted a violation of that trust does not follow. There was no conveyance or transfer of property involved. The property remained subject to the same ownership and subject to the same control and operation as had been the case before the inclusion. The properties were jointly owned, and jointly managed, for the joint benefit of the landowners in both districts, and after the inclusion proceedings that situation remained unaltered. Both before and after the inclusion the properties could only be controlled and managed by joint action and friendly cooperation of the districts. After the inclusion the same sort of control and management existed with the same limits imposed, not by reason of the inclusion, but by reason of the joint ownership.

[5] Respondent county contends that the Water Code sections under discussion authorize inclusion of land only and that not all of the property here included was land, since the property included an appropriative water right. It is difficult to see how this point, if good, would benefit the respondent county, since if the water right did not constitute land, it would fall under the general exemption from taxation declared in constitutional Article XIII, section 1, and not within the exception to that exemption under which respondent county has taxed the water rights. However, in Waterford Irrigation District v. County of Stanislaus, 102 Cal.App.2d 839, 228 P.2d 341, and in Alpaugh Irrigation District v. County of Kern, 113 Cal.App.2d 286, 248 P.2d 117, it was held that appropriative water rights were land within the meaning of the Constitution, Article XIII, section 1. A rehearing was denied by the Supreme Court in both cases. We see no reason for not now abiding by the cited decisions.

It is also contended that in the inclusion proceedings of peitioners there was a failure to comply with the requirements of Sections 30090–30092 of the Water Code and that this failure of compliance rendered the inclusion proceedings void. The sections referred to are found in that portion of the Water Code having to do with county water districts, the entire statutory plan for the organization and government of such water districts being contained in Division 12 of the Water Code. Section 30090 provides that:

> "The holders of title to any tract of land within any county water district may petition for the inclusion of the land and the land may be included within an irrigation district under the same conditions and in the same manner as if the land was not within the county water district."

Section 30091 provides that:

> "But, the inclusion shall not be made unless it appears and the board of directors of the irrigation district within which the land is to be included finds both:
>
> "(a) The county water district within which the land is situated has been in existence for not less than five years immediately preceding the date of the filing of the petition for inclusion with the secretary of the board of directors of the irrigation district.
>
> "(b) On the date of the filing of the petition the county water district is not delivering and is not prepared to deliver water from the irrigation works

owned by the county water district to the land for irrigation purposes."

Section 30092 provides that:

If lands be so included within an irrigation district, they shall not by such inclusion be released "from any of the burdens, obligations, or liabilities of the county water district in which it is situated because of its inclusion within an irrigation district but shall continue to be in all respects a part of the county water district."

[6] The jointly owned property of the petitioners consisted, as before stated, of their dam, reservoir and distributing systems; and that portion which lay on the Calaveras county side of the Stanislaus River was within the boundaries of the Calaveras County Water District at the time the properties were included within the irrigation districts. Calaveras County Water District had not been in existence for five years at the time of such inclusion proceedings and obviously the water district was not delivering and was not prepared to deliver water from any irrigation works owned by it to those properties. We say "obviously" because it would be absurd to suppose that the water district would ever contemplate delivering irrigation water to, and for the irrigation of, the dam, the reservoir and the water distributing systems which constitute the properties being included within the irrigation districts. Calaveras County Water District was permitted to intervene in these proceedings and it has joined respondent county in protesting that because of the provisions of Sections 30091–30092 of the Water Code the jointly owned properties of the irrigation districts could not be included within those districts without the findings required in Section 30091. A part of the taxes assessed by respondent county were assessed under appropriate provisions of law for the benefit of, and really constitute taxation by, Calaveras County Water District. They are a part of the total tax assessments which petitioners here seek to annul. We think the cited provisions of the Water Code have no application to the inclusion by petitioners of their jointly owned properties within their boundaries. To give to those code sections the meaning attributed to them by respondent county and respondent water district, not only in this case but in any other case wherein district owned property consisted of property devoted to the furnishing of water to irrigable lands, would be to declare absurdity in the legislation. We have already held that the legislature intended by the 1947 amendments to the pertinent sections of the Irrigation District Act to permit irrigation districts to achieve tax exemption by including such properties within their boundaries. To apply the referenced sections of the Water Code to such properties would be to nullify the amendatory acts wherever non-irrigable properties owned by irrigation districts were by them sought to be included within their own boundaries. Such properties are, of course, not irrigable. If irrigable in their natural state they are taken from that classification when devoted to the uses of distribution of water for the irrigation of other lands. It is unnecessary to give such construction to the referenced sections of the Water Code for the reason that full scope may be found for those sections without such construction. We think it clear that the intention of the legislature in enacting those sections, as demonstrated by its amendments to the Irrigation District Act, was that the Water Code sections refer exclusively to proceedings whereby lands owned by individuals are sought to be included within an irrigation district while already within the boundaries of a water district.

> "* * * Where the language of a statute is susceptible of two constructions, one of which, in application, will render it reasonable, fair and harmonious with its manifest purpose, and another which would be productive of absurd consequences, the former construction will be adopted." Uhl v. Badaracco, 199 Cal. 270, 284, 248 P. 917, 922.

[7] In this connection respondents further contend that the language of Section 30092 above quoted would apply to the subject lands even though their inclusion within the irrigation districts was valid because that section states in general language that lands so included and which were within a county water district could continue to

be "in all respects a part of the county water district". However, to say that this section would render the lands, even though so included, subject to further taxation by the water district, would be to fly in the face of the general exemption from all taxation declared by Article XIII, section 1, of the Constitution. This further contention, therefore, is untenable.

[8] We have said the legislature could constitutionally permit irrigation districts to include within their boundaries their own properties and that in adopting amendments to the existing statutes governing inclusion proceedings the legislature availed itself of methods contemplated by the Constitution itself, as held in County of Mariposa v. Merced Irrigation District, supra. This brings into operation further legislative enactments, which we will now discuss. The legislature, with its plenary power over such districts, could have added these lands to the districts by direct legislation. Further, the legislature could have dispensed with the requirements as to irrigability and the like. Reclamation District No. 70 v. Birks, 159 Cal. 233, 113 P. 170; Barber v. Galloway, 195 Cal. 1, 6, 231 P. 34. That being the case, the legislature could, if there be defect in the manner in which the districts have proceeded under the existing statutes, validate those proceedings, and this the legislature has done, not by one act but by six acts. (See Validating Act of 1949, Stats.1949, ch. 781, p. 1508; Validating Act of 1949, Stats.1949, ch. 782, p. 1511; Validating Act of 1951, Stats.1951, ch. 675, p. 1882; Validating Act of 1951, Stats. of 1951, ch. 1445, p. 3404; Validating Act of 1953, Stats. of 1953, ch. 1156, p. 2655; Validating Act of 1953, Stats. of 1953, ch. 1886, p. 3680.) Generally, these validating acts all follow the same pattern and are substantially identical in wording and purpose. We quote the language used in the Validating Act of 1949, Stats.1949, ch. 781. After declaring that the term "public body" includes irrigation districts, the legislature declared:

> "All acts and proceedings heretofore taken by any public body under any law, or under color of any law, for the annexation or inclusion of territory into any such public body are hereby confirmed, validated, and declared legally effective. This shall include all acts and proceedings of the governing board of such public body and of any person, public officer, board or agency heretofore done or taken upon the question of the annexation or inclusion of such territory."

These acts are all applicable to the proceedings under review and as authority for the foregoing we cite Los Angeles City Water Co. v. City of Los Angeles, C.C., 88 F. 720, 742. From that case we quote:

> "Whatever a legislature may originally authorize, it can, if the constitution under which it exists interposes no obstacle, subsequently ratify; and such ratification is equivalent to an original grant of power, operative by relation, as of the date of the thing ratified. This, according to all the authorities, is the theory and effect of a ratifying act." See, also, McKenzie v. Mukilteo Water District, 4 Wash.2d 103, 102 P.2d 251.

We quote the following from People ex rel. Amestoy Estate Co. v. Van Nuys Lighting District, 173 Cal. 792, 797, 162 P. 97, 99:

> "A curative act or a conclusive evidence clause in a statute is effective to cure all defects resulting from a failure to comply with provisions which are merely directory of the mode of the exercise of the power." See 2 Cooley's Const.Lim. 8th ed. 790.

[9] In this case by the subject legislation the legislature delegated to irrigation districts the power to include lands within their boundaries and directed the mode of the exercise of that power. Consequently, the legislature, if there was a failure to follow the mode, could by ratifying that which was done validate the inclusion proceedings notwithstanding the defects to which respondents direct their challenge.

[10, 11] Finally, respondents assert that these proceedings in mandate do not afford a proper and available method by which petitioners may receive the relief they ask, that is, a mandate to the board of super-

visors to take appropriate action to annul these illegal taxes, which action the board has heretofore refused to take. The contention cannot be sustained. Year by year over the protest of petitioners the board of supervisors of the respondent county has levied and assessed taxes upon the exempt property of petitioners. The amounts involved are large. It affords no reason under the circumstances of this case to deny mandate because these public bodies might have paid under protest the taxes levied and then have brought suit to recover them. The petition sets forth the following matters as justifying their not having followed the method of payment under protest and suit to recover: Petitioners are state agencies formed and existing for governmental purposes; they are controlled and limited by the provisions of the Water Code with respect to borrowing money and the collection of funds with which to pay expenses and obligations; for all practical purposes they obtain their funds through levies and collection of assessment upon lands within their boundaries which are served and benefited by the delivery of water thereto. If the county taxes are illegal, as we have held they are, then petitioners ought not to be put to the burden of levying assessments for the purpose of raising money to pay the unlawful charges represented in the tax assessments and, indeed, it may be questioned whether or not they would have any authority to raise such funds. It is obvious that the involved and circuitous method of first levying taxes to pay illegal charges and then suing to recover does not afford to petitioners an adequate remedy for the wrong which the respondent county and the respondent water district have been insistently inflicting upon them. If the budget of these districts should reflect that a part of the taxes levied upon their included lands would go to pay taxes of the respondents unlawfully assessed against them, it is likely that taxpayers' suits would be brought to restrain the proposed levies for such a purpose. Without going further we think it is clear that this is a proper case for the issuance of the writ prayed for. The duty of the respondent through appropriate official action to cancel these illegal taxes is specifically enjoined by law. City of Los Angeles v. County of Mono, 108 Cal.App. 655, 292 P. 539.

For the reasons given it is ordered that a peremptory writ of mandate as prayed for be issued.

PEEK and SCHOTTKY, JJ., concur.

133 Cal.App.2d 141

ROCK CREEK WATER DISTRICT, a public agency of the State of California, Plaintiff and Respondent,

v.

COUNTY OF CALAVERAS, a body corporate and politic of the State of California, Defendant and Appellant (two cases).

Civ. 8615.

District Court of Appeal, Third District, California.

May 18, 1955.

Rehearing Denied June 10, 1955.

Hearing Denied July 13, 1955.

Actions, consolidated for trial, by water district against county to recover taxes paid to county on lands purportedly included within boundaries of district. The Superior Court, Calaveras County, Ralph McGee, J., entered judgment for district, and county appealed. The District Court of Appeal, Van Dyke, P. J., held that, where water district had failed to comply with statutory requirements governing mode of inclusion of a reservoir and distributing system, county was entitled to collect and keep, as taxes legally levied upon reservoir and system, those taxes which had so levied and assessed and which constituted a lien thereon before effective date of validating act.

Judgment modified and, as modified, affirmed with directions.

1. Waters and Water Courses 🔑226

Water district's reservoir and distributing system could not be benefited by irrigation, even though irrigable in its natural estate, and, therefore, reservoir and system were not properly included within district, even though district's board of directors found that reservoir and system could be irrigated from works of district and that sole owner had consented in writing to its inclusion within district. Water Code, §§ 37486 et seq., 37506; Revenue and Taxation Code, § 5096 et seq.; West's Ann. Const. art. 13, § 1.

2. Waters and Water Courses 🔑226

Legislature can include reservoir and distributing system within boundaries of a water district by direct legislative action and can authorize inclusion of such items by district on its own petition, to itself and granted by itself, whether such reservoir and system are irrigable by district works or not. St.1949, p. 1508.

3. Constitutional Law 🔑92

County does not have vested right to continue to tax properties once they are included within a water district. West's Ann.Const. art. 13, § 1.

4. Constitutional Law 🔑193

Where legislature has power to authorize certain things to be done, it has power to ratify and confirm such thing when done irregularly or not done in mode previously prescribed by legislature. St.1949, p. 1508.

5. Constitutional Law 🔑193

Curative act, which pertained to validation of proceedings theretofore taken by a public body for annexation or inclusion of territory into such body, could not be applied to disturb vested rights. St.1949, p. 1508.

6. Taxation 🔑217
Waters and Water Courses 🔑226

Failure of water district to comply with statutory requirements governing mode of inclusion within its boundaries of reservoir and distributing system was cured by validating act which was thereafter passed by legislature, and effect of such act was to ratify and confirm inclusion of such property within district boundaries, and, therefore, county could not thereafter tax such property after effective date of validating act. St.1949, p. 1508; Water Code, §§ 37486 et seq., 37506; Revenue and Taxation Code, § 5096 et seq.; West's Ann.Const. art. 13, § 1.

7. Taxation 🔑217

Where water district had failed to comply with statutory requirements governing mode of inclusion of a reservoir and distributing system, county was entitled to collect and keep, as taxes legally levied upon reservoir and system, those taxes which had been so levied and assessed and which constituted a lien thereon before effective date of validating act. St.1949, p. 1508; Water Code, §§ 37486 et seq., 37506; West's Ann.Const. art. 13, § 1.

◆

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Jones, Lane, Weaver & Daley, Stockton, Minasian & Minasian, Oroville, Rutherford, Jacobs, Cavalero & Dietrich, Stockton, of counsel, for respondent.

VAN DYKE, Presiding Justice.

These actions were brought by Rock Creek Water District, hereinafter called "district" to recover taxes paid to the County of Calaveras, hereinafter called "county". The district is organized under the California Water District Act. All of the lands originally within its boundaries are located in Stanislaus County. In 1942 the district purchased a reservoir site, franchises, water rights and easements for the purpose of affording a water supply to the lands within its boundaries. The purchased property was all located in the County of Calaveras and was being taxed by the county at the time of acquisition by the district. These taxes were levied under the mandate of the California Constitution, Article XIII, section 1, which requires that all property in the state, except as otherwise provided in the Constitution, be taxed. Certain exemptions are then declared, including an exemption applicable to property belonging to the state or to any county, city and county or municipal corporation within the state. This exemption would free the subject property herein from taxation since it is owned by the district and was owned by it when these taxes were levied. The exemption was inapplicable, however, until and unless the property was within the boundaries of the district, for the Constitution provided that land and improvements thereon located outside of the district and which was subject to taxation at the time of its acquisition by the district should not be exempt. On October 21, 1948, the board of directors of the district began proceedings to include the subject property within the district's boundaries and completed these proceedings on December 15, 1948. The district purported to act under the provisions of section 48 et seq., of the Water District Act, now appearing in section 37486 et seq., of the Water Code. Notwithstanding the inclusion proceedings, the county continued to tax the property. For the tax year 1949–1950 it levied a tax thereon of $806.35, which amount was paid by the district without a valid protest. The tax for the year 1950–1951 was for the sum of $870.55, and this sum likewise was paid by the district without a valid protest. Thereafter and acting under the provisions of section 5096 and following of the Revenue and Taxation Code, which sections provide a proceeding for the refunding of taxes erroneously or illegally collected, the district asked the supervisors of the county to refund such sums. The claim for refund was rejected and the district filed suit to recover the taxes paid for the two years involved. For the tax year 1951–1952 the county taxed the same property for $901.36. This amount was paid by the district under written protest and a second action was begun to recover these taxes acting under the sections of the code providing for the recovery of taxes paid under protest. The two cases were consolidated for trial and judgment was rendered in favor of the district in each case. The county appeals. It was the contention of the district in the trial court and it is its contention on appeal that by the proceedings taken it included within its boundaries its water supply property; that once that inclusion had been accomplished the property was no longer taxable since no longer falling under the exception to the general exemption of state and state agency owned property from taxation. The county has at all times contended that the inclusion proceedings were void and hence that the taxes in issue here were lawfully levied and cannot be recovered.

[1] A number of the reasons advanced by the county for the invalidity of the inclusion proceedings have, since the filing of the briefs herein, been considered by this Court in Oakdale Irrigation District v. County of Calaveras, Cal.App., 283 P.2d 732, relying in the main upon the Supreme Court opinion in County of Mariposa v. Merced Irrigation District, 32 Cal.2d 467, 196 P.2d 920. Sections 48 et seq. of Act 9125, Deering's General Laws, provide that the owners of land may file with the board of directors of a water district a petition asking that their lands be included therein. Provisions are made for hearing the petition after notice and it is provided that if the board of directors, after such hearing, determines that the petition complies with the statutory requirements, and that inclusion of the land described in the petition will be for the best interests of the district, the board shall order the boundaries of the district changed to include such portions of the land as the board deems it for the best interests of the district to include. It is then provided that "no land shall be so included unless the board, * * *, shall determine that it can be irrigated by means of some of the works of the district or by means of practicable work connecting therewith and will be benefited by such irrigation." § 37506. If the board determines that not all of the land shall be included it can include portions of the land described in the petition if the owners thereof consent to the inclusion of such selected portions. There are other provisions with which we are not here concerned. In the order of inclusion the district's board of directors found that all of the property described in the petition could be irrigated from the works of the district and that the sole owner had consented in writing to its inclusion. The

county attacks the finding that the property thus declared included within the district's boundaries could be irrigated from the works of the district and would be benefited by such irrigation, as being false to the point of fraudulency, and asserts that the finding cannot be considered in testing the sufficiency of the inclusion proceedings to accomplish their purpose. We are referred to no evidence that the reservoir and the distributing system which constitute the property here involved could be "irrigated" from and by the system and we agree with the county that it is ridiculous to suppose that the property could or would be so irrigated. The district contends that the statutory requirement of a finding that the lands to be included can be irrigated from the district's works has no application to the property here involved. The district says that the requirement is obviously intended for the protection of property owners whose lands are included in those which the petitioner seeks to have included within the district; that such owners are given the opportunity to appear and protest that their lands cannot be so irrigated; and that the fact that this provision is only for the protection of such owners is indicated by the further provisions that permit lands not capable of irrigation to be included if the owners thereof consent. We think these contentions of the district cannot be upheld in view of the wording of the statute. The legislature has directed the mode in which lands may be included within a water district and has delegated to the board of directors the power to proceed to that end, but only by substantial compliance with the statutory conditions. Those conditions are clearly stated. Not only does the statute say that no land shall be included unless it can be irrigated by some of the works of the district, but also that such irrigation must benefit said lands. In the instant case the property sought to be included could not conceivably be benefited by irrigation, even though irrigable in its natural state. We hold that the district in the inclusion proceedings did not comply with the statutory requirements and that for that reason the subject property was not included by the action taken. That, however, does not mean that it is not now included.

After the district had completed its proceedings for inclusion and had purportedly, by order of its board of directors, included the subject property within its boundaries, various validation acts were passed by the legislature. We think we need refer only to the earliest of these, found in Chapter 781 of the Statutes of 1949, p. 1508. This act is known as the "Validating Act of 1949" and it took effect on June 30th of that year. After defining the term "public body" as including water districts, the act provides as follows:

> "All acts and proceedings heretofore taken by any public body under any law, or under color of any law, for the annexation or inclusion of territory into any such public body are hereby confirmed, validated, and declared legally effective. This shall include all acts and proceedings of the governing board of such public body and of any person, public officer, board or agency heretofore done or taken upon the question of the annexation or inclusion of such territory.
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> * * * * * *
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> "This act shall operate to supply such legislative authorization as may be necessary to validate any such acts and proceedings heretofore taken which the Legislature could have supplied or provided for in the law under which such acts or proceedings were taken.
>
> "This act shall be limited to the validation of acts and proceedings to the extent to which the same can be effectuated under the State and Federal Constitutions."

[2–5] That the legislature could include the subject properties within the boundaries of the district by direct legislative action, that the legislature could have authorized the inclusion by the district on its petition to itself, granted by itself, of these same properties, whether or not they were irrigable by the works of the district, and that appellant county had no vested right to continue to tax these properties once they were included, are matters settled by the decision of the Supreme Court in County of Mariposa v. Merced Irrigation District, above. It is a general rule that whatever the legislature has power to authorize to be done it has power to ratify and confirm when done irregularly or not in the mode previously described. Of course the curative act cannot be applied to disturb vested rights. City of Redlands v. Brooks, 151 Cal. 474, 479, 91 P. 150; 11 Cal.Jur.2d 653. Said the Supreme Court in Miller v. McKenna, 23 Cal.2d 774, 781–782, 147 P.2d 531, 535:

> "The Legislature may cure irregularities or omissions to comply with provisions of a statute which could have been omitted in the first instance. This rule is quoted from Cooley on Constitutional Limitations, at page 457, as follows: 'If the thing wanted or failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute; and if the irregularity consists in doing some act, or in the manner or mode of doing some act, and which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law.' "

[6, 7] We hold that the failure of the district to comply with the statutory requirements governing the mode of inclusion of the subject property within its boundaries could be and was cured by a validating act passed by the legislature thereafter and that the effect of the Validating Act of 1949 was to ratify and confirm the inclusion of the subject property within the boundaries of the district. The county could not, therefore, tax the subject property after the validating act went into effect on June 30, 1949. But since the curative act could not disturb vested rights it could collect and keep as taxes legally levied by it upon the subject property those taxes which had been so levied and assessed and constituted a lien thereon before that date. The district, therefore, cannot through its action recover taxes for the first year, 1949–1950. Those taxes were levied and assessed and constituted a lien upon the property before June 30, 1949. Turlock Irrigation District v. County of Tuolumne, 124 Cal.App.2d 611, 269 P.2d 129.

We think no further matters argued in the briefs need to be discussed.

For the reasons given, the judgment rendered is modified so as to deny recovery to the district of the taxes for the year 1949–1950. In other respects the judgment is affirmed, and the trial court is directed to enter a modified judgment in accordance herewith.

PEEK and SCHOTTKY, JJ., concur.

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133 Cal.App.2d 147

Cyrilla BLOS, Plaintiff and Appellant,

v.

BANKERS LIFE COMPANY, a corporation, Retail Grocers Association of San Francisco, Limited, and F. A. Tissier, Trustee of Retail Grocers Association Insurance Fund, Defendants and Respondents.

Civ. 16308.

District Court of Appeal, First District, Division 1, California.

May 19, 1955.

Action to reform and enforce group insurance policy. The Superior Court, City and County of San Francisco, Albert C. Wollenberg, J., entered a judgment of nonsuit, and plaintiff appealed. The District Court of Appeal, Patterson, J. pro tem., held that insurance fund trustee, appointed by board of directors of trade association which was negotiating group policy covering its members, was not an agent of the insurer, and statement, in bulletin sent out by such trustee, to effect that policy would become effective on date when 75% of all eligible members had enrolled, was not binding upon insurer.

Affirmed.

1. Insurance ⚷73

Insurance fund trustee, appointed by board of directors of trade association negotiating group policy covering its members, was not an agent of the insurer, and statement, in bulletin sent out by such trustee, to effect that policy would become effective on date when 75% of all eligible members had enrolled, was not binding upon insurer.

2. Insurance ⚷134(1)

As a general rule, an advertisement, pamphlet or preliminary statement issued for purpose of soliciting insurance does not constitute part of contract where it is neither attached to policy nor referred to therein. Insurance Code, §§ 10113, 10202.7(b).

3. Estoppel ⚷85

Generally speaking, to work an estoppel a representation must be one of fact as distinguished from a promise of something to be done in the future.

4. Insurance ⚷141(1)

Group insurer was not estopped to deny that insurance automatically became effective on date when seventy-five per cent of eligible members of trade association had signed written request for insurance, where its attention had not been called to association bulletins stating that policy would become effective when seventy-five per cent of all eligible members had enrolled and subsequent bulletin stating that quota had been reached.

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Carroll F. Jacoby, San Francisco, for appellant.

Knight, Boland & Riordan, John H. Riordan, San Francisco, for respondent Bankers Life Co.

E. R. Hoerchner, San Francisco, for respondents Retail Grocers Ass'n of San Francisco, Limited, and F. A. Tissier, Trustee of Retail Grocers Ass'n Insurance Fund.

PATTERSON, Justice pro tem.

Plaintiff appeals from a judgment of nonsuit in an action to reform and enforce a group insurance policy. The question presented is whether the policy should be reformed to show its effective date as of May 27, 1952, when Blos entered the hospital with an ailment causing his death on June 8, 1952.

On November 26, 1951, the board of directors of the Retail Grocers Association of San Francisco authorized its secretary to negotiate a group insurance policy covering its members. At the same meeting he was also appointed trustee of the insurance fund. As a result of negotiations an application was made on April 4, 1952, by the trustee on behalf of the association to defendant Bankers Life Company, for a group life insurance policy and a group hospital, surgical and medical expense policy. The provisions of both applications and policies affecting the points involved in this appeal are identical; so for convenience they will be considered as one.

The application provided the insurance should not become effective (a) unless the application was received and approved by the insurance company at its home office; (b) unless seventy-five per cent of the employees made a written request for the insurance; (c) as to any employee on a date on which he was not actively at work. It also provided that the effective date should be the date of issue shown on the policy, if issued.

On April 8th a bulletin was issued to the membership of the association. Pages 2 and 3 of the bulletin covered a statement of the benefits of the policy and were furnished by the insurance company. This portion of the bulletin contained the following language: "The Group Insurance Policy will become effective on the date that 75% of all eligible Members have enrolled." This is the representation upon which plaintiff relies for relief. The bulletin also contained the statement: "All benefits will be controlled by the Master Group Policy issued by Bankers Life Company and held by the Association. This bulletin is merely a description of benefits provided and is not a contract." The portion of the bulletin written by the trustee for the association contained this statement: "Please complete the application card, by filling in spaces indicated and mail it with your check payable to *Grocers' Insurance Fund.* Your check will be held (not deposited) until the insurance goes into effect." There is no evidence in the record that the latter statement ever came to the attention of the insurer. On April 26th William P. Blos signed a request for insurance together with a check for the first month's premium. On May 23rd the association issued another bulletin to its members which stated that the plan would positively go into effect June 1st. On May 26th a third bulletin was issued which stated that the quota had been reached and that the plan would be effective as of June 1st. On May 26th the checks were deposited. Blos was at work on May 27th, on which date he entered a hospital. He did not return to work and died on June 8th. On May 29th a list of the members who had signed a request for insurance together with the first month's premium was turned over by the trustee of the association insurance fund to the local agent of the insurance company. He in turn sent them to the home office. The agent, called as an adverse witness, testified that on May 29th there was not a sufficient number enrolled to qualify and that others had to be sent in to reach the required number. On June 10th the insurer issued a policy with the effective date of June 1st. Among other provisions the policy provided that to be eligible a member must be actively at work on the effective date. If not at work on that date the policy would become effective on the first date thereafter when he was actively at work. The insurer refused payment on the policy on the grounds that the deceased was not actively at work on June 1st, the effective date of the master policy, or at any time thereafter.

The plaintiff insists that the policy automatically became effective as stated in the bulletin of April 8th when the seventy-five per cent quota was reached. This, she claims, occurred before May 27th, the last day on which the decedent worked.

[1] Plaintiff urges that the trustee was the agent of the insurance company in the preliminary negotiations and that the statements made in the bulletins sent out by him to the members were binding upon the company. We do not agree with this contention. The correct rule is stated by the Supreme Court in Boseman v. Connecticut General Life Insurance Co., 301 U.S. 196, 57 S.Ct. 686, 81 L.Ed. 1036, 110 A.L.R. 732. The court said, 301 U.S. at page, 204, 57 S.Ct. at page 690: "Employers regard group insurance not only as protection at low cost for their employees but also as advantageous to themselves in that it makes for loyalty, lessens turn-over and the like. When procuring the policy, obtaining applications of employees, taking payroll deduction orders, reporting changes in the insured group, paying premiums, and, generally, in doing whatever may serve to obtain and keep the insurance in force, employers act not as agents of the insurer, but for their employees or for themselves."

Plaintiff relies upon the case of John Hancock Mut. Life Ins. Co. of Boston, Mass. v. Dorman, 9 Cir., 108 F.2d 220. That case did not, however, involve preliminary negotiations or statements. There the master policy had been in effect for several years and the court held that the employer was the agent of the insurer in delivering an individual certificate of insurance. There the employer was authorized by an express agreement to deliver the certificate, which contained terms not in its master policy, to the insured, and the court held that under those particular facts the contract was entered into in California instead of at the home office of the company.

[2–4] Based upon the statement contained in the bulletin of April 8th plaintiff contends that the insurer is estopped to deny that the insurance automatically became effective on the date that seventy-five per cent of the eligible members had signed written requests for insurance. The plaintiff seeks by estoppel to make language in a preliminary statement a part of the policy although it is in conflict with the express provisions of the application and the policy itself. As a general rule the courts have held that an advertisement, pamphlet or preliminary statement issued for the purpose of soliciting insurance does not constitute a part of the contract where it is neither attached to the policy nor referred to therein. Toth v. Metropolitan Life Ins. Co., 123 Cal.App. 185, 188, 11 P.2d 94; American Can Co. v. Agricultural Insurance Co., 12 Cal.App. 133, 135, 106 P. 720; Fowler v. Metropolitan Life Ins. Co., 116 N.Y. 389, 22 N.E. 576, 578, 5 L.R.A. 805; Luellen v. New York Life Ins. Co., 201 Mich. 512, 167 N.W. 950, L.R.A.1918F, 340. Section 10113 of the Insurance Code provides as follows: "Every policy of life, disability, or life and disability insurance issued or delivered within this State on or after the first day of January, 1936, by any insurer doing such business within this State shall contain and be deemed to constitute the entire contract between the parties and nothing shall be incorporated therein by reference to any constitution, by-laws, rules, application or other writings, of either of the parties thereto or of any other person, unless the same are indorsed upon or attached to the policy; and all statements purporting to be made by the insured shall, in the absence of fraud, be representations and not warranties. Any waiver of the provisions of this section shall be void." By statute the policy is the sole measure of the company's liability. It is for the protection of both the company and the policyholder. Neither should be permitted to show preliminary negotiations to defeat its operation. In considering the question of oral insurance the court in American Can Co. v. Agricultural Insurance Co., supra, 12 Cal.App. at page 135, 106 P. at page 721, said: "In fact it is the universal custom of insurance companies to issue written policies, with full and minute specifications as to their liability and the exceptions that would make the policy void. The preliminaries, as in contracts for the sale of real estate, are usually only negotiations which are afterwards merged into the written contract."

There is no element of fraud involved. The bulletin of May 23rd, issued at a time when there is no contention that the quota had been reached, stated the insurance would be effective on June 1st. Also the bulletin of May 26th made the same statement. No policies had been issued on either date nor had the list of those who had signed been delivered to the insurance company. There was time to withdraw from the plan if the decedent was dissatisfied with the June 1st date. There was no change of position. Generally speaking, to work an estoppel a representation must be one of fact as distinguished from a promise of something to be done in the future. Rottman v. Hevener, 54 Cal.App. 474, 480, 202 P. 329; Hosner v. Skelly, 72 Cal.App.2d 457, 463, 164 P.2d 573. In the Rottman case the court said, 54 Cal.App. at page 480, 202 P. at page 331: "It is the general rule that, to work an estoppel, a statement or representation made during the negotiations that terminate in a written contract must relate to an existing fact, and not to a mere promise of future performance. The only exception to this rule is where the representation relates to the intended abandonment of an existing right. The doctrine of estoppel, therefore, has no place for application when the representation relates to rights depending upon contracts yet to be made to which the person complaining is yet to be a party. He has it in his power in such case to guard in advance against any consequences of a subsequent change of intention or conduct by the person with whom he is dealing. For compliance with arrangements respecting future transactions, parties must provide by stipulations in their contracts when reduced to writing."

Section 10202.7 of the Insurance Code provides in part: "* * * (b) The policy must cover at date of issue not less than 75 per cent of the eligible employees of at least 50 per cent of the total employer members of the trade association * * *." This provision was made a condition to the issuance of a policy by the express terms of the application. There is no evidence in the record that the seventy-five per cent quota was ever reached at a time when the decedent was actively at work. Plaintiff relies for proof upon two statements in the bulletins issued by the Grocers Association to its members. The first statement was that found in the bulletin of April 8th to the effect that the checks would be held and not deposited until the insurance went into effect, and the second statement was that the quota had been reached contained in the bulletin of May 26th. There was no evidence that either of these statements ever came to the attention of the insurance company. They were not issued by the company and are not binding on it. The only evidence on the question of when the quota was reached which would bind the company was the testimony of its agent, called as an adverse witness, who stated that the quota had not been reached on May 29th when a list of those who had signed was delivered to him. The depositing of the checks on May 26th was an act of the association and in pursuance of an arrangement between it and its members. These checks were not at any time in the possession of the insurer nor did it have any control over when they were deposited. Acts of the association would not give rise to an estoppel on the part of the insurer.

Plaintiff makes some claim that there was an oral contract of insurance. However, we find no evidence in the record of any oral contract.

Viewing the evidence in the light most favorable to the plaintiff and drawing all inferences in her favor, we are of the opinion that there is no evidence upon which a reformation of the policy could be based.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

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133 Cal.App.2d 210

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Howard BROOKS, Defendant and Appellant.

Cr. 985.

District Court of Appeal, Fourth District, California.

May 23, 1955.

Defendant was convicted of violating sections 288 and 288a of the Penal Code. The Superior Court of Orange County John Shea, J., entered judgment of conviction and an order denying a new trial, and defendant appealed. The District Court of Appeal, Griffin, J., held that evidence supported verdict as to each of the three counts in the information.

Judgment and order affirmed.

1. Infants 🔑20

Sodomy 🔑6

Evidence sustained the convictions for violating sections 288 and 288a of the Penal Code. Pen.Code, §§ 288, 288a.

2. Criminal Law 🔑1170½(1)

In prosecution for violating sections 288 and 288a of the Penal Code, wherein defendant's medical expert testified that he had examined defendant and had made certain tests in conjunction with a clinical psychologist, and that they found no evidence that defendant was a sexual deviate, and that he did not find anything to indicate any tendency of defendant toward type of conduct charged, but wherein he replied "No, not necessarily" to question whether defendant was incapable of having performed acts charged, it was not prejudicial error for trial court to refuse to permit counsel for defendant to elicit a more definite answer to the question. Pen.Code, §§ 288, 288a.

3. Criminal Law 🔑1168(2)

Where children, who testified against defendant in prosecution under sections 288 and 288a of the Penal Code, could not remember the particular calendar dates when acts charged allegedly occurred, but defendant was sufficiently apprised of approximate dates of offenses charged, and defendant admitted being present at times described but denied the acts charged, it was not prejudicial error not to require prosecution to elect and fix precise date on which it claimed that the acts charged occurred. Pen.Code, §§ 288, 288a.

4. Criminal Law 🔑1172(10)

In prosecution under three count information charging defendant with having violated sections 288 and 288a of the Penal Code, giving of oral instruction that jury must find beyond a reasonable doubt on all three counts and on all phases of all three counts, was not prejudicially erroneous, on ground that it was a direction to jury to find defendant guilty on all three counts, where jury was otherwise properly instructed in such respect in previous written instructions. Pen.Code, §§ 288, 288a.

5. Criminal Law ⚷369(2)

In prosecution under sections 288 and 288a of the Penal Code, testimony of one of the prosecuting witnesses that on one of the occasions referred to in the information the defendant exposed himself to the prosecuting witness and other children was admissible to corroborate the testimony of the children. Pen.Code, §§ 288, 288a.

6. Criminal Law ⚷1159(2)

Record in prosecution for violating sections 288 and 288a of the Penal Code did not show that jury was prompted in returning verdict of guilty by reason of passion or prejudice. Pen.Code, §§ 288, 288a.

Monroe & Chula, Santa Ana, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant was charged in an information in three counts with violating sections 288 and 288a of the Penal Code, consisting of certain acts alleged to have taken place on or about certain dates in August, 1954, upon the body of and with one Barbara Jean DeWald, aged seven years.

Defendant pleaded not guilty to each count and a jury convicted him of the charges. A motion for new trial was denied. Criminal proceedings were suspended pending sexual psychopathic examination.

As noted by counsel for defendant, the factual situation revealed by the evidence is "highly distasteful and repugnant". Briefly summarized, the complaining witness testified that sometime "this summer" during school vacation, after July 4, 1954, she went to defendant's garage, next door to her home, and defendant exposed his private parts to her; that at a later time, without stating all the gory details, she went to his house and defendant induced her to do a "Hula" dance with her pants off, and defendant showed her how to do this dance by pulling his pants down and exposing his private parts; that defendant then touched her private parts; that on another such occasion thereafter he rubbed her private parts; and on another occasion he committed an act denounced by section 288a of the Penal Code; that this latter act occurred on five or six different occasions thereafter; that on one occasion, he induced her and her brother, Wayne, aged ten years, to take a bath in the tub, nude, with him, and committed other indecent acts with, and in the presence of, other children in his home. The testimony as to many of these acts was corroborated by the testimony of Wayne, one Jill Young, eight years of age, and one Kenneth Jerome. Defendant told Wayne not to tell his parents of these occurrences.

On September 10, 1954, defendant was asked by an officer if he knew why he was called to the police station and defendant stated he thought it was in relation to the children next door. He was asked if he ever touched and kissed Barbara on her private parts and he admitted he had on two or three occasions. He denied he had her in the bathroom and stated he had warned the children about the happenings in his home and that he did not want his name made public in connection therewith.

On the witness stand he testified he was 64 years of age. He admitted Barbara, as well as Jill, Kenneth and one Charles Wilson, had been in his home. He stated Barbara came over and asked him if he wanted her to do the "Hula", and she dropped her pants and did the "Hula". He admitted he had the children in the bath tub with him on the occasion indicated, but claimed that they came in on him while he was taking a bath. He denied touching Barbara's private parts in any manner.

[1, 2] From a mere reading of the record it must be concluded that the evidence fully supports the verdict as to each count. On this appeal defendant contends that he was not permitted at the trial to introduce so-called character evidence consisting of a statement by a qualified

psychiatrist to the effect that defendant would probably be incapable of doing the acts complained of and that he was not a sexual psychopath, and his nature was such that it would be "improbable" that he intentionally could have committed any of the alleged acts, citing People v. Jones, 42 Cal.2d 219, 266 P.2d 38. This complaint arises as a result of the testimony of a certified psychiatrist, neurologist, and brain wave specialist called by defendant. He was allowed, over objections, to testify that he examined the defendant and made certain tests in conjunction with a clinical psychologist, and they found no evidence that defendant was a sexual deviate. The witness, upon questioning, stated that he did not find anything in his examination to indicate any tendency toward this type of conduct. He was then asked if he could say whether defendant was incapable of having performed these acts with the intent, as charged, and the witness answered: "No, not necessarily". Counsel for defendant then endeavored to elicit a more definite answer to the question. The trial court sustained objections thereto. Defendant claims prejudicial error as a result of the ruling. It affirmatively appears from the record that the expert witness did testify to such opinions as were held allowable in the Jones case, and defendant's counsel was not unduly limited in his examination of the witness in this respect. No prejudicial error appears.

[3] The next claim is that the court erred in not requiring the prosecution to elect and fix the precise date upon which it claimed these particular acts occurred, and in failing to instruct the jury accordingly. It appears that these were young children testifying to certain acts on certain occasions that occurred several months before the trial. A particular calendar date was not remembered by the children. If the jury believed that the offenses did happen on or about the dates charged and within the limitation period, and defendant was sufficiently apprised of the approximate dates of the offenses and was not misled in making his defense or placed in danger of being twice in jeopardy, no prejudicial error appears. A sufficient showing was made by the prosecution, and the necessity of election or further instructions to the jury is not indicated. Defendant admitted being present at the time described but denied the acts charged. No prejudicial error resulted. People v. Ralls, 21 Cal.App.2d 674, 70 P.2d 265; People v. Becker, 140 Cal.App. 162, 35 P.2d 196.

[4] Some complaint is made of an oral instruction given by the court which was in part: "You must find beyond a reasonable doubt on all three of them (counts) and on all phases of all three of them." It is concluded by defendant that this was a direction to the jury to find defendant guilty on all three counts. We do not so construe it. Literally construed, it was probably more favorable to the defendant than it should have been. The jury was otherwise properly instructed in this respect in previous written instructions. No prejudicial error appears.

[5] Next, defendant complains of the testimony of Kenneth Jerome, who related certain facts about defendant's conduct on one of these occasions in reference to the "Hula" dance when defendant exposed himself to the children. The claim is that it was extraneous evidence and highly prejudicial. It was corroborative of the other children's testimony and was clearly admissible under the circumstances of this case. People v. Hunt, 17 Cal.App.2d 284, 286, 61 P.2d 1208.

[6] The last claim is, as we construe it, that the evidence was not fairly interpreted by the jury, in conjunction with the presumption of innocence, due to the nature of the charges against defendant. The testimony of the various witnesses fully supports the verdict rendered, a fair trial was had, and nowhere does it appear from the record that the jury was prompted into returning such a verdict by reason of passion or prejudice.

Judgment and order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

133 Cal.App.2d 193

Edward T. SMITH, Plaintiff and Appellant,
v.
W. H. WATTENBURG, Willard H. Wattenburg, William A. Kirby, Jr., Thomas J. Reinhart, Charles H. Purcell, George T. McCoy, Edward Delano, et al., Defendants and Respondents.

Civ. 8503.

District Court of Appeal, Third District, California.

May 23, 1955.

Action by driver of pickup truck for personal injuries suffered in head-on collision with dump truck while pickup truck driver was attempting to avoid collision with stalled logging truck parked on pavement. The Superior Court, Plumas County, William M. MacMillan, J., granted nonsuit for driver of logging truck and his employer and driver of dump truck and his employer. Driver of pickup truck appealed. The District Court of Appeal, Van Dyke, P. J., held that where logging truck driver did not place flares behind truck, although truck was stalled just around a curve, and dump truck driver, although he realized that situation was a dangerous one, did not pull over to side of road, to allow room for another vehicle to pass between dump truck and logging truck, questions of negligence of logging truck driver, negligence of dump truck driver, and contributory negligence of pickup truck driver were for jury.

Judgment reversed.

1. Automobiles 🔑242(3)

Rule that burden is upon driver of vehicle left on highway to show it was not practicable to drive vehicle off highway onto shoulder, in compliance with statute prohibiting the parking of vehicle upon traveled portions of highway by proof that vehicle was left on paved portion of highway outside of business or residential district, is applicable if excuse for stopping vehicle on traveled portion of highway is claimed by operator to be disablement of vehicle to such extent that it is impossible to avoid obstructing the road. Vehicle Code, § 582.

2. Automobiles 🔑242(3)

In action for personal injuries suffered by pickup truck driver when his truck collided head-on with dump truck in avoiding stalled logging truck, evidence that logging truck was stopped on traveled portion of highway made prima facie case of negligence against driver of logging truck and his employer; and burden passed to them to rebut that prima facie showing. Vehicle Code, § 582.

3. Automobiles 🔑156

One operating a logging truck loaded with logs is bound to use care commensurate with the proper handling of the vehicle to anticipate and to prevent mechanical failure of which he has adequate warning, and if he has such warning he is obliged to take such precautions as are available to prevent such failure.

4. Automobiles 🔑173(1, 2)

Driver of a disabled vehicle which is stopped in a traffic lane has duty to do all that is required of him by prudence or by statute to obviate as far as possible danger flowing from presence of stationary vehicle on traveled portion of highway. Vehicle Code, § 582.

5. Automobiles 🔑245(17)

In action for personal injuries suffered by pickup truck driver when his truck collided head on with dump truck in avoiding logging truck stalled on paved portion of highway, question of negligence of driver of logging truck in failing to place flares behind his truck, or in starting up hill when he was experiencing mechanical difficulties was for jury.

6. Automobiles 🔑245(83)

In action for personal injuries suffered by pickup truck driver when his truck collided head on with dump truck in attempting to avoid stalled logging truck parked on paved portion of highway, question of contibutory negligence of pickup truck driver in attempting to pass stalled truck on hill was for jury.

7. Automobiles 🔑245(13)

In action for personal injuries suffered by pickup truck driver when his truck collided head-on with dump truck as he attempted to avoid collision with logging truck stalled on highway, question of negligence of dump truck driver in not getting his truck under such control that he could stop or make room for another vehicle when he observed that one lane of highway was entirely blocked by stalled truck was for jury.

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Partridge, O'Connell & Whitney, San Francisco, for appellant.

Griswold & Vargas, Reno, Nev., for respondent Reinhart.

Fitzwilliam & Memering, Sacramento, for respondents Wattenburg and Kirby.

VAN DYKE, Presiding Justice.

Plaintiff brought this action to recover damages for injuries he suffered when the pickup truck he was driving collided with a dump truck operated by defendant Reinhart at a point where a logging truck, driven by defendant Kirby, was standing on the traveled portion of the highway. Plaintiff charged that the accident was caused by the concurring negligence of the driver of the logging truck and the driver of the dump truck. Plaintiff was traveling south on a two-lane road. At the point where the accident occurred the road was ascending and curved to the right for cars traveling upgrade. As plaintiff went up the grade he came upon the loaded logging truck standing squarely in his lane of travel. Although, as he came around the curve toward the logging truck, his view ahead was somewhat obscured by a cut bank and a tree which stood near the road, he did see the standing truck. He said he thought at first it was moving, and did not realize it was standing until he was within about 100 feet of it. He was then so close that he determined he could not stop without hitting the truck. He elected to cross over into the northbound traffic lane and go around. He said further that as he was executing this maneuver and when he had come out from behind the logging truck to where he could see along the northbound lane, he observed a dump truck coming downgrade. He then attempted to cross in front of the dump truck and go out on the shoulder of the road and thus escape the collision, but he was unable to do so. His vehicle and the dump truck collided almost head-on.

At the close of plaintiff's testimony the trial court denied motions for nonsuit made by all defendants. When all the evidence was in these motions for nonsuit were renewed and were granted. From the judgment entered upon the orders of nonsuit the plaintiff appeals.

We will first consider the propriety of the nonsuit order in favor of defendant Kirby, driver of the logging truck, and his employer. The first question posed is whether or not, from all the evidence, disregarding conflicts and adopting all favorable inferences and constructions, appellant made out a prima facie case of actionable negligent conduct toward him. So considered, the evidence shows the following in addition to what we have stated: Appellant rounded the curve at about 45 miles per hour. No one warned him the truck was there and no warning flags or flares had been placed. Unaware the truck was not moving, he began to reduce the speed of his pickup. When he realized the truck was stopped he made a forceful application of his brakes in an attempt to stop. Almost instantly he realized he would be unable to do so in the remaining space. He then swerved his car into the northbound lane.

Section 582 of the Vehicle Code provides that:

> "Upon any highway in unincorporated areas no person shall stop, park or leave standing any vehicle, whether attended or unattended, upon the main traveled portion of the highway when it is practicable to stop, park or so leave such vehicle off such part or portion of said highway but in every event an unobstructed width of the highway opposite a standing vehicle shall be left for the free passage of other vehicles and a clear view of such stopped vehicle shall be available from a distance of 200 feet in each direction upon such highway. * * *
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> "This section shall not apply to the driver of any vehicle which is disabled in such a manner and to such extent

that it is impossible to avoid stopping and temporarily leaving such disabled vehicle on the main traveled portion of a highway."

Concerning this section the Supreme Court said in Thomson v. Bayless, 24 Cal.2d 543, 546, 150 P.2d 413, 414:

> "* * * [T]he courts in this state have uniformly held for the past 12 years that a prima facie case of negligence is established under section 582 by proof that the vehicle was left on the paved portion of the highway outside of a business or residential district and that the burden to show that it was not practicable to drive off the main traveled portion of the highway rests upon the operator of such vehicle."

[1] In the cited case the parked vehicle was not disabled. However, the same rule applies if the excuse for stopping a vehicle on the traveled portion of the highway is claimed by the operator thereof to be the disablement of the vehicle to such extent that it is impossible to avoid obstructing the road. Barone v. Jones, 77 Cal.App. 2d 656, 662, 176 P.2d 392, 177 P.2d 30. Said the court in Scoville v. Keglor, 27 Cal.App.2d 17, 32, 80 P.2d 162, 169:

> "* * * while the general burden of proof continued with the plaintiffs yet it must be remembered, as said in Casey v. Gritsch, 1 Cal.App.2d 206, 211, 36 P.2d 696, 698, quoting from Watt v. Associated Oil Co., 123 Or. 50, 260 P. 1012, that:
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> "'One who parks his automobile upon the public traveled part of a highway is prima facie a violator of the law, and it is incumbent upon him to show affirmatively that it was necessary for him to so park it at that time and place. It is not the duty of a party injured in a collision, under such circumstances, to show that such parking was not necessary, but for the other party to bring himself within the exception prescribed by the statute.'"

[2] Applying the foregoing rules to the facts it results that appellant made out a prima facie case of negligence against Kirby and his employer and the burden passed to them to rebut that prima facie showing. We now turn to a consideration of the evidence in the record on which said defendants rely.

Kirby testified that he entered the upgrade curve at a speed of 25–30 miles per hour; that he began to reduce his gears to climb the grade and had reduced the speed to between 3 and 5 miles per hour when the motor started sputtering and stopped within 20 or 30 feet, and could not be started. He said the engine had operated properly up to that time and he had never had mechanical difficulty with the truck; that he knew he was stopped in a dangerous place and prepared to put out flare pots, which he carried, to warn oncoming cars of the hazard but did not have time before this accident occurred since he had been there only a few minutes. This testimony as to the length of time his truck was stopped before the accident occurred was disputed. Other evidence indicated that he had been there some 20 minutes before appellant's vehicle came along. Kirby's employer testified that he came to the scene, examined the motor of the logging truck and after a brief check found that the stoppage was caused by a clogged fuel pump screen; that later investigation showed two handfuls of wadded paper were in the gasoline tank. He gave it as his opinion that this paper was the source of small fibers of paper that were on the screen of the fuel pump, shutting off the gas supply. He found the entire surface of the screen was clogged with these fibers. He said that this blocking of the screen by the fibers would come about gradually, ultimately stopping the motor for want of fuel.

We have said that from the fact that the logging truck was found standing in the lane of traffic a prima facie case of negligence against its operators was made out; that is, that from these primary facts the trier of fact could infer the ultimate fact of negligence. The following matter quoted from Blank v. Coffin, 20 Cal.2d 457, 460–461, 126 P.2d 868, 870, is pertinent:

> "An inference is a conclusion as to the existence of a material fact that a jury may properly draw from the exist-

ence of certain primary facts. * * * It is not always possible for a party to a lawsuit to introduce evidence directly bearing upon the existence of a fact that he is attempting to prove. The evidence available to him may serve only to establish the existence of certain primary facts that are logically connected with the material fact. If a jury can reasonably infer from these primary facts that the material fact exists, the party has introduced sufficient evidence to entitle him to have the jury decide the issue. The jury is not compelled to draw the inference, however, even in the absence of contrary evidence and may refuse to do so. Whether a particular inference can be drawn from certain evidence is a question of law, but whether the inference shall be drawn, in any given case, is a question of fact for the jury. * * *

"Usually, the opposing party introduces evidence as to the nonexistence of the fact in issue, and the jury must then determine the existence or nonexistence of the fact from all the evidence before it. If the evidence contrary to the existence of the fact is clear, positive, uncontradicted, and of such a nature that it can not rationally be disbelieved, the court must instruct the jury that the nonexistence of the fact has been established as a matter of law. * * * The jury, however, is the sole judge of the credibility of the witnesses * * * and is free to disbelieve them even though they are uncontradicted if there is any rational ground for doing so. * * * In most cases, therefore, the jury is free to disbelieve the evidence as to the nonexistence of the fact and to find that it does exist on the basis of the inference. * * *

"There are many reasons why a jury may refuse to believe a witness. Section 1847 of the Code of Civil Procedure provides: 'A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility.' Section 2061 subd. 3, of the Code of Civil Procedure provides: 'That a witness false in one part of his testimony is to be distrusted in others.' In passing on the credibility of a witness, the jury is entitled to consider his interest in the result of the case."

[3] It may be conceded that if Kirby's testimony were accepted at face value it would free him from the inference of negligence, but it was not for the trial court, sitting with a jury, and it is not for this Court on appeal to determine that Kirby's testimony must be so accepted. Kirby was operating a logging truck loaded with logs. Such a truck with its load constitutes a ponderous object. If it becomes disabled and stops it may well be under such circumstances that it will have to be left blocking a lane of travel. One operating such a vehicle with its load is bound to use care, commensurate with the proper handling of the vehicle, to anticipate and to prevent mechanical failure of which he has adequate warning. If he has such warning he is obliged to take such precautions as are available to prevent such failure. Kirby said that he had no warning whatever, that the truck appeared to be in good condition and he had had no trouble with it. But the jury could infer from the testimony of his employer that such was not the case and that in fact the clogging of the carburetor screen had been a slow process such as would give adequate warning that the truck's motor was losing its power, and might lose it to such an extent as to stop suddenly under the strain of the load. The jury therefore was not compelled to accept Kirby's statement that he had no warning of an impending mechanical failure, and could conclude that, on the contrary, he had such warning and negligently entered the upgrade with failing motor.

[4, 5] There is also the further consideration that arises from the duty placed upon the driver of a disabled vehicle which is stopped in a traffic lane, to do all that is required of him by prudence or by statute to obviate as far as possible the danger

flowing from the presence of a stationary vehicle on a traveled highway. (Blashfield's Cyc. of Automobile Law and Practice, sec. 1195.) From the testimony that the truck had been stationary for a time amply sufficient for Kirby to have sent his helper back to warn approaching cars or to have placed flares with which his truck was equipped and his failure to do either, the jury could infer that Kirby was negligent in failing to give warning, and that this failure was a proximate cause of the collision of appellant's automobile with the dump truck. True, Kirby testified he had no time to give warning and in this his helper corroborated him. But this testimony, given by two interested witnesses, was materially in conflict with that of two witnesses who passed the standing truck before appellant arrived. The jury could have inferred that Kirby did have ample time to give warning. On the whole record it is clear that appellant could not be nonsuited as against Kirby and his employer upon any theory that he had not made out a sufficient prima facie case of negligent conduct for the jury to pass on.

[6] It is argued that the nonsuit can be justified as to Kirby and his employer and also as to the owner and operator of the dump truck upon the ground that appellant was guilty of contributory negligence as a matter of law. This contention cannot be upheld upon the record here. Taking as true, as we must here, the testimony of appellant which we have stated, it cannot be said that his conduct amounted to contributory negligence as a matter of law. The following language taken from Doane v. Smith, 63 Cal.App.2d 691, 697, 147 P.2d 650, 652, where the factual situation was similar to that presented here is pertinent:

> "* * * It cannot be said as a matter of law that there is some definite distance from a parked vehicle at which an approaching driver must realize that the vehicle is standing still, in order to be free from negligence. No more can it be said upon the facts of this case that plaintiff was negligent as a matter of law in failing to realize that the truck was standing still until he was within about 100 feet of it. It must be remembered that automobile drivers have the right to anticipate that standing vehicles ahead of them will be parked off the highway, if it is practicable to so park them, and the right to act upon that assumption until there are reasonable grounds for believing that there is some vehicle ahead that is not so parked."

Whether or not appellant was contributorily negligent was for the jury.

[7] We have next to consider the issues posed by the granting of the nonsuit in favor of respondent Reinhart, the driver of the dump truck. He was coming down the grade toward the logging truck, traveling in the northbound lane and the case against him depends largely, if not entirely, upon the inferences that can be drawn from his own testimony as to his actions. Taking this testimony as strongly against him as it can be taken it amounts to the following: He was an experienced truck driver and familiar with the operation of the truck he was driving; he was familiar with the road in the vicinity of the accident; he had about 5½ tons of gravel on his truck and was driving down a 5½% grade at a speed of 35 miles per hour when he saw the logging truck from 200 to 300 feet ahead of him. He saw it was stopped on the curve and that the southbound lane was entirely blocked. He realized that the situation was a dangerous one. A rule of his superior, which he knew and for which he knew the reasons, directed him in such a situation to slow down and pull as far to the right as he could. He slowed down to 30 miles per hour and continued downgrade with his left wheels 3½ feet from the center line and his right wheels close to the edge of the pavement. Opposite the standing logging truck there was a firm, gently sloping shoulder 8 to 9 feet in width. He did not go out upon this shoulder. He saw appellant's pickup approaching at a distance of 90 to 200 feet and he then attempted to stop, but his momentum carried him to and at least partly, if not entirely, past the logging truck, at which point his dump truck collided with appellant's pickup, driving it back down the hill about 100 feet.

We are unable to agree that the foregoing facts are such that a finding of the jury that he was negligent in not taking greater precautions when he saw and realized the danger of the situation ahead of him, and that such failure contributed to the accident, would not be sufficiently supported. It could be inferred that had he brought his vehicle to a point where it was well under control, in anticipation that an approaching driver might, in an emergency, come over into the northbound lane, he would have been in a position when this happened to have either stopped, thus permitting that driver to get onto the shoulder and out of his way, or to have pulled further over, thus yielding a passage between the two vehicles. Certainly the case against him is weak, but under the circumstances we hold it was not a case where the question of negligence could be resolved in his favor as a matter of law and that such a resolution should have been left to the jury.

The judgment is reversed as to all respondents.

PEEK and SCHOTTKY, JJ., concur.

133 Cal.App.2d 201

Nerses ODIAN and Arousiag Odian, Plaintiffs and Appellants,

v.

Axel Peter HABERNICHT, Defendant and Respondent.

Civ. 4931.

District Court of Appeal, Fourth District, California.

May 23, 1955.

Hearing Denied July 20, 1955.

Action to recover for damages arising out of automobile intersection collision. The Superior Court, Fresno County, Edward L. Kellas, J., entered judgment for defendant and plaintiffs appealed. The District Court of Appeal, Barnard, P. J., held that instruction that any degree of negligence on part of plaintiff driver, however slight, would prevent recovery by plaintiffs, was not prejudicially erroneous, where reference to such contributory negligence in any degree was tied up in same sentence to language showing that it must be negligence which contributed proximately to accident.

Judgment affirmed.

1. Trial 🔑296(4)

In action arising out of automobile intersection collision, instruction which informed jury that before plaintiffs could recover it must appear that their injuries and damages were proximately caused by negligence on part of defendant, unmixed with any negligence on part of plaintiff driver, was not error requiring reversal, where another instruction informed jury that burden of proving contributory negligence rested upon defendant and that such issue would have to be determined upon evidence presented in case.

2. Trial 🔑295(7)

In action arising out of automobile intersection collision, instruction that any degree of negligence on part of plaintiff driver, however slight, would prevent recovery by plaintiffs, was not prejudicially erroneous, where reference to such contributory negligence in any degree was tied up in same sentence to language showing that it must be negligence which contributed proximately to accident.

3. Evidence 🔑207(4)

In action arising out of automobile intersection collision, evidence that defendant had entered plea of guilty of violation of Vehicle Code section in failing to stop at intersection was admissible as an admission against interest. Vehicle Code, § 552.

4. Evidence 🔑207(4)

Fact that explanation offered by defendant in automobile accident case as to why he had pleaded guilty to traffic violation in connection with accident was made some months after such plea had been entered, would go to weight of evidence, but would not affect its admissibility. Vehicle Code, § 552.

5. Trial ⚷125(4)

In action arising out of automobile intersection collision, injection into case of element of poverty on part of defendant was not error, where such element appeared incidentally in connection with admissible testimony.

6. Appeal and Error ⚷1050(1), 1064(1)

In action arising out of automobile intersection collision, action of trial court in permitting defendant to explain why he pled guilty to traffic violation and in giving instruction permitting jury to consider such explanation, was not reversible error, where instruction left to jury to consider all of facts in determining whether or not making of plea should have been taken as establishing fact that defendant admitted having negligently taken right of way from plaintiffs. Vehicle Code, § 552.

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John D. Chinello, Leo Koligian, Fresno, for appellants.

Stammer, McKnight & Barnum, Fresno, for respondent.

BARNARD, Presiding Justice.

This is an action for damages arising from an automobile collision. The defendant's answer denied negligence on his part and alleged contributory negligence. A jury returned a verdict in favor of the defendant and the plaintiffs have appealed from the judgment.

The collision occurred at 3:00 P.M. on November 28, 1952, at the intersection of Jensen and Clovis Avenues at the outskirts of Fresno, this being a clear day. Jensen Avenue runs east and west, and Clovis Avenue north and south. The paved portion of Jensen was 30 feet wide and the paved portion of Clovis 24 feet wide. Jensen Avenue is a through highway protected by stop signs, one of which was at the northwest corner of the intersection about 25 feet north of the paved portion of Jensen Avenue. The northwest corner of this intersection was unobstructed for a distance of 100 feet north of the intersection. Beyond that point there was a row of olive trees on the west side of Clovis Avenue.

At the time in question the plaintiff Nerses Odian was driving a Dodge in an easterly direction on Jensen, accompanied by his wife, and the defendant was driving a Ford in a southerly direction on Clovis Avenue. The two automobiles collided at a point three feet east of the west line, and nine feet north of the south line, of the intersection. The left front of the plaintiffs' car struck the right front side of the defendant's car. The plaintiffs' car left skid marks 42 feet in length leading up to the point of impact. Mrs. Odian fainted at the time of the accident and had no recollection as to what happened.

The defendant testified that he approached this intersection at a speed of 40 to 45 miles per hour; that he began to reduce his speed when 200 feet north of the intersection; that he stopped at the stop sign near the northwest corner of the intersection and looked to his right and left for traffic; that he looked about 200 feet down Jensen, to his right; that he saw no cars approaching from either his right or left; that after stopping and looking he shifted into low gear and proceeded into the intersection; that he remained in low gear all the way and the highest speed he attained was about five miles per hour; and that he never saw the plaintiffs' car until the collision occurred.

The plaintiff Nerses Odian testified that he approached the intersection at a speed of about 45 miles per hour; that he could not remember whether he slowed down before applying his brakes, just before the collision; that when he was about 400 feet west of the intersection he saw the defendant's car just south of the olive trees and approaching the intersection at a speed of 40 miles per hour; that he had a clear and unobstructed view of the defendant's car; that he assumed that the Ford would stop at the stop sign, and he "had no, any interest in that car which was coming at the time"; that he then looked to the south for traffic; that when he again looked to the north the Ford had entered the intersection and was north of the center line of Jensen Avenue; that he immediately applied his brakes; that his brakes were in good condition, and traveling at 40 to 45 miles per hour he could have stopped his car in 100 feet; and that he did not see the defendant's car near the stop sign and did not know whether or not the defendant had stopped before entering the intersection.

[1] No contention is made that the evidence is not sufficient to support the verdict. Negligence on the part of the defendant rather clearly appears, and it seems equally clear that the evidence was sufficient to support a factual finding of contributory negligence. The defendant did not see the plaintiffs' car prior to the collision and the only evidence of contributory negligence came from the plaintiff driver and his own witness, the highway patrol officer. It thus appears that the plaintiff driver approached this intersection at a speed of 40 to 45 miles per hour; that when he was 400 feet away he saw the defendant's car within 100 feet of the intersection and traveling at a speed of about 40 miles an hour; that he paid no further attention to that car and looked and continued to look in the opposite direction; that although the defendant's car was in plain sight at all times he did not look at it again until he saw it in the intersection; that he was then so close to the intersection that he was unable to avoid colliding with the other car when that car was over half way through the intersection; and that he could have avoided the accident had he again looked toward the other car a second or two sooner. Appellants' main contention is that the court gave two erroneous instructions which were prejudicial "on the vital issue of contributory negligence." These instructions read as follows:

> "Contributory negligence means negligence on the part of the plaintiffs which proximately contributed to the accident and to their own injuries and damages. In this connection, you are instructed that *before the plaintiffs can recover in this action, it must appear that their injuries and damages were proximately caused by negligence on the part of the defendant, unmixed with any negligence on the part of Nerses Odian* proximately contributing thereto, and if negligence on the part of the plaintiff Nerses Odian contributed in any manner or in any degree, however slight, directly and proximately to the plaintiffs' injuries and damages, then there can be no recovery on their part and your verdict must be for the defendant." (Italics ours.)
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> "In determining whether or not the plaintiff Nerses Odian was guilty of contributory negligence, you should not compare his conduct with any conduct on the part of the defendant to determine who was the most negligent or whose conduct contributed the most or in the greater degree to the accident. Contributory negligence on the part of the plaintiff Nerses Odian in any degree, however slight, bars the recovery of both the plaintiffs; and if you find that the plaintiff Nerses Odian was negligent and that such negligence did proximately contribute in some degree to the accident, your verdict must be for the defendant, regardless of any conduct on the part of the defendant, and regardless of however slight may have been the degree of such contributory negligence."

It is first argued that the italicised portion of the first of these instructions had the effect of shifting the burden of proving contributory negligence from the defendant to the plaintiffs, and that this must be held to be reversible error under the holding in Lopez v. Knight, 121 Cal.App.2d 387, 263 P.2d 452. In that case, where similar language was criticised, it also appeared that the trial judge had in effect instructed a verdict for the defendant if the doctrine of last clear chance were not applied, had refused to instruct upon the presumption of due care, and had refused to instruct the jury that the burden of proving contributory negligence was upon the defendant.

In the case before us, the portion of the instruction thus complained of did not purport to relate to the burden of proof, which was covered in another instruction. While it was stated that certain facts must appear nothing was said therein about "preponderance of the evidence", "satisfactory evidence" or "burden of proof". Immediately following the two instructions thus complained of the court gave another short instruction on contributory negligence, and then gave, at the request of the plaintiffs, the following instruction:

> "In this case the defendant alleges in his answer that plaintiffs, Nerses Odian and Arousiag Odian, were guilty of contributory negligence. Contributory negligence is an affirmative defense in this state and the burden of proof in support of this defense rests upon the defendant in this case. Before you can find that plaintiffs, Nerses Odian and Arousiag Odian, or either of them, were guilty of contributory negligence, you must find that a preponderance of all the evidence in the case establishes two things: first, that plaintiff, Nerses Odian was himself negligent; second, that the negligence of said plaintiff, if you find that he was negligent, was a proximate cause of the collision complained of and of the injuries, if any. If the defendant fails to prove either of these things, then this entire defense fails." (The court then fully defined contributory negligence in language of which no complaint is made.)

The jury was thus clearly, and at length, told that the burden of proving contributory negligence rested upon the defendant and that this issue must be determined upon the evidence presented in the case. Under the instructions as a whole it cannot reasonably be held that the portion complained of was sufficiently confusing or misleading to have in any manner affected the result. Thomas v. Irvin, 96 Cal.App.2d 816, 216 P.2d 476; Oliphant v. Brown, 7 Cal.App.2d 584, 46 P.2d 790; Wells v. Lloyd, 21 Cal.2d 452, 132 P.2d 471.

[2] It is further contended that the latter part of the first instruction, as above quoted, and the second instruction above quoted improperly told the jury that any "degree of negligence, however slight, prevents recovery by a plaintiff, instead of properly telling the jury that it is the negligence contributing proximately, no matter how slight to the injury that prevents recovery." In both of these instructions any reference to contributory negligence "in any degree, however slight," was tied up in the same sentence to language showing that it must be negligence which contributed proximately to the accident. The instructions, as a whole, were a correct statement of the law in this regard and it cannot be held that small portions thereof could have misled the jury or that they had any prejudicial effect. Conner v. Southern Pacific Co., 38 Cal.2d 633, 241 P.2d 535; Kettman v. Levine, 115 Cal.App.2d 844, 253 P.2d 102.

The plaintiffs introduced evidence that the defendant had been charged in the municipal court with a violation of section 552 of the Vehicle Code in that he had failed to stop at this intersection on this occasion; that he had pleaded guilty to that charge; and that he was fined $7.50, which he paid. In his testimony in this case, upon redirect examination, the defendant was permitted, over the objection of the plaintiffs, to explain the reason why he had pleaded guilty to that charge. His explanation was that he was not able to go into court and hire a lawyer, and that in view of the loss of time that would be involved he figured that the small fine levied on him was the only way he could handle it. At the request of the plaintiffs the court gave an instruction giving the language of section 552 of the Vehicle Code, and then telling the jury that if it found from the evidence that the defendand conducted himself in violation of this section such conduct constituted negligence as a matter of law. Also, at the request of the defendant, the court gave this instruction:

> "The mere fact that the defendant Axel Peter Habernicht was charged with, and pleaded guilty to a violation of Section 552 of the Vehicle Code, pertaining to right of way, does not mean that the defendant is liable in this case. There may be a great difference between a plea of guilty to a traffic violation and an admission of liability for civil damages; and in determining whether there is civil liability, you must consider all the facts surrounding the plea of guilty, including the nature of the charge and of the plea, the defendant's explanation, if any, of why

> he entered the plea, the effect of the plea under the rules of civil liability as given to you in these instructions, and all of the other evidence introduced in this case on all of the various defenses offered by the defendant."

[3–6] The appellants contend that it was reversible error for the court to permit the respondent to thus explain his plea of guilty and to give this instruction permitting the jury to consider this explanation. It is argued that the respondent's plea of guilty to violating section 552 was a judicial admission that he negligently usurped the appellants' right of way at this intersection; that no explanation of the plea was admissible unless it was one that had accompanied the original plea of guilty; that to permit an explanation several months afterward allowed the respondent to "concoct" a reason he then deemed fitting to serve his interest; and that the error was increased by the court's instruction which permitted the jury to consider evidence of the respondent's poverty in appraising his plea of guilty.

The evidence that respondent had entered such a plea of guilty was admissible and was an admission against interest. It was admitted as an admission against interest and not as a judgment establishing the fact. Vaughn v. Jonas, 31 Cal.2d 586, 191 P.2d 432, 438. As was said in that case, "it tended to some extent to support plaintiff's charges; its weight and significance under the circumstances were for the jury to determine." The fact that the explanation was made some months after the plea had been entered would go to the weight of the evidence, but would not affect its admissibility. An explanation at the time of the trial, under circumstances not too dissimilar, has been permitted. Brooks v. E. J. Willig Truck Transp. Co., 40 Cal.2d 669, 255 P.2d 802; Vaughn v. Jonas, 31 Cal.2d 586, 191 P.2d 432. Neither error nor prejudice appears in the fact that the information was brought out upon redirect examination instead of upon direct examination. The order of proof was a matter for the court. No error appears with respect to the claimed injection into the case of the element of poverty on the part of the respondent. Aside from any other consideration, this element appeared incidentally in connection with admissible testimony. Packard v. Moore, 9 Cal.2d 571, 71 P.2d 922. The instruction given by the court left it to the jury to consider all of the facts in determining whether or not the making of the plea should be taken as establishing the fact that the respondent admitted he had negligently taken the right of way from the appellants. It may also be observed, in this connection, that the evidence strongly indicates that the controlling matter in this case was with respect to whether or not the appellants were guilty of contributory negligence, and not as to whether or not the respondent had actually stopped at this intersection. No reversible error appears.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

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133 Cal.App.2d 208

PEOPLE of the State of California,
Plaintiff and Respondent,
v.
James Lawrence WILLIAMS,
Defendant and Appellant.
Cr. 888.

District Court of Appeal, Fourth District, California.

May 23, 1955.

Hearing Denied June 22, 1955.

Defendant was charged with the commission of armed robbery and with a prior conviction. From a judgment of the Superior Court of Fresno County, Edward L. Kellas, J., the defendant appealed. The District Court of Appeal, Barnard, P. J., held that the evidence sustained conviction.

Judgment affirmed.

Robbery ⟹24(3)

Evidence on identity of defendant as perpetrator of armed robbery sustained conviction.

◆

L. Kenneth Say, Fresno, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with the commission of an armed robbery, and also with a prior conviction. He pleaded not guilty but admitted the prior conviction. He was found guilty by the verdict of a jury, and he has appealed from the judgment sentencing him to prison. He was represented at the trial by an attorney of his own choosing, and the same attorney was appointed by this court to represent him on this appeal.

The evidence shows, without conflict, that two men robbed a service station in Fresno about 10:00 P.M. on June 25, 1954. The service station was operated by a Mr. Voss and his wife, both of whom were present at the time. One of the men handed a half dollar to Mrs. Voss and asked for change with which to operate a cigarette machine. When she handed him the change the other man produced a gun and threatened to kill both Mr. and Mrs. Voss if she did not open the cash box for them. The box was opened and the smaller of the two men grabbed the bills in the box. About that time Mr. Voss ran behind a tire rack for the purpose of getting his gun. The two men then fled. On a check being made it was found that $62 had been taken. The defendant was arrested about a week later but the other man was not apprehended. At the trial both Mr. and Mrs. Voss identified the defendant as the one who had taken the money. The defendant testified that on the night in question he was playing cards at his home continuously from about 8:30 P.M. to midnight, and that he had not been at the service station. His common law wife also testified that he was at home that night between those hours.

The only point raised is that the only identification of the defendant as a participant in the robbery is that appearing in the testimony of Mr. and Mrs. Voss, and that a reasonable doubt exists as to that identification. There is evidence that the defendant was only five feet three inches tall, that he had a mark on his face, and that his appearance was unusual in several respects. Both Mr. and Mrs. Voss, at separate times, picked the defendant from a police line-up of five men and identified him as being one of the men who held up the station. An officer testified that the five men in the line-up were about the same size. Both Mr. and Mrs. Voss positively identified the defendant at the trial, as being one of the men in question, and gave good reasons for being positive. The appellant argues, however, that some doubt exists from the fact that although Mrs. Voss positively identified the defendant at the preliminary examination and at the trial, the probation officer in making his report included this statement: "Mr. Voss was very positive and had no doubts, while Mrs. Voss was a little reluctant on the positive identification due to the fact that Williams has a thin mustache which she did not remember." The probation officer's report is not in the record. If such a fact had been brought out at the trial it would have gone to the weight of her evidence, and nothing more than a conflict would appear. The evidence was amply sufficient to support the verdict, including the matter of identification.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

133 Cal.App.2d 175

Jennie B. DE LONG, Plaintiff and Respondent,

v.

Fred A. MILLER et al., Defendants and Appellants.

Civ. 20669.

District Court of Appeal, Second District, Division 1, California.

May 23, 1955.

Divorced wife's action for an accounting and a division of community property. Husband moved to disqualify wife's attorney. The Superior Court, Los Angeles County, Philbrick McCoy, J., denied motion, and husband appealed. The District Court of Appeal, Doran, J., held that affidavits and testimony disclosed substantial support for trial court's finding that there was no sufficient ground for disqualifying plaintiff's attorney.

Order affirmed.

1. Trial 🔑388(1)

Findings are required and necessary only where a statute so provides.

2. Trial 🔑388(2)

Proceeding before trial court on defendant's motion to disqualify plaintiff's attorney was not a "trial of question of fact," within statute requiring findings upon trials of questions of fact, but the determination of a question of law, and no findings were required. West's Ann.Code Civ. Proc. § 632.

See publication Words and Phrases, for other judicial constructions and definitions of "Trial of Question of Fact".

3. Attorney and Client 🔑20

Affidavits and testimony disclosed substantial support for trial court's finding that there was no sufficient ground for disqualifying plaintiff's attorney on ground of claimed business and social association with defendant. Rules for Professional Conduct, rule 5, West's Ann.Bus. & Prof.Code, following § 6076; West's Ann.Bus. & Prof. Code, § 6068(e); Canons of Professional Ethics of American Bar Association, Canons 6, 37.

Hightower & Martin, John L. Martin, Los Angeles, for appellants.

Vincent J. Blumberg and Leslie L. Heap, Los Angeles, for respondent.

DORAN, Justice.

The defendants herein are appealing from an order "refusing to enjoin or restrain Vincent J. Blumberg (respondent's attorney) from participating thereafter, directly or indirectly", in this proceeding. According to appellants' brief, this appeal is concerned "with the problem of whether a man (Attorney Blumberg), once attorney for Fred (A. Miller, appellant), can now some years later be attorney for the former wife of Fred (now Jennie v. DeLong, respondent)".

It appears that the respondent and the appellant Fred A. Miller were married on July 2, 1927, that there are two children now of age, and that on October 5, 1944 a default divorce decree, at the suit of the husband was entered in Los Angeles County. In this action the husband was represented by Attorney Burke Mathes.

The present complaint, filed for the wife, Jennie B. (Miller) DeLong, on July 13, 1953 by Attorney Vincent J. Blumberg, is denominated "Complaint for an accounting and division of community property; for rescission and cancellation of an alleged assignment; to declare a trust and other equitable relief or damages and declaratory relief, etc.". It alleges that at the time of marriage Fred A. Miller "neither owned or possessed any property, apart from a small sum of money and some personal belongings"; that Miller was engaged in "many and varied oil well drilling and leasing activities and ventures" in California.

The complaint further alleges that the wife had no experience in business matters and relied upon the husband's integrity; that previous to the divorce Miller represented "that he was willing to and would, divide equally with her, all of the community property", and "that the only community property then existing, consisted of the four room house in which she was then living at Templeton (San Luis Obispo County) and its meagre furnishings", and that all community property "was worth not more than

$5,000.00". Relying on these representations, the wife consented to the proposed division, retaining the family home and causing "a cash payment in the amount of $2,500.00 to be made to said defendant, believing it to be as and for, his one-half of the then existing community property".

It is then alleged that at the time mentioned the wife "did not consult an attorney, was not aware of her legal rights"; that "unbeknownst to her", the husband had, during the marriage, acquired various other items of community property consisting of oil leases, etc., of the value of not less than $675,000, the income from which has not been less than $7,500 per month; that the husband had variously schemed and planned by assignments and otherwise, to defraud the plaintiff of any share therein.

Following the taking of the wife's deposition, "it was immediately apparent", says appellants' brief, "that Vincent (J. Blumberg) had been retained by the former wife to act against Fred (A. Miller) because Vincent had been Fred's attorney in earlier years", whereupon appellant Miller filed the motion in question, seeking to disqualify Blumberg as the wife's attorney. The motion was supported by affidavits of Fred A. Miller and others to the effect that Vincent J. Blumberg had acted as attorney for Miller in various matters and that Miller had made confidential statements to Blumberg, together with the deposition that the wife had "contacted Mr. Blumberg because he had formerly been attorney for your former husband * * *", and that Blumberg "knew a long time ago about his business affairs; but during the time that there was an association between the two, business association".

It is further claimed by appellants that "Fred (A. Miller) and Vincent (J. Blumberg) were good friends" who "worked upon deals together and in addition to which, chased after girls together", by reason of which relationships, Attorney Blumberg became confidentially informed as to all of Fred's affairs, business and social, disqualifying Blumberg from acting as attorney for the former Mrs. Miller.

While admitting that the two men were formerly business and social associates, and that Blumberg at times represented certain companies and groups in which Miller was interested, respondent's brief denies that Blumberg was ever "Mr. Miller's personal attorney", alleging that "Mr. Burke Mathes handled Mr. Miller's legal matters". Attorney Blumberg served in the United States Navy from June, 1942 until January, 1946, during which period, it was stipulated, that "there have been no dealings between Mr. Miller and Mr. Blumberg * * * except as adversaries in connection with this proceeding". There was likewise a stipulation that none of the property claimed by plaintiff "was acquired by him (Miller) prior to the interlocutory decree * * * about October 6, 1944".

Appellants' first contention is that, on the hearing of the motion to disqualify Attorney Blumberg from acting for Jennie Miller DeLong, at which oral testimony was taken, it was the trial court's duty to make written findings of fact and conclusions of law, there being no waiver thereof. The respondent, however, points out that this matter is governed by the language of Section 632 of the Code of Civil Procedure which reads: "In superior courts and municipal courts, upon the trial of a question of fact by the court, its decision must be given in writing and filed with the clerk * * *. In giving the decision, the facts found and the conclusions of law must be separately stated".

[1, 2] It is to be noted that the above section contains no mention of motions, and as said in Carpenter v. Pacific Mutual Life Ins. Co., 10 Cal.2d 307, 327, 74 P.2d 761, 774, "Findings are required and necessary only where a statute so provides. Matter of Danford, 157 Cal. 425, 108 P. 322." In the present case the proceeding before the trial court was not "the trial of a question of fact", but the determination of a question of law upon a motion to disqualify plaintiff's attorney. That testimony was actually taken, in augmentation of the accompanying affidavits, does not change the nature of the proceeding. And as respondent observes, "We would need twice as many courts as we have if findings were required on motions. Such is not required

by law, nor is it contemplated by any of the authorities".

Rule 5 of the Rules for Professional Conduct, cited by appellants as authority for the contention that the plaintiff's attorney should be disqualified because of previous confidential, legal, business and social relations with Fred A. Miller, reads as follows: "A member of the State Bar shall not accept employment adverse to a client or former client, without the consent of the client or former client, relating to a matter in reference to which he has obtained confidential information by reason of or in the course of his employment by such client or former client."

Business and Professions Code of California, Section 6068(e), makes it the duty of an attorney "To maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client". In like manner, Canons 6 and 37 of Professional Ethics of the American Bar Association, dealing with the same matter, are set forth in appellants' brief. In respect to these rules there can be, of course, no complaint.

As respondents aver, however, "those rules are applied only when there is a factual basis for the application". The matter was squarely presented by motion, and the trial judge, after considering the affidavits, oral testimony given by Vincent J. Blumberg, Attorney Burke Mathes, and appellant Fred A. Miller, and the arguments of the parties, took the matter under submission on May 25, 1954, until June 2, 1954, at which time the court ruled that "Defendant's motion for order disqualifying attorney from further participation in this action is denied".

[3] Careful examination of the affidavits and testimony taken at the hearing of the motion discloses substantial support for the trial court's finding that there was no sufficient ground for the attorney's disqualification. As respondent says: "The Honorable Judge who heard this motion was familiar, through years of experience, with matters of this kind. He thoroughly considered the situation * * *." In this state of the record, even if another court might conceivably find otherwise, no reversal is warranted under the rules of appellate review. It is obvious that the trial judge was in a better position to evaluate the evidence than any appellate tribunal.

The order is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

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133 Cal.App.2d 25

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

John Charles VON HECHT, Defendant and Appellant.

Cr. 5320.

District Court of Appeal, Second District, Division 1, California.

May 16, 1955.

Prosecution for attempted grand theft. From order of the Superior Court of Los Angeles County, Kenneth C. Newell, J., denying a motion for new trial, the defendant appealed. The District Court of Appeal, White, P. J., held that the evidence was sufficient to establish an attempt to commit the crime charged.

Order affirmed.

1. Criminal Law 🔑365(1), 369(1, 2), 370, 371(1, 12), 372(1)

An accused can be tried only for offense charged against him in an indictment or information, and evidence of collateral, independent crimes is not admissible except when it tends directly to establish crime charged by proving a material fact, where it is part of res gestae, or where it helps to disclose motive, intent, premeditation, guilty knowledge, malice, or a common plan or scheme.

2. Criminal Law 🔑371(3), 372(9)

In prosecution for attempted grand theft by defendant, who sought to obtain personal property by use of a credit card, which had been lost by owner thereof, evidence of other transactions whereby defendant had made purchases by use of credit card was admissible since it disclosed both intent and a common scheme or plan.

3. Criminal Law ⚷371(3)

In prosecution for attempted grand theft by defendant, who sought to obtain personal property by use of credit card which had been lost by owner thereof, evidence of other transactions whereby defendant had made purchases of property by use of credit card was admissible on question of defendant's affirmative defense that he had freely and voluntarily abandoned a criminal intent to acquire property by use of a credit card.

4. Criminal Law ⚷44

Abandonment is a defense if attempt to commit a crime is freely and voluntarily abandoned before act is put in process of final execution and where there is no outside cause prompting such abandonment.

5. Criminal Law ⚷369(2)

If evidence of another crime or proof of similar acts is necessary or pertinent to proof of one charged, the law will not thwart justice by excluding that evidence simply because it involves commission of another offense.

6. Witnesses ⚷331½

In prosecution for attempted grand theft by defendant, who sought to obtain personal property by use of credit card which had been lost by owner thereof, and who testified that he had never used card to secure any merchandise, evidence of other transactions whereby defendant had made purchases by use of credit card was admissible for purpose of impeachment.

7. Witnesses ⚷277(4)

It is proper to cross-examine an accused upon any relevant and material matter elicited on his direct examination, for purpose of showing conduct or statements inconsistent with his direct testimony.

8. Witnesses ⚷277(4)

Where defendant, who was charged with attempted grand theft, testified on direct examination that credit card, on which he sought to obtain the property in question, had been given to him by person whose name appeared on card but that he had never secured merchandise upon it, evidence of other transactions whereby defendant had acquired property by use of credit card within scope of direct examination and therefore was proper cross-examination to controvert defendant's direct testimony. Pen.Code, § 1323.

9. False Pretenses ⚷49(1)

Evidence was sufficient to establish an attempt to commit grand larceny.

10. Criminal Law ⚷44

Preparation is the devising or arranging of the means or measures necessary for the commission of the crime.

11. Criminal Law ⚷44

Attempt to commit a crime is the direct movement toward commission after preparations are made, and must be manifested by acts which would end in consummation of particular offense unless frustrated by extraneous circumstances.

12. Criminal Law ⚷44

Once design of a person to commit crime is clearly shown, slight acts in furtherance of design will constitute an attempt.

13. Criminal Law ⚷44

Abandonment of attempt to commit a crime because of appearance of police does not constitute a termination of the criminal act sufficient to save defendant from criminal liability for his attempt.

◆

Charles Hollopeter, Pasadena, William B. Esterman, Los Angeles, of counsel, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was accused of the crime of attempted grand theft in that he wilfully, unlawfully and feloniously attempted to take certain personal property of Robert Arnett and Firestone Stores.

Following entry of a not guilty plea trial by jury was waived and it was stipulated that the cause might be submitted on the transcript of the preliminary examination; that the exhibits received thereat might be admitted in evidence, and that further testimony might be submitted. Defendant reserved the right to object to certain testimony in the aforesaid transcript and to certain exhibits on the claimed ground of their immateriality and irrelevancy.

The court read the transcript of the preliminary examination, received certain exhibits in evidence and further testimony was offered by defendant and by the People in rebuttal.

Defendant was adjudged guilty of the crime charged against him in the information. His motion for a new trial was denied. Proceedings were suspended and he was granted conditional probation. From the order denying his motion for a new trial defendant prosecutes this appeal.

As to the factual background surrounding this prosecution, we regard the following as a fair epitome thereof:

On February 19, 1954, at the Union Oil Company station in Palo Alto, California, Joseph H. Ronan of Santa Cruz, California, lost the national Union Oil Company credit card, No. 5398–T–18, which had been issued to him. The next day, he reported that loss to the Union Oil Company. He was not acquainted with the defendant, and did not give him or anyone else permission to gain credit by the use of his credit card.

On February 23rd, Margaret Callahan, 511 South Fifth Avenue, Arcadia, whose husband worked at the Broadway-Pasadena, noticed that her California license plate, 2R16134, and its holder, were gone from her 1953 Buick, which had been in the Broadway parking lot.

About 2:30 p. m. on May 6, 1954, the defendant drove a Lincoln Capri automobile into the Firestone Store at 1100 East Colorado, Pasadena. He and Mr. Arnett, the office and credit manager of the store, discussed a sunvisor, and then talked about tires. The defendant noticed some wire wheels which the store had on display. Mr. Arnett told him that the price was $385, and showed him how they worked. The defendant said that he wanted a set of the wire wheels, and wanted them put on a Union credit card, stating something about its being an expense item where he worked. He handed Mr. Arnett a Union Oil Company Credit Card, from which Mr. Arnett, with the defendant watching, took the information and made out a work order for the wheels, oil, filter, and "lube", placing on that order the name "Joe P. Ronan" and the number "5398–T–18." Mr. Arnett had the credit card just long enough to copy it, and he gave it right back. He told the defendant to return about 5:00 o'clock. The defendant took his brief case and said that he was going to his office, but would be back about 5:00 o'clock to pick up the car. After he had gone, Mr. Arnett called the Union Oil Company.

Officer Hoocker of the Pasadena City Police Department first saw the defendant's car on May 6th about 3:30 p. m. on a grease hoist at the Firestone Store in Pasadena. On it was California license plate 2R16134—taken from Mrs. Callahan's vehicle—and 1954 tab No. 1993889.

Officer Hoocker saw the defendant for the first time walking west on the south side of the street at about 1140 East Colorado Street, Pasadena, three or four lots east of the Firestone Store. The defendant walked farther west on the sidewalk, picked up a brown brief case from the sidewalk there, then continued into the service station. It was some time after 4 o'clock and before 5:00 o'clock when he returned to the station. The car was up on the grease rack, and the wheels had not been installed, when he returned. He was placed under arrest by Officer Hoocker who told him that he was being held for investigation of forgery because they had a report that a man with the car which was on the grease rack had tried to buy merchandise on a Union Oil Company credit card that had been reported stolen, and that there was a stolen license plate on the rear of the automobile. The defendant said that he didn't know how the license plate got on the back of the automobile, and that the "deal" there was for cash—that he didn't have a Union Oil Company credit card.

Officer Hoocker asked the defendant if he had a key for the glove compartment and for the trunk of the car, and the defendant gave him the key from his key case. The officer opened the glove compartment and therein found a temporary receipt of the California Department of Motor Vehicles, showing validation on March 11, 1954, containing the defendant's name John Charles Von Hecht "6114H", and in boxes under "Issued" the number "1993889" in the box beside the word "Tab" and the number "1J60712" in the box beside the word "Plate."

In the glove box also there were three Union Oil Company sales slips filled in in handwriting. One showed a sale at a station at 10th and Mission, "S. F." on the "4/12" to "Von Hecht", license "1J60721" of 14.4 gallons of 7600 gasoline at 33.7, amounting to $4.83; 6 Royal Triton at 60 amounting to $3.60, "Lub" in the amount of $1.75, wash in the amount of $1.75 and filter in the amount of $2.05, with sales tax of $.20, totalling $14.18. A second sales slip showed a sale on "4/18/54" at the Master Service Station, Salem, Oregon, to "54 Lincoln" license "1J60721", of 13.5 gallons of 7600 gasoline at 34.1, amounting to $4.70, 5 Royal Triton at $.60, amounting to $3, "AC Service" amounting to $.75, "Lube" amounting to $1.75, wash amounting to $2, wheel pack amounting to $2, and screen amounting to $.98, totalling $15.18. A third sales slip showed a sale at Robert C. Hall, 5477 San Fernando Road, Glendale on "4/8/54" to "John Von Hecht", license "1J60721", of four U. S. Royal Masters at $64.20 "exch" each, amounting to $256.80, four U. S. Royal Lite Tubes at $25.09, amounting to $100.36, with excise tax of $9.80 and sales tax of $14.14, totalling $381.10, with a notation "Cash". Officer Hoocker asked the defendant about the sales slips and the latter said that he had written them himself for expense records, and that he did not get the tires and tubes in Glendale, but had obtained them in Oregon and made the slip for tax records.

In the defendant's brief case the officer found a document labelled "State of Oregon Department of State Police", dated "4/27/54", containing the defendant's name, age, address and other data, and showing "Vehicle 54 Linc Cch", "License Calif. 2R16134", which the defendant said was a warning ticket which he had received while driving his car in the State of Oregon.

Wrapped in a towel in the trunk of the defendant's car Officer Hoocker found two license plates numbered 1J60712.

On May 7, 1954 Officers Hoocker and Rittenhouse and the defendant had a conversation. The officers asked the defendant if a ledger book and a personal expense book contained his entries and he said that they did. The latter told them about the Union Oil Company sales slips being kept by him for tax records. Officer Hoocker asked the defendant what he had done with the Union Oil Company credit card he had presented at the Firestone Store and the defendant said that he didn't have one—that he had never had one.

On May 8, 1954, Officer Repetti of the Pasadena Police Department found the "Joseph H. Ronan" credit card and another Union Oil Company credit card between pages 496 and 497 of the Northeastern telephone directory in the rear of a cocktail lounge at 1154 East Colorado.

The original records of the Union Oil Company contained certain credit card delivery tickets each showing "5398–T–18" as the "Customer's Credit Card Account No." and "Joseph H. Ronan" as the person to whom the sale was made. One ticket from the 10th and Mission Parking Station, 10th and Mission Streets, dated "4/12/54", showed a license number of R41483, the space before the R being written over by a writing from a lower line. The ticket was written up for 14.4 gallons of 7600 gasoline at 33.7, amounting to $4.83; "6/4" Royal Triton Motor Oil at .60, amounting to $3.60; "Lub" in the amount of $1.75; wash in the amount of $1.75; and filter in the amount of $2.05, with sales tax of .20, totalling $14.18. A second ticket from the Master Service Station, Salem, Oregon, showed a license number of "2B1613", a date of "4/17/54", and a sale of 13.5 gallons of 7600 gasoline at 34.4, amounting to $4.70; 5 of Royal Triton Motor oil at .60, amounting to $3.60, "Lub" in the amount of $1.75; wash in the amount of $2; wheel pack in the amount of $2; "AC Service in the amount of $.75; and screen in the amount of $.98, totalling $15.18. A third such ticket showed the license written as 2D61143 and the date as "4/1/54". It was from D. O. Stewart, Portland, Oregon, and was for 4 U. S. Royal Masters at $64.28, amounting to $256.80; excise tax of $9.80, and four tubes at $25.09, amounting to $100.36, totalling $366.96. In the space provided on each ticked for "Rec'd by" there appeared a series of pencil marks.

R16134

In his own behalf defendant testified that on May 6, 1954 he was employed by Universal Publicizers, Inc. as a sales manager. The work consisted of selling advertising on radio and television to local merchants. During March and April, he had working for him on a probationary basis as a salesman a person representing himself to be Joseph Ronan. Ronan did not have a car, and when he worked he used the car either of the defendant or of another salesman named Ferrar. Sometimes Ronan bought materials and services for the defendant's car, and sometimes in so doing he used the Union Oil Company credit card containing the name of Joseph H. Ronan and the number 5398–T–18. When Ronan did this, the defendant gave Ronan the cash for the services and materials furnished for his car and bought with the credit card, and made out a duplicate of the receipt Ronan had received in each such transaction, on sales slips, blanks of which he had picked up, so that he could use them in his income tax.

That he bought a set of tires from Ronan about April 1st while they were in Portland or Vancouver. He paid him half price for them, and did not know where Ronan got them. He did not see any charge slip for them. When he bought them, he had Ronan sign a receipt for the money he paid him, and had it witnessed by Mr. Ferrar. That he looked up the retail price of the tires and put that amount down on a blank sales slip which had "Robert C. Hall, L1930, 5744 San Fernando Road, Glendale" stamped on it, for income tax deduction purposes, adding a sales tax which he had not in fact paid. That the other sales slips were made by copying credit card delivery tickets, duplicates of which Ronan had showed him.

Defendant further testified that license plates numbered 1J60712 or 21 were issued to him for his Lincoln, with, he presumed, tab number 1993889. He did not remove the plate numbered 2R16134 from any other vehicle, and did not find it anywhere. He was in San Jose from February 21st to 27th, 1954. He never paid any attention to the number of his license plate, and had no conscious knowledge that the plate with number 2R16134 was on his car. He had no idea how it got on his car, and he did not know how his own license plates got into the trunk of his car.

That about May 1st, Ronan went to see the defendant at Lido Village where he and his wife had a house trailer. Ronan said that he was on his way to Florida. That Ronan, who owed the defendant about $400, said that he would give the latter his credit card as security for the money he owed him. The defendant objected because he did not believe that it would be security. Then Ronan, who was going to be gone for a month, said that if the defendant used the card he should sign his own name so Ronan would know which purchases were the defendant's, and Ronan would deduct the amount that the defendant had spent from what he owed and pay him the balance.

That after he got the credit card from Ronan, he did not use it to charge any gasoline or oil or anything. On May 6, 1954, he was in Pasadena, where he went to the Firestone Store to get a sunvisor, as he had some time to spend in that town before he had to go to an appointment. He looked at sunvisors and ordered a lubrication job and an oil change on his car, which he had parked in the station. He and Mr. Arnett discussed wire wheels for the Lincoln. That he told Mr. Arnett that he wanted wire wheels, which would cost about $400, and gave Mr. Arnett the "Ronan" credit card, intending to charge the wheels on the credit card and "get even all in one charge with

Mr. Ronan." He was not asked what his name was. Mr. Arnett was behind the desk writing, but the defendant did not watch what he was writing on the order. He did not see a copy of the work order, and did not know that the number of the credit card was written on it. He did not sign the work order nor any other document. Mr. Arnett said that he was to return for the wheels at five o'clock. That he then left the station.

Defendant further testified that after he departed from the station he started to think about the transaction, and it occurred to him that if Ronan could not pay him the money he owed him, he did not see how Ronan could pay for the wheels. He was not familiar with the legal aspects of the thing, but he thought that there was a good possibility that he could get into trouble for using Ronan's credit card. The more he thought about it the more he wanted to stop the transaction. If he had to pay for the wheels he would do so, but if he got back to the station early, he could tell them that he had changed his mind and did not want the wheels, thus saving himself the expense. He started back to the station.

As he was approaching the service station he decided that he didn't even want to take the credit card in with him. He knew that if he didn't have it he could not charge anything, as his experience had been that one could not get delivery without the card. He put his brief case on the sidewalk, as it was heavy, and went into a bar, where he tried to telephone to a man in Reno on a business matter. He put the credit card between the pages of the Northeast telephone directory so that he could come back and get it and mail it to the address on it. He did not put anything else in the telephone directory. As far as he knew there was no Union Oil Company credit card with the name of Joseph T. Wills on it in the directory at that time.

That he returned to the station early, at about 3:30 o'clock, to cancel the order if he could and pay for the wheels in cash if he could not. He had a sufficient bank balance to do so. When he returned, he saw Officer Hoocker there and thought that he worked there. He told Officer Hoocker that he was going to pay cash for whatever he bought there, as that was his intention when he returned. That when Officer Hoocker asked him if he had a Union Oil credit card he told him that he did not have any. At the time, he had a Shell Oil Company credit card.

On cross-examination defendant was shown a series of photostatic copies of the documents, each imprinted "Union Oil Company of California". Each ticket showed a sale to "Joseph H. Ronan" on credit card "5398–T–18". On each, in the space provided for the name of the person by whom the merchandise was received was a penciled series of marks. As to some of them defendant testified he did not make the purchases reflected thereon, while as to others he did not recall whether or not he had made the purchases. That as to the stolen license plate No. 2R16134 which was on his vehicle when he was arrested, he paid no attention to it but "assumed" that at some time when his employee Ronan borrowed defendant's automobile he placed the license plate on it.

In rebuttal, Joseph H. Ronan of Santa Cruz, to whom the credit card here in question was issued, testified that he did not make a purchase at the 10th and Mission Parking Station in San Francisco on April 12, 1954, and did not authorize anyone to make a purchase. The credit card delivery ticket showing a sale to his name on that date at that station was not his. He did not make a purchase in Salem, Oregon on April 17, 1954 and did not authorize anyone else to use his credit card or to make a purchase in his name on that date in Salem. He did not make a purchase in Portland, Oregon, on April 1, 1954 at the D. O. Stewart Service Station, nor authorize anyone to do it. The signatures on the credit card delivery tickets showing sales to his name on those dates and in those places were not his. He wrote his name out.

Mr. Ronan saw other Union Oil Company credit card delivery tickets when they came in on his duplicate bill from the oil company. He was not in the territory shown on the tickets at the times indicated thereon, and did not authorize anyone to make any purchases on his credit card.

Officer Repetti found a Union Oil Company credit card made out to Joseph T. Wills and numbered 3416–x–25, on May 8, 1954, at 1154 East Colorado Street, Pasadena, between pages 496 and 497 of the Northeastern Directory in the rear of the establishment there, which was about 100 yards from the Firestone Store. It was with the "Joseph H. Ronan" card which he found also at that time.

The records of the Union Oil Company showed that Joseph T. Wills reported his credit card missing, April 13, 1954.

With reference to this last-mentioned credit card, lost by Mr. Wills, there was testimony that on April 1, 1954 defendant entered the service station of D. O. Stewart, in Portland, Oregon, and purchased some tires. During this transaction Mr. Stewart's dinner was delivered to him. Defendant told the latter to eat his meal and that he (defendant) would write up the sale. Mr. Stewart handed defendant his book and the latter wrote the order in it, putting the "Joseph H. Ronan" credit card beside it. Mr. Stewart checked the number and name written on it and saw that they corresponded with the name and number on the credit card. However, as defendant drove his Lincoln automobile out of the service station he stopped before crossing the sidewalk to go into the street. At that time Mr. Stewart observed that the license plate on the vehicle was "2R16134" (the plate stolen from Mrs. Callahan) and not "2B61143" as the defendant had written it on the ticket. Mr. Stewart inserted the number "R16134" over the numbers "2B61143" which the defendant had written.

Donn Mire, an examiner of questioned documents, examined and compared the handwriting which the defendant had made on page 47 of a record book; the writing on certain motel receipts, some portions of which were written by the defendant; the handwriting found on the Union Oil sales slips found in the defendant's car, which he stated that he had written; and the writing appearing on the credit card delivery ticket for the U. S. Royal Master tires and tubes purchased from the aforesaid Stewart Service Station. He formed the opinion that the printing on the record book, the printing on the motel receipts, and the writing on the sales slips, were made by the same person who printed the body of the credit card delivery ticket for the tires and tubes from the Stewart Service Station, consisting of the name "Joseph H. Ronan", the license number, date, "4 U. S. Royal Master", the price, "Excise tax" and "4 tubes".

As his first ground for reversal of the order denying his motion for a new trial, appellant earnestly insists that while evidence of other transactions is admissible for the purpose of establishing intent, it was inadmissible and prejudicially erroneous in the case at bar since in the middle of the trial appellant conceded that intent had been proved and established. He contends that the only issue then remaining was his defense that he had voluntarily abandoned the attempt charged against him and that as to that issue evidence of the other similar transactions was inadmissible.

[1] It is true, as contended by appellant, that a long and unbroken line of decisions in this state establishes as a cardinal and universally recognized rule that in a criminal prosecution an accused can be tried only for the offense charged against him in the indictment or information, and that evidence of collateral, independent crimes is not admissible. But, there are equally well recognized and clearly defined exceptions to this rule. "Evidence of other crimes may be admitted when it tends directly to establish the crime charged by proving a material fact, where it is part of the res gestae, or where it helps to disclose motive, intent, premeditation, guilty knowledge, malice, or a common plan or scheme. 20 Am.Jur., sec. 310 et seq., p. 289 et seq.; 22 C.J.S., Criminal Law, § 683 et seq., p. 1089 et seq.; Wigmore on Evidence, vol. II, ch. XIII, p. 191 et seq.; Wharton's Criminal Evidence, sec. 345 et seq.; p. 487 et seq.; 8 Cal.Jur., sec. 168 et seq., p. 60 et seq.; 13 Cal.Jur., sec. 84 et seq., p. 703 et seq." People v. Albertson, 23 Cal.2d 550, 576, 577, 145 P.2d 7, 21.

[2] We are persuaded that in the case now engaging our attention the evidence was admissible because it disclosed both intent and a common plan or scheme.

A mere reading of defendant's testimony immediately suggests that he did not unequivocally concede that he intended to commit grand theft when he engaged in the actions charged against him. True, his counsel stated that it was conceded appellant "intended to use that card at the time he went in that station. * * * The issue here is what his intention was at the time of his return.", but, as pointed out by respondent, "* * * such is not an admission that the appellant had the intent to defraud, by false or fraudulent representation, the Firestone Store of the wheels. He had admitted that he intended to use the credit card to obtain the wire wheels on credit, but he asserted that he had been authorized to do so by the man who gave it to him, whom he believed to be Joseph Ronan, whose name was on the card. If his story was true, we submit that he would have had no intent to defraud, because he believed that his actions had been authorized by 'Ronan', who would pay the Firestone Store for the wheels. At no time did the appellant waver from his position that his intentions were completely innocent ones, designed to secure repayment of money owed to him by 'Ronan' in a manner authorized by 'Ronan'. He admitted no felonious intent to defraud the store. His attorney's statement that he had admitted such an intent by using the credit card was not supported by the appellant's testimony".

The prosecution had the right in the light of appellant's testimony to challenge his statement that his actions on the day here in question were not, as he contended, innocent and authorized, but on the contrary were unlawful and criminal, by showing a common scheme, plan and design. The evidence complained of herein tends to establish such a common scheme or plan and in the light of appellant's testimony, was admissible as tending to show that the crime of which he here stands convicted was committed by him as a part of his scheme or plan. People v. Peete, 28 Cal.2d 306, 314–319, 169 P.2d 924; People v. Westek, 31 Cal.2d 469, 480, 481, 190 P.2d 9; People v. Deysher, 2 Cal.2d 141, 149, 40 P.2d 259; People v. Craig, 111 Cal. 460, 468, 469, 44 P. 186; People v. Hickok, 56 Cal.App. 13, 18, 204 P. 555.

[3, 4] We are also impressed that the evidence of other transactions was admissible on the question of appellant's affirmative defense that he had freely and voluntarily abandoned a criminal intent. Abandonment is a defense if the attempt to commit a crime is freely and voluntarily abandoned before the act is put in process of final execution and *where there is no outside cause* prompting such abandonment (1 Wharton Crim.Law, sec. 226, pp. 305–308; 14 Cal. Jur.2d 221). In the case at bar appellant testified that he ordered the wire wheels intending to charge them to "Ronan's" credit card as the supposed "Ronan" had authorized. He testified that after he ordered the wheels and presented the credit card, he began to be afraid that he would have to pay for the wheels himself, and that although he did not know the legal aspects of the transaction, he thought he might get in trouble for using the card. Thereupon he decided to stop the sale and save himself the money, and if he couldn't stop it, he would pay cash. He thought that if he didn't have the credit card with him he could not charge them, so he left it in a telephone book so that he couldn't charge the wheels. When he entered the station he did not have the card with him.

[5] Appellant contends that the foregoing testimony given by him shows that he had voluntarily abandoned his plan to obtain the wheels on credit of the "Ronan" card and put the means of committing any offense entirely beyond his reach, thereby terminating the transaction before it amounted to an attempt to commit grand theft. We are satisfied that the testimony presented to the trial court a factual question as to whether appellant's failure to complete a crime was such a free and voluntary act constituting abandonment or whether his conduct was because of fear of discovery of his unlawful acts or the appearance of the police at the service station. If the latter was true then there was no abandonment, as that term is known to the law. To challenge the evidence offered by appellant as to abandonment, the prosecu-

tion was justified in offering proof that he had theretofore secured merchandise by using credit cards not belonging to him, thereby supporting an inference that because of his past performances, it was unlikely that he would, in the instant case, freely and voluntarily abandon his plan after commission of a definite overt act. People v. Walker, 33 Cal.2d 250, 258, 201 P.2d 6; People v. Corkery, 134 Cal.App. 294, 297, 25 P.2d 257. If evidence of another crime or proof of similar acts is necessary or pertinent to the proof of the one charged, the law will not thwart justice by excluding that evidence simply because it involves the commission of another offense.

[6] Also, the challenged evidence was admissible for the purpose of impeachment. On direct examination the appellant testified that he had received the credit card from "Ronan" about May 1st, and that he had never used it to secure any merchandise.

[7, 8] In a criminal case it is proper to cross-examine an accused upon any relevant and material matter elicited on his direct examination, for the purpose of showing conduct or statements inconsistent with his direct testimony, Penal Code, § 1323; People v. Hoffman, 199 Cal. 155, 161, 162, 248 P. 504; People v. Peete, 28 Cal.2d 306, 320, 169 P.2d 924; People v. Westek, supra, 31 Cal.2d at pages 476–479, 190 P.2d 9. The evidence of other similar transactions was clearly within the scope of the direct examination of the appellant and therefore proper cross-examination to controvert appellant's direct testimony that he received the "Ronan" credit card about May 1st but had never secured merchandise upon it.

[9] Finally, appellant insists that the evidence is insufficient to establish an attempt to commit the crime charged; that it shows no more than preparation to do so, and an abandonment of the project before any appreciable fragment of crime had been accomplished. In support of his claim, appellant asserts that "the undisputed fact is that before appellant came back to the Firestone Store he consciously and intentionally placed out of his reach the one indispensable instrument essential to 'commencement of the consummation' ".

While it is true that appellant left in a telephone book the credit card which he had originally presented to the service station manager, it cannot be said to be "indisputable" that he did so to deprive himself of the opportunity to consummate his previously initiated plan. As pointed out by respondent, it could, in view of the facts and circumstances shown in this case, be reasonably inferred that "appellant placed the card in the telephone book close by the store so that if, when he returned to the store he was apprehended by the police, he would be free of the incriminatory card which would have furnished evidence of his criminal activities; and that if, when he returned to the store he needed the card to secure delivery of the wheels he could excuse himself to go and get it, and then present it to get the delivery. Thus, it appears that the act of the appellant in putting the card in the telephone book did not necessarily indicate that he had abandoned his plan to secure the wheels by using it to obtain credit, or that he had put it out of his reach, as it could reasonably be inferred that his act was done to get the evidence of his criminal activity out of his possession until such time as it might be needed for the consummation of the crime. Further, there is no showing that the appellant would have had to present the credit card in order to get delivery of the wheels after his return to the store. As he had already presented the card and the name and number had been taken from it, it appears reasonable to infer that he would not have had to present it again, as the store had the pertinent information contained on it, and that he would have had only to sign for the receipt of the merchandise in order to get delivery."

[10–12] It is true, as appellant insists, that preparation alone is not sufficient. The act, " 'must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation.' " People v. Miller, 2 Cal.2d

527, 530, 42 P.2d 308, 309, 98 A.L.R. 913. Preparation is the devising or arranging the means or measures necessary for the commission of the offense. The attempt is the direct movement toward the commission after the preparations are made, and must be manifested by acts which would end in the consummation of the particular offense unless frustrated by extraneous circumstances. And, once the design of a person to commit crime is clearly shown, slight acts in furtherance of the design will constitute an attempt. People v. Anderson, 1 Cal.2d 687, 690, 37 P.2d 67.

[13] In the instant case it could reasonably be inferred that the appellant, when he returned to the store, first approached it with his brief case, and, perhaps because he saw the officers at the store and his car without the new wheels, he became apprehensive that his criminal act had been discovered and in an effort to rid himself of the evidence thereof, he placed his brief case on the sidewalk, went back to the cocktail lounge and hid the card, and then returned to the station with the explanation that he intended to pay cash for the wheels. This would not be a voluntary abandonment, but rather an abandonment because of the appearance of the police, which would not constitute a termination of the criminal act sufficient to save the appellant from criminal liability for his attempt. See People v. Walker, supra, 33 Cal.2d at page 258, 201 P.2d 6.

Furthermore, the conduct of appellant did not necessarily amount to an abandonment because, he left the card in a place to which he could have returned and obtained it had the fear of apprehension proved groundless, and had it then become necessary to have the card in order to obtain the credit authorized by it. In view of the authorities we cannot agree with appellant in the conclusion that the evidence fails to disclose any overt act reasonably directed toward the consummation of the intended grand theft.

The order denying defendant's motion for a new trial is affirmed.

DORAN and DRAPEAU, JJ., concur.

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133 Cal.App.2d 223

CHEMINOL CORPORATION, Plaintiff and Respondent,

v.

Irwin G. OHLSSON, Defendant and Appellant.

Civ. 20731.

District Court of Appeal, Second District, Division 3, California.

May 24, 1955.

Action on contract. The Superior Court, Los Angeles County, William J. Palmer, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Ashburn, J. pro tem., held that release, which was executed by plaintiff, defendant, and another, and which expressly excluded liability which plaintiff owed to defendant and the other for sales of merchandise consigned by them to plaintiff and for which plaintiff expressly agreed in release to account, "subject to right of offset and valid assignments," did not release plaintiff's claim for overpayment to defendant from sales of consigned merchandise under bill of sale and assignment agreement which provided that defendant was to return any overpayments.

Judgment affirmed.

1. Appeal and Error ⚷931(1)

Upon appeal from judgment for plaintiff upon contract made for plaintiff's benefit, District Court of Appeal would adopt evidence favorable to plaintiff at points of conflict.

2. Arbitration and Award ⚷1

Where function of purported arbitrator was that of third person employed to determine a fact upon understanding that his finding would bind parties in interest, proceeding involved did not constitute an arbitration proceeding.

3. Contracts ⚷164

Where one of two documents, which are executed at the same time, refers to the other, the documents are to be construed as a single instrument, but express promise of one document must prevail over silence of the other. West's Ann.Civ.Code, §§ 1642, 1655.

4. Release ⚷30

Release, which was executed by plaintiff, defendant, and another, and which expressly excluded liability which plaintiff owed to defendant and the other for sales of merchandise consigned by them to plaintiff and for which plaintiff expressly agreed in release to account, "subject to right of offset and valid assignments," did not release plaintiff's claim for overpayment to defendant from sales of consigned merchandise under bill of sale and assignment agreement which provided that defendant was to return any overpayments. West's Ann.Civ.Code, §§ 1642, 1655.

5. Appeal and Error ⚷1011(1)

Where there was substantial conflict in the evidence, the District Court of Appeal was bound by trial judge's finding in favor of plaintiff.

6. Factors ⚷9, 44

Where sales of consigned goods were not made by individual consignors but by subagent for consignee-distributor, commission upon sales would not be barred, and question whether consignee, as a factor, had authority to delegate authority was beside the point. West's Ann.Civ.Code, § 2368.

7. Contracts ⚷284(1)

Where agreement between parties provided that, in making audit, auditor was to follow principles set forth by named person, auditor's handling of certain commissions could not be said to have violated such principles in view of fact that matter of commissions was not mentioned by such named person, even though, in making his audit, named person threw out the commissions and found as fact that sales on which such commissions were based had not been made by plaintiff.

8. Appeal and Error ⚷758(3)

Statement, in appellant's opening brief, that, in view of dispute over amounts, interest should commence only after final determination of amount due was not sufficient to raise point for consideration upon appeal.

Ekdale, Shallenberger & Toner, San Pedro, George E. Toner, San Pedro, for appellant.

Frank R. Davis, Hollywood, for respondent.

ASHBURN, Justice pro tem.

[1] Plaintiff recovered judgment upon a contract made for its benefit. Defendant, as appellant, argues that the trial judge misinterpreted the evidence and ignored a binding decision of an arbitrator; also that defendant had been released from liability if any ever existed. In the following statement of facts we adopt the evidence favorable to respondent at points of conflict, as we are bound to do. Murphy v. Ablow, 123 Cal.App.2d 853, 858, 268 P.2d 80.

Two men and two corporations weave the web of conflict: Henry T. M. Rice and Irwin G. Ohlsson started as equal owners of the stock of the corporations,—Ohlsson & Rice, Inc. and Cheminol Corporation. The former was engaged in some manufacturing, but chiefly in assembling for sale, of model airplane engines and parts for same; Cheminol was a sales organization. Differences having arisen between the two owners, Ohlsson (defendant herein), gave Rice an option, on or about August 1, 1951, to buy his stock in Ohlsson and Rice, Inc., which option was exercised on October 13, 1951.[1] About July 1, 1951 Rice and Ohlsson had acquired from Ohlsson & Rice, Inc. its entire inventory of model airplane engines and parts and special tools for manufacture of same. They thereupon consigned the stock in trade to Cheminol Corporation (plaintiff herein) for sale. This was done by written agreement dated August 22, 1951, which was considered by the parties to be effective from August 1, 1951. The first subject of controversy is the right to certain commissions under this agreement.

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[1] Counsel have drawn freely and unjustifiably upon facts outside the record, but in instances where they agree we accept their statements as the equivalent of proof. This is one of those instances.

The consignee agreed to use its best efforts to dispose of the goods and obligated itself to account to the two individual consignors monthly for proceeds of sales, less certain deductions, one of which was a ten per cent commission upon net sales. Through August, September and October (pending the exercise, on October 13th, of Rice's option to buy Ohlsson's stock in Ohlsson & Rice, Inc.), sales were made by Ohlsson & Rice, Inc., to its existing customers and in its own name, but for the account of Cheminol; the purchase price was collected by Ohlsson & Rice, Inc., certain authorized deductions made by it, and the balance transmitted to Cheminol, which in turn would deduct its commission and other agreed items such as its direct costs and account to the individual consignors, Ohlsson and Rice, for the balance. During this first three months sales aggregating some $51,851.13 were made; ultimately a total of about $100,000. It is the commissions upon that first $51,851.13 which cause one of the disputes in this case. The business seems to have been conducted in the same manner until the inventory was entirely disposed of, but there is no controversy over later commissions. It should be noted that the sales were made and the moneys collected by the corporation Ohlsson & Rice, Inc. and not by the individuals Ohlsson and Rice or either of them, and that those sales were shown on the books of Ohlsson & Rice, Inc. as made for the account of Cheminol.

[2] When the financial statement of October 31, 1951, prepared by Mr. Albert N. Greenfield, the regular accountant for Ohlsson & Rice, Inc., came in, defendant, who knew little about such matters, became dissatisfied. He objected to the manner in which overhead and inventory were handled. He refused to accept the report. The parties consulted Mr. Nathan Schwartz, attorney and accountant, who had been representing both of them in legal matters. This conference resulted in the selection of Mr. Arthur A. D. Benson, a certified public accountant, who was a stranger to all of them, for the purpose of making an independent investigation of the disputed matters from an accounting standpoint. He has been referred to as an arbitrator, but his function seems to have been that of a third party employed to determine a fact with the understanding that his finding would bind the parties in interest, which falls short of an arbitration; see Dore v. Southern Pacific Co., 163 Cal. 182, 189, 124 P. 817; Bewick v. Mecham, 26 Cal.2d 92, 97, 156 P.2d 757, 157 A.L.R. 1277; however, the parties did agree to be bound by his decision. And the immediate question is: What was he to decide? Mr. Schwartz instructed him "* * * to independently determine what would be a fair amount of overhead to allocate to the Cheminol business that was incurred by Ohlsson & Rice, Inc., in connection with the selling overhead and general administrative overhead, and also he was to make his own independent investigation into the changes in inventory to see that he would be satisfied that the inventories had been properly or substantially properly accounted for; and that he was to make a recommendation of some formula that could be used in the future for determining these overhead items such as selling and administrative overhead." Nothing was said about commissions on the August-October sales; indeed defendant had not raised that point. Mr. Benson made his examination, which was confined to the books and records, and rendered a report covering the period of August 1, 1951 to October 31, 1951. In effect it threw out the commissions on the $51,851.13 of sales made in August-October, but no specific mention was made of the fact. And there was no discussion of the matter between Rice and Ohlsson.

Their relations continued to deteriorate until it was agreed that Rice (who then owned all the stock of Ohlsson & Rice, Inc.) should purchase all of Ohlsson's interest in Cheminol, also in the consigned goods, the tools, and an indebtedness owing from Cheminol. By this time they were represented by different attorneys. On March 1, 1952 a series of agreements was made. One effected the sale of Ohlsson's stock in Cheminol to Rice, thus making him owner of all the corporate stock. Another was a "Bill of Sale and Assignment" which, for separate considerations, transferred to

Rice defendant's half interest in consigned inventory on hand and in special tools jointly owned. Then follows paragraph 3. "In consideration of the sum of $23,700.00, all his [Ohlsson's] right, title and interest in and to any sums of money due him by Cheminol Corporation as Assignee of Messrs. I. G. Ohlsson and H. T. Rice, which amount is subject to right of offset, and subject to any other valid assignments on file with Cheminol Corporation; this assignment being limited to the amount of $23,700.00. It is further understood and agreed that $23,700.00 is the estimated amount due Mr. Irwin G. Ohlsson by Cheminol Corporation at this date; that the actual amounts that may be due shall be determined by audit and upon being so determined, any additional sums found to be due Mr. Ohlsson shall be paid to him forthwith by Cheminol Corporation and if it shall be determined that Mr. Ohlsson owes any sums to Cheminol Corporation, he shall forthwith pay said amount to said corporation. The accounting shall be prepared by the firm of Greenfield and Company and shall follow the principles set forth by Mr. Benson of F. W. LaFrentz and Company. It is further agreed that if Mr. Ohlsson desires to have the report checked by Mr. Benson, he may do so, but shall be personally responsible to Mr. Benson for the cost of such services." The $23,700 was paid to defendant at that time. It will be noted that the parties specifically agree that the $23,700 is an estimated amount due; that the actual amount must be determined by an audit; that on that basis Cheminol will pay to Ohlsson any additional amount found due him and "* * * if it shall be determined that Mr. Ohlsson owes any sums to Cheminol Corporation he shall forthwith pay said amount to said corporation." (Rice, being sole owner of Cheminol, in effect agrees to cause it to perform, and also contracts for its benefit.)

On the same occasion Rice, Cheminol and Ohlsson executed a release which recites that "* * * the parties desire that mutual releases be given and received by each party and by the corporation." The document then proceeds with a three-way general release subject to one exception: "That excluded from this release is the liability of Cheminol Corporation to Messrs Ohlsson and Rice for sales made prior to date of this rel[e]ase of consigned merchandise owned by Messrs. Ohlsson and Rice as tenants in common, for which Cheminol Corporation shall account, subject to right of offset and valid assignments; that the actual amounts shall be determined by audit as provided in paragraph 3 of that certain Bill of Sale and Assignment from Irwin G. Ohlsson to Henry T. M. Rice, dated March 1, 1952."

The audit was made by Greenfield and Company, and it showed an indebtedness to defendant of $17,945.38, instead of $23,700; a difference of $5,754.62, the amount for which plaintiff sues. Demand for payment was made on defendant, who thereupon employed Mr. Benson to check the Greenfield audit. Benson concluded and reported that Greenfield had not followed "* * * the principles set forth by Mr. Benson * * *." and that the Greenfield result was off to the extent of $6,249.39,—made up of three items, viz.: $5,185.11, a 10 per cent commission on the $51,851.13 of sales made in August to October, 1951 inclusive; $485.42, difference in overhead computation for same period; $578.86, difference in overhead computation for period from November 1, 1951 to February 29, 1952. Appellant contends that there is no liability to plaintiff because the figures compiled according to "* * * principles set forth by Mr. Benson * * *." so show and (2) any such liability was released by the document of March 1, 1952.

First as to the release. The quoted paragraph of that document, upon which appellant relies, was dictated by Ohlsson's attorney as a substitute for one drafted by Rice's counsel. The attorneys described this language as a "one way street" and that of Mr. Davis, Rice's counsel, as a "two way deal." And Ohlsson contends on this appeal that the redrafting was intended to preserve liability of Cheminol to defendant if the audited debt exceeded $23,700, but to release Ohlsson from liability with respect to any overpayment which he might have received; this, notwithstanding his express agreement in a contemporaneous instrument to make payment of same to the corporation.

[3, 4] The trial court held that the documents were not ambiguous and that they do not spell the result which appellant claims. The judge stressed the phrase "which amount is subject to right of offset"; and properly. Reference to the consignment agreement shows that set off of Cheminol commissions was to be made before payment of net sales proceeds to the consignors Rice and Ohlsson. And the document entitled "Release" incorporates by reference the contemporaneous agreement in which Ohlsson agrees to pay any deficiency resulting from the audit. This it did through the language "that the actual amounts shall be determined by audit as provided in paragraph 3 of that certain Bill of Sale and Assignment from Irwin G. Ohlsson to Henry T. M. Rice, dated March 1, 1952." Moreover it is a settled rule that documents executed at the same time, with one referring to the other are to be construed as a single instrument. Civ.Code, § 1642; 12 Cal.Jur.2d § 123, p. 333. Of course, the express promise of the one instrument must prevail over the silence of the other. If this were not so, the court would have to read into the release instrument a covenant of defendant to pay any deficiency in order to make the same reasonable. Civ.Code, § 1655. The trial court properly ruled that plaintiff's claim was not released by either or both of the instruments of March 1, 1952.

[5, 6] Concerning appellant's contention that the Benson figures were correct, and that those of Greenfield were not right, he is confronted with a substantial conflict in the evidence and this court is, of course, bound by the trial judge's finding thereon in favor of plaintiff. It fairly appears that Mr. Benson exceeded his proper function in undertaking to determine whether commissions were due Cheminol upon the August-October sales, a question which had not been submitted to him; that he also erroneously assumed that those sales had been made by Rice and Ohlsson, Inc., on their own behalf whereas they were made, as their books showed, for the account of Cheminol Corporation. There was no agreement to be bound by Benson's findings upon matters not submitted to him, and the mistake just mentioned falls in that category. Opposed to Benson's testimony is that of Greenfield who says that all sales during that period were made by Ohlsson & Rice, Inc. for the account of Cheminol and that the books of the selling corporation so show. There is no perceivable bar to payment of commission on those sales under the circumstances. They took place during the transition period, before plaintiff had exercised his option to buy defendant's interest in Ohlsson & Rice, Inc.; both corporations were owned by Rice and Ohlsson equally; Ohlsson was president of Ohlsson & Rice, Inc.; it is inconceivable that this method of handling sales was not pursued with full knowledge and consent of both parties. Had those sales been made by the individual consignors there might be some merit in Mr. Benson's position; but, as they were made by a sub-agent for the consignee-distributor there is no bar to a commission, and the question of whether Cheminol (as a factor) had authority to delegate authority, Civil Code § 2368, is beside the point.

[7] But, says appellant, be all that as it may, Greenfield in making his audit was to "* * * follow the principles set forth by Mr. Benson * * *." and this he did not do. Benson so testified. Greenfield said that there was no Benson principle to be followed in this matter of commissions. The trial judge agreed with this view. We agree. The matter was never mentioned by Benson or any one else until after March 1, 1952; his treatment of those sales does appear from his report made before that date; but he declared no rule or principle with respect thereto; he merely found as a fact that those sales had not been made by Cheminol. Had the parties wanted his determination for purposes of the March 1st sale they would have so provided. Benson was then in the individual employment of defendant. The parties chose Greenfield for an audit. He testified that Benson had laid down no principle for him to follow in this matter. The trial court correctly resolved this dispute in favor of plaintiff.

There is no controversy concerning the overhead items of $485.42 and $578.86. The trial judge allowed these amounts as fixed by Benson (holding his decision to be binding in this regard). He totaled those amounts, divided by two, and subtracted the result ($532.14) from $5,754.62, leaving a balance of $5,222.48, for which sum judgment was rendered in favor of plaintiff. Neither side questions the correctness of the judge's method of computing the amount of recovery.

[8] Appellant's opening brief concludes with these words: "In view of the dispute over amounts, interest should commence only after final determination of the amount due." That is all it says on the subject. This does not comply with the rules and the point is not entitled to consideration. 4 Cal.Jur.2d, § 480, p. 311.

Judgment affirmed.

PARKER WOOD, Acting P. J., and VALLÉE, J., concur.

133 Cal.App.2d 187

The PEOPLE of the State of California,
Plaintiff and Respondent,
v.
Leonard A. WOODS, Defendant and
Appellant.
Cr. 5284, 5285.

District Court of Appeal, Second District,
Division 3, California.

May 23, 1955.
Rehearing Denied June 6, 1955.

Defendant was convicted of unlawfully possessing marihuana. The Superior Court, Los Angeles County, Thomas L. Ambrose, J., rendered judgment and entered judgment and order revoking probation granted in respect to previous conviction, and defendant appealed. The District Court of Appeal, Parker Wood, J., held that evidence was sufficient to sustain conviction.

Judgments and order affirmed.

1. Poisons 🔑9

Evidence sustained conviction for unlawful possession of marihuana. Health and Safety Code, § 11500.

2. Criminal Law 🔑316

Where it appears from evidence that defendant could reasonably be expected to explain or deny evidence presented against him, jury may consider his failure to do so as tending to indicate truth of such evidence.

3. Criminal Law 🔑394

A defendant may not be convicted on basis of evidence obtained by use of the rack or the screw or other brutal means no matter how reliable evidence so obtained may be.

4. Criminal Law 🔑982

Where defendant was properly convicted of crime of unlawfully possessing marihuana, and offense occurred while defendant was on probation after conviction in same court for same offense, trial court at time of judgment in second case, properly revoked probation. Health and Safety Code, § 11500.

Matthews & Hill, John J. Hamilton, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant was charged with violation of section 11500 of the Health and Safety Code in that on April 10, 1954, he unlawfully had marihuana in his possession. He admitted an allegation in the information that on or about April 27, 1951, he had been convicted in the Superior Court of Los Angeles County of violation of said section 11500, a felony. In a trial by jury, he was found guilty as charged. He appeals from the judgment (entered July 6, 1954).

In said case in which he had been previously convicted, the imposition of sentence was suspended and probation for three years was granted. The order therein denying his motion for a new trial was affirmed on appeal. People v. Woods, 108 Cal.App.2d 50, 238 P.2d 124. On July 6, 1954, at the time of pronouncing judgment upon the second conviction (the offense committed on April 10, 1954), the court referred to the first conviction and the order granting probation, and said: "The defendant has violated the terms of his probation by the commission of the instant offense, probation is therefore revoked and the defendant is sentenced to State Prison for the term prescribed by law. These two sentences are ordered to run concurrently." Thereupon (on July 6, 1954) a judgment upon the first conviction was rendered, revoking probation and ordering imprisonment in the state prison. Defendant also appeals from that judgment. That notice of appeal states he appeals from the judgment and sentence, "based upon alleged violation of probation in the above entitled case [No. 139926—first conviction], because of conviction in violation of Section 11500 Health and Safety Code in case No. 164068 [second conviction]."

As to the judgment upon the second conviction, appellant contends that the verdict is contrary to the evidence and the law.

As to the judgment upon the first conviction which was based upon the order revoking probation, appellant contends that since the order revoking probation was predicated upon the second conviction, and since the second conviction was erroneous and should be reversed, the judgment upon the first conviction should also be reversed.

Officer Wiseman testified that on April 10, 1954, about 10 p. m., he and Officer Dorrell went to a certain residence in Los Angeles and "they just walked in," without previously making their presence known. There were four or five men and a woman in the house. After the officers had been there about 45 minutes, there was a knock at the door and when Officer Dorrell opened the door the defendant and another man entered. Defendant had his hand in his left coat pocket. Officer Wiseman asked him to remove his hand, but he refused to do so. The officer (witness) grabbed defendant's left forearm, and then the defendant "withdrew free of" the officer and put his hand toward his (defendant's) mouth in a fast motion. The two officers grabbed defendant and a struggle ensued, and at that time Officer Wiseman (witness) observed a piece of brown wrapped paper cigarette fall from defendant's left hand and fall toward the floor, but he did not see it land on the floor. He saw Officer Dorrell retrieve "a piece of paper" and keep it in his possession. When the defendant "was taken to the floor" his hand was forced away from his mouth. In the struggle the two officers and defendant were down on the floor. While defendant was on the floor, Officer Wiseman told defendant to open his mouth so that the officer could look inside. Defendant opened his mouth, and Wiseman placed his handcuffs in the lower part of defendant's mouth so that Wiseman could look into defendant's mouth. He used the handcuffs, rather than his finger, because he did not want the defendant to bite his hand. He testified further that he saw Officer Dorrell mark, with his initial, the "piece of paper" which he had retrieved. Later, he (witness) looked at the paper more closely and it looked like a portion of a brown paper wrapped cigarette containing a brownish green material. He saw Officer Dorrell place the paper in an envelope and seal it. An envelope, Exhibit 1 for identification, is the envelope in which the paper was placed. The object which was taken from the envelope, at the trial, is the same portion of the cigarette that he saw fall to the floor. Defendant told the officers that he bought the cigarette that night from a boy at 54th and Central for fifty cents, that he had been smoking it on the way to the house and the reason he had it in his pocket was that he didn't want to throw it away and didn't want to go into the house smoking it. He also said that he used the "weed" but he did not use any "hard stuff". The witness (Wiseman) testified that in the language of narcotic users the word "weed" means marihuana; and that the words "hard stuff" refer to heroin.

Officer Dorrell testified that he was in said house with Wiseman when defendant and another man came in. While he was watching the other man, he (witness) saw defendant and Wiseman make a quick movement, and then he saw that defendant had his left hand near his (defendant's) mouth and that Wiseman had defendant by the arm. Dorrell grabbed defendant and attempted to remove his hand from his mouth. Dorrell picked up a brown paper wrapped cigarette that was partly smoked. He recognized Exhibit 1,—the initials on it were placed there by him. He was a party to the struggle, and eventually he was on the floor. While he was on the floor he told defendant to open his mouth. Defendant then stated, "I swallowed it." Dorrell did not see anything leave defendant's hand; he just picked the cigarette up off the floor.

It was stipulated that Officer Allen was qualified to make an examination of the contents of the envelope, Exhibit 1; and that he would testify that he examined the cigarette butt referred to and found that it contained a quantity of loose green material which was marihuana.

Defendant did not testify.

One Brown, called as a witness by defendant, testified that he resided in the house herein referred to. The two officers were in the house before defendant came in. Defendant was a cleaner who came to his house to pick up some clothes. When the doorbell rang an officer opened the door and the two officers grabbed defendant and there was a tussle in the front room. After the tussle the officers picked up a short marihuana cigarette from the floor. Before they picked it up he (witness) had it in his possession; he had been smoking it before defendant came in, and it was knocked from his hand at the time Wiseman rushed to the door. On cross-examination, he testified that just before the officers came in he was rolling marihuana cigarettes from loose material that was on the kitchen table; the officers put the substance, which was his marihuana, in a can; they placed him under arrest, for possession of the cigarette and the loose material, before defendant arrived; the case against him for possession of marihuana was still pending (at the time of the trial herein); he told the officers that all the stuff in the house was his; defendant came to his house at his request to pick up cleaning. On redirect examination, he testified that he had pleaded not guilty to the said charge against him.

One Crouch, called as a witness by defendant, testified that he had known defendant about 25 years, and that defendant had a cleaning and pressing establishment. On April 10, 1954, he was helping defendant in his business and they were picking up clothes. He and defendant went to the house referred to herein around 10 p. m. When defendant knocked on the door one of the officers opened it and defendant went in ahead of the witness. The witness saw both officers in the scuffle and "all three of them" were on the floor. When the officer was putting the handcuffs in defendant's mouth one of the officers said, "Oh, let him up, he swallowed it already." When the officer got up he looked down and said, "Oh, no, here it is here." Defendant was not smoking as they approached the house.

One Morris, called as a witness by defendant, testified that he was in the house on April 10. Defendant entered the house with his hand in his pocket and one of the officers ordered him to take his hand out of the pocket. Defendant was reluctant to remove his hand, and he was hit. He threw up his hands, and one of the officers grabbed him and the other officer continued to hit him and they all fell to the floor. One of the officers attempted to pry defendant's mouth open with handcuffs. Then the officer said, "Oh, he swallowed it, let him up." After he was up, one of the officers stooped to the floor and picked up something and said, "Oh, it is a roach, this is it." On cross-examination, he testified that before the officers came in he saw Brown make a marihuana cigarette; there was loose marihuana on the kitchen table; that the word "roach" means a part of a marihuana cigarette.

[1,2] Appellant's contention that the verdict upon the second conviction is contrary to the evidence and the law is not sustainable. There was evidence that Wiseman saw a piece of cigarette fall from defendant's hand; that Dorrell picked up part of a cigarette (Exhibit 1) and marked it with his initials; that it was a marihuana cigarette; that defendant said that he bought the cigarette for 50 cents and had

been smoking it on the way to the house and had it in his pocket when he entered the house. Defendant did not testify. As stated in People v. Steccone, 36 Cal.2d 234, 239, 223 P.2d 17, 20, "' * * * if it appears from the evidence that defendant could reasonably be expected to explain or deny evidence presented against him, the jury may consider his failure to do so as tending to indicate the truth of such evidence * * *.'" Defendant argues that the testimony on behalf of defendant renders the evidence of the People "highly impossible inherently." There were witnesses, called on behalf of defendant, who testified that after the tussle an officer picked up a part of a cigarette. One of those witnesses, Brown, said that he had been smoking the cigarette before defendant arrived, and that it was knocked from his hand when Wiseman rushed to the door. That testimony of Brown, if believed, would have established that defendant did not have possession of the cigarette. The jury, however, did not believe that testimony. The evidence supports the verdict.

[3] The conduct of Arnold G. Wiseman, a policeman of the city of Los Angeles, in putting handcuffs in defendant's mouth was brutal and lawless. That conduct indicates that he is not qualified to perform the duties of policeman and seriously reflects upon his credibility as a witness. Also, such conduct reflects unfavorably upon the qualifications of his superior officers. A defendant "may not be convicted on the basis of evidence obtained by the use of the rack or the screw or other brutal means no matter how reliable the evidence obtained may be. Rochin v. People of [State of] California, supra, 342 U.S. 165, 72 S.Ct. 205 [96 L.Ed. 183]." People v. Cahan, 44 Cal.2d 434, 282 P.2d 905, 912; see also People v. Martinez, 130 Cal.App.2d 54, 278 P.2d 26. In the present case, however, the evidence upon which the conviction was based was not obtained by the brutal use of the handcuffs. There was no evidence that the cigarette was taken from defendant's mouth or that it was in his mouth during the struggle. There was evidence, including the testimony of defendant's witness Brown, that the cigarette was on the floor before the handcuff brutality. It seems that Wiseman's search of defendant's mouth, by using the handcuffs as a hook with which to hold his mouth open, was an unsuccessful attempt to obtain further evidence. Appellant makes no point on appeal regarding the lawless acts of Wiseman.

[4] With reference to the judgment upon the first conviction which included an order revoking probation, appellant contends, as above stated, that the judgment should be reversed because it was predicated upon the second conviction which was erroneous. In view of the conclusion hereinabove stated to the effect that the second conviction was not erroneous, the said contention of appellant as to the judgment and order upon the first conviction is not sustainable. The order revoking probation is supported by the evidence herein. The evidence with respect to the first conviction was reviewed upon defendant's appeal from the order denying his motion for a new trial, People v. Woods, supra, 108 Cal.App.2d 50, 238 P.2d 124, and it was held therein that the evidence was sufficient to sustain the finding of guilt.

The judgment in case No. 5284 (superior court No. 164068) is affirmed. The judgment, and order revoking probation, in case No. 5285 (superior court No. 139926) are affirmed.

SHINN, P. J., and VALLÉE, J., concur.

Eythie SMITH, Plaintiff and Respondent,
v.
Ray SMITH, Defendant and Appellant.
Civ. 16249.

District Court of Appeal, First District, Division 2, California.
May 23, 1955.

Hearing Granted July 20, 1955. *

Divorce proceeding. From order of the Superior Court, Alameda County, Ralph E. Hoyt, and Richard H. Chamberlain, JJ., denying husband's motion to vacate interlocutory decree of divorce except insofar as wife was declared entitled to a divorce, the husband appealed. The District Court of Appeal, Nourse, P. J., held that where husband, who had a real estate business in California, left California on extended lecture and business tour, but he communicated regularly with manager of his real estate business in Oakland and maintained his address for mail and bills at address of his Oakland real estate business, and he repeatedly expressed his intention to return to Oakland when property settlement with wife had been reached, husband was a domiciliary, who was outside of state temporarily at time of commencement of divorce action, and he was duly brought within personal jurisdiction of court by personal service made on him in New York.

Decree and order affirmed.

1. Judgment ⚷17(1)

The word "resident" as used in statute providing that where jurisdiction is acquired over a person who is outside of state by publication of summons in accordance with statutes, court shall have power to render a personal judgment against such person only if he was personally served with a copy of summons and complaint and was a "resident" of state at time of commencement of action or at time of service, means or includes domiciliary. West's Ann.Code Civ.Proc. §§ 412, 413, 417.

2. Divorce ⚷78

Where husband, who had a real estate business in California, left California on extended lecture and business tour, but he communicated regularly with manager of his real estate business in Oakland and maintained his address for mail and bills at address of his Oakland business, and he repeatedly expressed his intention to return to Oakland when property settlement with wife had been reached, husband was a domiciliary who was outside of state temporarily at time of commencement of divorce action, and he was duly brought within personal jurisdiction of court by personal service made on him in New York. West's Ann. Code Civ.Proc. §§ 412, 413, 417, 537; West's Ann.Civ.Code, §§ 128, 129, 946; West's Ann.Government Code, §§ 243, 244; Probate Code, § 301.

Desmond N. Bonnington, Oakland, for appellant.

Harris, Darter & Older, Oakland, for respondent.

NOURSE, Presiding Justice.

[1] This appeal involves the interpretation of Section 417 of the Code of Civil Procedure, which reads: "Where jurisdiction is acquired over a person who is outside of this State by publication of summons in accordance with Sections 412 and 413, the court shall have the power to render a personal judgment against such person only if he was personally served with a copy of the summons and complaint, and was a resident of this State at the time of the commencement of the action or at the time of service."

Section 412 supra provides in substance that a person who "resides out of the State; or has departed from the State; or can not, after due diligence, be found within the State; or conceals himself to avoid the service of summons" is subject to service by publication, and Section 413 provides that under such circumstances personal service outside the state is "equivalent to publication".

Plaintiff-respondent filed her complaint for divorce, alimony, and division of personal property on October 27, 1953 and the same day moved for an order directing service of summons by publication, the supporting affidavit stating that defendant "temporarily resides out of the State of

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* Opinion vacated 288 P.2d 497.

California to wit: Buffalo, New York." The order entered on it the same day states that it appears from said affidavit that defendant "does not reside within the State of California and that said defendant resides in the city of Buffalo, State of New York." Personal service was made on defendant in Buffalo on October 30, 1953. The interlocutory decree of divorce providing for alimony and division of personal property and a separate order for attorneys' fees and costs were entered by default. Subsequently, defendant, appearing specially, moved to vacate said decree and order, except only insofar as plaintiff was declared entitled to a divorce, on the ground that no jurisdiction over his person had been obtained because he had not been a resident of this state at the time of the commencement of the action or at the time of the service as required by Section 417 of the Code of Civil Procedure, supra. His supporting affidavit states that on January 1953 he left California and established his residence and domicile in Cincinnati, Ohio, where he maintained his permanent abode and permanent headquarters of his business of lecturing and selling a certain publication connected with it; that he does not actively participate in the management of his real estate business in California, which is operated by a manager; that he did not have when he left California and does not have an intention of returning there.

At the trial of the motion to vacate plaintiff testified, supporting her testimony in part with many exhibits, that for more than twenty years prior to their separation in January 1953 the parties had lived in Alameda County where defendant had a real estate business, the last eight years at the same address; that in January 1953 he left California on an extended lecture and business tour, as he had done before, visiting many cities but staying nowhere more than ten days continuously, meanwhile communicating regularly with the manager of his Oakland real estate business, maintaining his address for mail and bills at the address of said Oakland business, to which he also charged the costs and where he kept the supplies for his book selling campaign; that he had plaintiff keep for him in Alameda County part of his personal effects and that during 1953 he repeatedly expressed his intention, both orally and in writing, to return to Oakland when a property settlement with plaintiff would have been reached and/or he would have earned enough to pay outstanding bills, to keep control of the policy and management of his California real estate business and to build it up further on his return.

The court denied the motion to vacate granting plaintiff further attorneys' fees. Defendant appeals from said order of denial, from the interlocutory decree, except insofar as it declares plaintiff entitled to a divorce, and from the orders for attorneys' fees and costs. He contends that the denial of the motion to vacate can only have been based on the holding that appellant's domicile was still in California and that in Section 417 supra "resident" means "domiciliary"; that the latter cannot be the legislative intent because Senate Bill No. 302, which in 1951 proposed Section 417, contained the words "domiciled in" which were later amended to read "a resident of"; that therefore Section 417 requires a residence in fact, or even the physical presence of defendant, in California at the time of the commencement of the action, which was not the case here, as shown by the statement in the order for service by publication, that defendant at that time did not reside in California, but in Buffalo, New York. Respondent urges that resident in Section 417 means domiciliary.

Neither the Code nor any California decision gives a specific definition of "resident" as used in Section 417 and without it the meaning of "resident" in statutory language is uncertain. Text writers and courts normally distinguish "domicile" and "residence" so that "domicile" is the one location with which for legal purposes a person is considered to have the most close and permanent connection, which normally is his hometown, where he intends to remain or to return to, but which the law may also assign to him constructively whereas "residence" indicates any factual place of abode of some permanency, more than a mere temporary sojourn. But statutes do not conform to this usage. They use "resident" and "residence" mostly in the legal meaning of "domicile" and "domiciliary" but sometimes also in the meaning of factual residence or in still other meanings. (Restatement, Conflict of Laws § 9 comment e; 16 Cal.Jur.2d 648.) The most general provisions concerning this subject in our codes, Section 243 and Section 244 Government Code use the word "residence" in giving the basic rules as to legal domicile. It has been held that "resident" means "domiciliary" in Section 128 Civil Code as to residence requirement for divorce, Ungemach v. Ungemach, 61 Cal.App.2d 29, 36, 142 P.2d 99, and Section 301 Probate Code, relating to jurisdiction of administration of descendants' estates, In re Estate of Glassford, 114 Cal.App.2d 181, 186, 249 P.2d 908, 34 A.L.R.2d 1259, but that nonresident has a more factual or wider meaning in Section 537 of the Code of Civil Procedure with regard to attachment against nonresidents, Hanson v. Graham, 82 Cal. 631, 23 P. 56, 7 L.R.A. 127, and Section 404 Vehicle Code, relating to service of process on nonresidents in auto collision matters. Briggs v. Superior Court, 81 Cal.App.2d 240, 183 P.2d 758, 762. In the Briggs case it is said 81 Cal.App.2d at page 245, 183 P.2d at page 762: "Residence, as used in the law, is a most elusive and indefinite term. * * * To determine its meaning, it is necessary to consider the purpose of the act." (See also generally Reese and Green: That Elusive Word, "Residence", 6 Vanderbilt Law Review 561; I Beale Conflict of Laws, p. 109 et seq.)

With respect to Section 417 Civil Code we have concluded that "resident" means or includes "domiciliary". The leading case as to that section and its historical interpretation is Allen v. Superior Court, 41 Cal.2d 306, 259 P.2d 905, 906. In that case the defendant, served personally without the state, was at the time of the commencement of the action "a *resident* of the state of California" and at the time of the order for service by publication and at the time of the personal service on him in Oregon "he was a *resident* of the state of Oregon", 41 Cal.2d at page 309, 259 P.2d at page 906. It is pointed out that Section 417 was enacted in 1951 with the following background: For many years the provisions of Sections 412 and 413 Code of Civil Procedure, stated at the beginning of this opinion, had been in the code, but, although these provisions literally were broad enough to authorize a personal judgment based on such extraterritorial service, such was not accepted by our courts. Based on language in Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565, De La Montanya v. De La Montanya, 112 Cal. 101, 44 P. 345, 347, 32 L.R.A. 82, held that service by publication upon a California resident outside the state was under the federal due process clause insufficient to support a personal judgment, even though the defendant had left the state to avoid service, because "the state has no jurisdiction over * * * persons * * * not within its territory." This principle derived from Pennoyer v. Neff was re-examined in Milliken v. Meyer, 311 U.S. 457, 61 S.Ct. 339, 342, 85 L.Ed. 278, which upheld a personal judgment of a Wyoming court against a domiciliary who had been personally served outside that state. It stated that "*domicile* in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service" and that the extraterritorial personal service in accordance with a statutory scheme provided by Wyoming satisfied the actual notice requirement of due process. It was held in the Allen case that Section 417 was designed to restrict the wide authority of Section 412 and Section 413 with respect to personal jurisdiction as to defendants who had their *residence* within the state either at the time of commencement of the action or the time of service and who had been personally served with summons and that a reasoning analogous to the one of Milliken v. Meyer justified the application of Section 417 "where a *domiciliary* at the time of the commencement of the action thereafter changes his state of residence and is personally served with process in the latter state", 41 Cal.2d at pages 312–313, 259 P.2d at page 909. It would seem that in the Allen case domiciliary and resident, domicile and residence are used as synonyms, although it is not expressly stated that resident in Section 417 means domiciliary. Moreover the history of the adoption of the section is highly significant. The section as introduced in the Senate was drafted by the Committee on Administration of Justice of the State Bar of California, which in its Report to the Governors of the State Bar over the year 1945–46 stated as to its draft:

> "(c) Personal service outside the state on *residents*. In the course of the study of the foregoing problem the Committee considered the case of Milliken v. Meyer, 1940, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278 and the dictum in Pinon v. Pollard, 1945, 1st Dist. Div. 1, 69 Cal.App.2d 129, 158 P.2d 254, wherein it was intimated that the doctrine of the Milliken case does not apply in this State, citing De La Montanya v. De La Montanya, 1896, 112 Cal. 101, 44 P. 345, 32 L.R.A. 82.
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> "In order to bring our statutes clearly within the reasoning of the Supreme Court in the Milliken case and define the effect of personal service outside the State, the Committee recommends the adoption of a new section of the Code of Civil Procedure to be numbered 417, reading as follows:
>
> "'417. Extent of Jurisdiction Acquired. Where jurisdiction is acquired over a person who is outside of this state by publication of summons in accordance with Sections 412 and 413 of this Code, the Court shall have power to render a personal judgment against such person only if he was personally served with a copy of the summons and complaint, and was *domiciled* in this state at the time of the commencement of the action, or at the time of service.'
>
> "The Committee believes this section will be sufficient to give a California court jurisdiction to render a personal judgment against a person *domiciled* in this State who is personally served outside the State, where there has been a compliance with C.C.P. Sections 412 and 413 relating to substituted service. On the other hand this section makes it clear that a personal judgment may be rendered only against a defendant personally served." (21 State Bar Journal p. 170. Emphasis added.)

See for the successive slight amendments, ending in the text introduced in the Senate, which still contained the words "domiciled in" and for further comments of the committee: 22 State Bar Journal 261, 23 State Bar Journal 196, 25 State Bar Journal 287. In 1951 the words "domiciled in" in the proposed section were in the Senate amended to read "a resident of". (Senate Daily Journal, May 8, 1951, p. 2076.) Thereafter the Senate Interim Judiciary Committee, on page 37 of its Progress Report filed June 1951, comments as follows:

> "Under present California law, it is impossible to acquire jurisdiction in personam of *a resident of* California while he is absent from the State, under the construction placed on our present statutory law and without regard to the question of constitutionality. See Pinon v. Pollard, 1945, 69 Cal.App.2d 129, 158 P.2d 254. To abrogate the doctrine of this case, a proposal was made to add Section 417 to the Code of Civil Procedure. This proposal was embodied in Senate Bill No. 302, introduced at the 1951 Regular Session, which adopts the doctrine laid down by the United States Supreme Court in the case of Milliken v. Meyer, 1940, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278, and provides that personal jurisdiction can be obtained over a person *domiciled in* California at the time of the commencement of the action or at the time of service, by means of publication of summons even though he is not in the State at the time of such publication." (Information received from the Legislative Counsel. Emphasis added.)

The above facts give no support whatever to appellant's contention that the words "domiciled in" were amended to read "a resident of" for the purpose of describing the more factual concept. The emphasized words indicate that "resident of" and "domiciled in" were by the drafters felt as synonyms. Moreover the comments show clearly that the purpose of the new section was to conform the California law to Milliken v. Meyer which case specifically related to a domiciliary. The amendment was probably made to keep to the terminology mostly used in our codes. The word "domicile" is used there exceptionally only, Sections 129 and 946 Civil Code. It is also conceivable that the legislature used the more indefinite and wider term "resident" to permit the judiciary to define its exact scope. If that were so any person could be considered a resident under Section 417 whose present or past habitation in California caused such a connection with this state as to constitutionally justify bringing him within its jurisdiction for purposes of personal judgment by means of extraterritorial personal service, thereby extending by analogy the rule of Milliken v. Meyer, as seems indicated to some extent in the Allen case, supra. At any rate, however, such wider concept would include a domiciliary.

Appellant relies for his interpretation of residence as a factual concept on Myrick v. Superior Court, Cal.App., 256 P.2d 348, which contains language which seems to distinguish the resident of Section 417 from the domiciliary of Milliken v. Meyer. However in that case the Supreme Court granted a hearing and its opinion, 41 Cal.2d 519, 261 P.2d 255, solely based on the Allen case, although reaching the same result, does not contain any such language, so that said language is not authoritative.

[2] If we accept as true the evidence of respondent, as we must on this appeal, then appellant was a domiciliary who was outside the state temporarily at the time of the commencement of the action and of the service and he was duly brought within the personal jurisdiction of the court. Appellant's situation is the same as the one involved in Milliken v. Meyer, and therefore one for which Section 417 was especially written. It is not true, as contended by appellant, that Section 417 applies only to persons who have given up their residence or domicile in California after the commencement of an action, as was the fact in the Allen and Myrick cases, supra. The question whether "resident" in Section 417 may have a more general meaning then domiciliary does not require decision in this case and we do not express an opinion on it.

We do not consider the statement in the order for service by publication that defendant does not reside in California but resides in Buffalo, New York, as necessarily inconsistent with defendant being a resident of California in the sense of Section 417. See Hanson v. Graham, supra, 82 Cal. at pages 632–633, 23 P. 56, 7 L.R.A. 127. Moreover we see no reason to hold respondent bound by that statement giving it a meaning which is not true. The order was based solely on respondent's affidavit, in which she stated that appellant *temporarily* resided outside California, in Buffalo, thereby evidently meaning the situation to which she testified, to wit that appellant was on a lecture tour on which he had reached Buffalo for a short sojourn. Such short sojourn does not constitute appellant a "resident" there according to normal terminology. He probably had no residence in that factual sense. The court probably left out "temporarily" to conform to the first situation mentioned in Section 412. It would have been better to state in the affidavit in accord with the second situation of Section 412 of the Code of Civil Procedure that defendant had departed from the state, but appellant does not attack the substituted service on the ground of insufficiency of the affidavit, but recognizes its validity for the purpose of the divorce proper. Neither does he contend that the statement in the order is true, as he at all times urged that his residence and domicile were in Cincinnati, a contention rejected by the trial court. To reverse the court's decision after trial on such a technicality would be wholly inconsistent with our system of procedure. Compare Buxbom v. Smith, 23 Cal.2d 535, 542–543, 145 P.2d 305.

Decree and orders affirmed.

KAUFMAN, J., and DRAPER, Justice pro tem., concur.

133 Cal.App.2d 163

Julius NEUSTADT, Plaintiff, Cross-Defendant, and Appellant,

v.

Joseph SKERNSWELL, Defendant, Cross-Complainant, and Respondent,

J. L. Perusio, Defendant, Cross-Defendant, and Respondent.

No. 16345.

District Court of Appeal, First District, Division 1, California.

May 23, 1955.

Hearing Denied July 20, 1955.

Action to obtain declaration of resulting trust or partition of funds held by title company's mere stakeholder following realty partition sale. The Superior Court, City and County of San Francisco, Thomas M. Foley, J., entered judgment adverse to plaintiff and favorable to defendant, who was cross-complainant, and cross-defendant, and plaintiff, who was also cross-defendant, appealed. The District Court of Appeal, Fred. B. Wood, J., held that, before plaintiff could establish a right against receiver who was appointed in realty partition proceeding, plaintiff would have to establish cause of action against defendant, who was also defendant in the partition action, and enforcement of such cause of action would be barred, in view of fact that more than one year had elapsed since reversal of judgment in partition proceeding for plaintiff.

Judgment affirmed.

1. Limitation of Actions ⚷5(3)

Action, in which plaintiff sought to obtain declaration of resulting trust or partition of funds held by title company as mere stakeholder following realty partition sale, was not an action to recover money or other property deposited with a bank, even if title company was the required type of financial institution within meaning of statute declaring lack of limitation to an action brought to recover money or any other property deposited with any bank, banker, trust company, building and loan association, or savings and loan society. West's Ann.Code Civ.Proc. § 348.

2. Limitation of Actions ⚷110

Mere appointment of a receiver and his taking custody does not toll statute of limitations, but such tolling occurs only when the receivership function is of such nature that it prevents maintenance of independent litigation over the subject matter, such as in case of dissolution of partnership and winding up of its affairs. West's Ann.Code Civ.Proc. §§ 336, 337, subd. 1, 337.5, 338, subd. 4, 339, subd. 1, 343, 348, 355.

3. Limitation of Actions ⚷172

Before plaintiff could establish a right against receiver who was appointed in realty partition proceeding, plaintiff would have to establish cause of action against defendant, who was also defendant in the partition action, and enforcement of such cause of action would be barred in view of fact that more than one year had elapsed since reversal of judgment in partition proceeding for plaintiff. West's Ann.Code Civ. Proc. §§ 336, 337, subd. 1, 337.5, 338, subd. 4, 339, subd. 1, 343, 348, 355.

4. Limitation of Actions ⚷15

Even if statute of limitations can be waived in action for tort, agreement, which was between plaintiff and defendant, and which provided that defendant was to quitclaim to purchaser without prejudice, as between defendant and plaintiff, to any of defendant's rights, remedies, and objections in the then pending partition action and that plaintiff was to refrain from execution of all orders and judgments in his favor and that funds from sale should not be disbursed until order directing disbursement should become final, was not sufficient to indicate intent of parties to waive statute of limitations. West's Ann.Code Civ.Proc. §§ 336, 337, subd. 1, 337.5, 338, subd. 4, 339, subd. 1, 343, 348, 355.

5. Limitation of Actions ⚷166

Where, prior to partition sale, defendant was record owner of realty partitioned, and plaintiff's action to obtain declaration of resulting trust or partition of proceeds of sale held by title company as mere stakeholder following realty partition sale was predicated upon prior partition action, in which a dismissal had become the final judgment, award to defendant of money on deposit was proper, even though judgment was based upon bar of statute of limitations. West's Ann.Code Civ.Poc. §§ 336, 337, subd. 1, 337.5, 338, subd. 4, 339, subd. 1, 343, 348, 355.

6. Appeal and Error ⚿1135

Award of $500 to referee-receiver would not be disturbed in absence of showing on appeal of basis, in fact or in law, for error in such award.

◆

Joseph A. Brown, San Francisco, for appellant.

Marcel E. Cerf, Robinson & Leland, San Francisco, for respondent Joseph Skernswell.

FRED B. WOOD, Justice.

The main question is whether or not this action, commenced October 31, 1950, is barred by the statute of limitations.[1]

Plaintiff seeks his alleged share of a sum of money which represents the proceeds of the sale of real property which stood in the name of defendant Skernswell but in which plaintiff claims to have had a one-half interest.

The sale was conducted pursuant to an interlocutory decree in a suit for the partition of said real property which plaintiff brought against defendant Skernswell in 1940. After said sale, the interlocutory decree was reversed upon appeal. Neusted v. Skernswell (May 29, 1945), 69 Cal.App.2d 361, 159 P.2d 49. The remittitur went down July 31, 1945. Later, in September, 1949, the partition suit was dismissed for lack of prosecution, the dismissal being affirmed upon appeal. Neustadt v. Skernswell (August 31, 1950), 99 Cal.App.2d 293, 221 P.2d 694.

The trial court has correctly found that the cause of action pleaded by the plaintiff herein is predicated upon the cause of action set forth in the partition suit. Plaintiff does not challenge that finding.

Accordingly, we start with the premise that plaintiff's cause of action, if any he has, arose at least as early as the date of the filing of the partition suit, May 29, 1940, ten years and five months prior to the filing of the present action. Plaintiff has advanced four theories for the tolling of the statute.

The referee and receiver appointed by the court to conduct the sale deposited the down payment with a bank, in his name as referee and receiver. The remainder of the purchase price was paid in escrow to a title company, which still holds it.

[1] As to the latter amount, plaintiff claims section 348 of the Code of Civil Procedure applies, which declares there is no limitation to an action "brought to recover money or other property deposited with any bank, banker, trust company, building and loan association, or savings and loan society." But this is not such an action, even if we assume that the title company in question is the kind of financial institution which comes within the purview of section 348. This is an action to declare a resulting trust or for the partitioning of funds held by the title company as a mere stakeholder. It is not an action to recover money or other property deposited with a bank, within the meaning of section 348. See Bell v. Bank of California, 153 Cal. 234, 242, 94 P. 889. Indeed, the title company is not even a party to this action.

Next, plaintiff claims this is an action against the referee and receiver as an officer of the court; that as such trustee he has not repudiated or disavowed his trust; hence, the statute has not commenced to run. That is not the nature of the action. Plaintiff's rights, if any, to a portion of the funds in the hands of the referee stem back to an earlier transaction which assertedly made defendant Skernswell a constructive trustee of the real property in question. And plaintiff in his third amended complaint, filed October 2, 1946, in the partition suit, alleged that Skernswell, on or about January 1, 1940, "repudiated and denied that plaintiff had any right, title or interest in or to the said real property or any part thereof * * *"

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[1] The trial court found it was barred by the following sections of the Code of Civil Procedure: 336 (subd. 1 [now § 337.5 as amended in 1953]), 336 (subd. 2), 337 (subd. 1), 338 (subd. 4), 339 (subd. 1), and 343.

[2, 3] All this time, says the plaintiff, the money in suit has been in custodia legis which tolls the statute. It is not the law that the mere appointment of a receiver and his taking custody tolls the statute of limitations. The latter occurs only when the receivership function is of such a nature as to prevent the maintenance of independent litigation over the subject matter, as in the case of the dissolution of a partnership and the winding up of its affairs. See People v. California Safe Deposit etc. Co., 41 Cal.App. 727, 731, 183 P. 289; 34 Am. Jur. 198, Limitation of Actions § 241. This was not such a receivership. And before plaintiff can establish a right against this receiver he must establish a cause of action against defendant Skernswell. The enforcement of that cause is barred.[2]

[4] Finally, plaintiff contends that Skernswell waived the defense of the statute. It appears that in view of the pendency of Skernswell's appeal from the interlocutory decree in the former action and for the purpose of giving the purchaser of the real property title thereto, the parties executed an agreement and a supplemental agreement whereby Skernswell agreed to quitclaim to the purchaser without prejudice (as between him and the plaintiff) to any of his rights, remedies and objections in the then pending action, including his appeal. Plaintiff quotes paragraphs "3" and "5" of the agreement,[3] claiming that paragraph "5" tolled the statute. Defendant contends that the statute of limitations cannot be waived in an action for tort. Assuming, however, that a waiver is effective in a tort action, see Atlas Finance Corp. v. Kenny, 1945, 68 Cal.App.2d 504, 515, 157 P.2d 401, we find nothing in the agreement in any way indicating an intent to waive the statute of limitations.

[5] Plaintiff says the court should not have awarded Skernswell the money on deposit (the balance remaining after an award of $500 for compensation of the referee and receiver) because the judgment, based as it was upon the bar of the statute of limitations, had no foundation in the evidence for determination of title to the fund. He overlooks the findings that prior to the sale in 1942 Skernswell was the record owner of the real property; that the moneys in question are the proceeds of the sale of that property; that the partition suit was dismissed, such dismissal being a final judgment. Nelson v. Geiss, 120 Cal. App. 247, 250–251, 7 P.2d 720; and that the present action is predicated upon the former. Under these circumstances we see no basis for plaintiff objecting to the award to Skernswell.

[6] Plaintiff also asserts error in the award of $500 to the referee-receiver. He has furnished no reason, no basis in fact or in law, for this assertion, and we find no merit in it.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

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[2] If we assume the suit filed in 1940 was timely, § 355 of the Code of Civil Procedure would at most toll the statute until one year after reversal of judgment for the plaintiff in that suit, if we may also assume that section 355 applies to the reversal of an interlocutory judgment. That reversal was effective July 31, 1945.

[3] These paragraphs read as follows: "3. The proceeds of said sale be held by Title Insurance & Guaranty Co. in escrow until the final determination of all actions and proceedings now or hereafter pending in said action, Second Party reserving all objections as to the correctness of the amount of said proceeds, as hereinafter provided."

"5. The execution of all orders and judgments in favor of First Party shall be stayed during the pendency of any of said proceedings, and First Party consents to refrain from execution of any thereof, and said funds shall not be disbursed until an order or judgment directing disbursement shall become final, and then said funds shall be disbursed in accordance with such order or judgment, and this agreement."

132 Cal.App.2d Supp. 904

Maude M. DUIN, Plaintiff and Respondent,

v.

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, etc., as Executor of the Estate of Thomas Andrew Hunt, deceased, Defendant and Appellant.

Civ. A. No. 8617.

Appellate Department, Superior Court,
Los Angeles County, California.
April 19, 1955.

Action by real estate broker against executor of landowner's estate for commission. The Municipal Court of the Los Angeles Judicial District rendered a judgment for plaintiff and defendant appealed. The Appellate Department of the Superior Court, Swain, J., held that the broker had not earned commission by producing purchaser prior to owner's death, where she had not given owner the name of purchaser, put him in possession of purchaser's offer, or brought the two together.

Reversed with directions.

1. Brokers ⚷51

Where owner of realty employed broker "to sell" and broker obtained purchaser, informing owner by letter but not giving name of purchaser, putting owner in possession of written offer or bringing owner and purchaser together, and owner died without receiving the letter, broker was not entitled to commission.

2. Brokers ⚷94

A written real estate listing in which owner employed broker "to sell" did nothing more than empower broker to find a purchaser, and hence memorandum signed by prospective purchaser was a mere offer.

3. Brokers ⚷51

Broker's duty to produce and introduce to seller a customer in order to earn commission does not mean that owner and customer must meet personally.

4. Brokers ⚷49(1)

Agent's duty to communicate offer to principal, in order to earn commission, is the same whether offer be written or oral.

Thomas R. Lynch, Los Angeles, for appellant.

Alfred J. Borstein, Los Angeles, for respondent.

SWAIN, Judge.

This is an appeal by the defendant, the executor of the estate of Thomas Andrew Hunt, deceased, from a judgment in favor of the plaintiff, a real estate broker, for a commission. On November 28, 1951, Hunt signed a written listing in which he (1) employed the plaintiff "to sell" certain property and (2) agreed to pay her a 5% commission. On February 19, 1952, while the listing was still in force, plaintiff obtained from one Jacob Borstein a $500 deposit on the purchase price of the property. She signed a receipt for the money which stated the terms on which Hunt had listed the property. Borstein wrote on an executed copy of the receipt "accepted by Jacob Borstein." On February 20, 1952, the plaintiff mailed a letter to Hunt at his home, advising him that she had secured a purchaser who had made a $500 deposit. This was the only communication, written or oral, between the two regarding the offer which plaintiff obtained. Neither in the letter nor by any other means did she give Hunt the name of the buyer, put him in possession of the written offer or bring the two together. Hunt never received the letter because, on February 19, 1952, he was taken to the hospital where he died February 21, 1952. It is undisputed that Hunt's death revoked plaintiff's authority. 8 Am.Jur. 1010.

[1] The plaintiff claims that she is entitled to her commission because she produced a purchaser who was ready, willing and able to buy on Hunt's terms. We do not agree with her. She did not produce to Hunt a purchaser because she never put Hunt in a position where he could have made a contract of sale with Borstein had he so desired.

[2] The listing signed by Hunt did nothing more than empower the plaintiff to find a purchaser even though it stated that the broker was authorized "to sell" the property. Holway v. Malloy, 1945, 70

Cal.App.2d 317, 319, 160 P.2d 893; 9 Cal. Jur.2d 195. The memorandum signed by the prospective purchaser was, therefore, nothing but an offer. This offer was never communicated to Hunt. The letter which did not reach him did not serve to apprise him of the offer.

[3] 2 Mechem on Agency, p. 2003, sec. 2431, says: "If the broker has obtained from a proper person and *delivered to his principal* * * * a written offer to purchase which the principal can immediately turn into a written contract by accepting it, he would ordinarily be deemed to have performed his undertaking." (Emphasis added.) 4 R.C.L. 304, "* * * the duty of a broker employed to sell is usually performed when through one means or another he has brought his employer and a customer acceptable to the latter into negotiations with one another and his service in doing so may be said to be the procuring cause of the resulting deal between them." Brown v. Mason, 1909, 155 Cal. 155, 158, 99 P. 867, 868, 21 L.R.A., N.S., 328, holds, "The two essentials to the broker's success under a written appointment such as Brown obtained from Mason are, first, that he should produce and introduce to the seller a customer ready, able, and willing to take the property upon the terms stipulated; and, second, that this should be done within the time limit of the option." This, of course, does not mean that the two must meet personally, Woodbridge Realty v. Plymouth Development Corporation 1955, 130 Cal.App.2d 270, 278 P.2d 713. 2 Restatement, Agency, sec. 453: "Illustrations: (1) P lists Blackacre for sale. A persuades T to purchase Blackacre and is on the way to P's office when he learns that P died. Subsequently, T, without further action by A, goes to P's administrator, tells him the facts, and buys the land which is sold for the payment of debts at private sale. A is entitled to no compensation."

[4] In Mattingly v. Pennie, 1895, 105 Cal. 514, 519, 39 P. 200, the court held that no commission is due the broker if the offer is made to the broker only. It is true, in that case, that there was no written offer and no sale. In a similar case, Gunn v. Bank of California, 1892, 99 Cal. 349, 354, 33 P. 1105, it was held that the broker must give the seller the name of the buyer and the terms of the offer. Without that or some further action by the broker there never could have been a meeting of the minds of Hunt and the prospective purchaser. The duty of the agent to communicate an offer to the principal is the same whether the offer be written or oral.

The defects in plaintiff's case could not be cured on a new trial. The judgment is reversed with directions to enter judgment for the defendant.

BISHOP, Acting P. J., and PATROSSO, J., concur.

44 Cal.2d 625

Sadie HILLMAN, Plaintiff and Appellant,

v.

Rudolph GARCIA-RUBY and Katherine Garcia-Ruby, Defendants and Respondents.

S. F. 19233.

Supreme Court of California.
In Bank.

May 27, 1955.

Rehearing Denied June 23, 1955.

Action for injuries sustained when defendants' police dog allegedly jumped upon and knocked down plaintiff. The Superior Court, City and County of San Francisco, Ben V. Curler, J., rendered judgment on jury's verdict for defendants, and plaintiff appealed. The Supreme Court, Traynor, J., held that where uncontradicted evidence showed that defendants had done nothing whatever to restrain dog, so that in returning verdict for defendants, jury must have found that dog did not have alleged dangerous propensity, or that defendants did not know or were not charged with notice of such propensity, error in instructing that keeper who knows his dog to have dangerous propensity has only duty to exercise ordinary care, rather than absolute duty to restrain dog, was not prejudicial.

Judgment affirmed.

Carter, J., dissented.

Opinion, 277 P.2d 413, vacated.

1. Animals 🔑70

Keeper of animal of species dangerous by nature or of any animal which keeper knows or has reason to know to have dangerous propensities, is liable, without wrongful intent or negligence, for damages to others resulting from such propensities. West's Ann.Civ.Code, §§ 3341, 3342.

2. Appeal and Error 🔑1064(1)

In action for injuries sustained when defendants' police dog allegedly jumped upon and knocked down plaintiff, wherein uncontradicted evidence showed that defendants had done nothing whatever to restrain dog, so that in returning verdict for defendants, jury must have found that dog did not have alleged dangerous propensity, or that defendants did not know or were not charged with notice of such propensity, error in instructing that keeper who knows his dog to have dangerous propensity has only duty to exercise ordinary care, rather than absolute duty to restrain dog, was not prejudicial. West's Ann.Civ.Code, §§ 3341, 3342.

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James C. Purcell and Michael Riordan, San Francisco, for appellant.

Bronson, Bronson & McKinnon and John F. Ward, San Francisco, for respondents.

TRAYNOR, Justice.

Plaintiff appeals from a judgment entered on a jury verdict in an action for personal injuries. Plaintiff's complaint alleged, and evidence was introduced to support the allegations, that as she was walking along a public sidewalk defendants' police dog jumped upon and knocked her down causing severe injuries, that the dog had a propensity, to jump on people, that defendants knew of this propensity, and that, notwithstanding this knowledge, defendants allowed the dog to roam at large without restraint. The defendants' evidence showed that the dog was a gentle dog with no propensity to jump on people and that it had merely accidentally bumped into plaintiff while playing with another dog.

Plaintiff does not question the sufficiency of the evidence to support the judgment. Her sole contention is that the court erroneously failed to instruct the jury in accordance with the applicable rule of law.

[1] There is no dispute as to that rule. "The keeper of an animal of a species dangerous by nature, or of any animal which he knows, or has reason to know, to have dangerous propensities, is liable, without wrongful intent or negligence, for damage to others resulting from such a propensity." Prosser, Torts, p. 432; Gooding v. Chutes Co., 155 Cal. 620, 624, 102 P. 819, 23 L.R.A.,N.S., 1071; Clowdis v. Fresno Flume, etc., Co., 118 Cal. 315, 320, 50 P. 373; Heath v. Fruzia, 50 Cal.App.2d 598,

600, 123 P.2d 560; Opelt v. Al. G. Barnes Co., 41 Cal.App. 776, 779, 183 P. 241; see 3 C.J.S., Animals § 148; cf. Civ.Code, §§ 3341, 3342. The liability of the keeper is absolute, for "[t]he gist of the action is not the manner of keeping the vicious animal, but the keeping him at all with knowledge of the vicious propensities. [Citation.] In such instances the owner is an insurer against the acts of the animal, to one who is injured without fault, and the question of the owner's negligence is not in the case. [Citations.]" Opelt v. Al. G. Barnes Co., supra, 41 Cal.App. 776, 779, 183 P. 241, 242.

Plaintiff was entitled to instructions in conformity with this rule. Daniels v. City & County of San Francisco, 40 Cal.2d 614, 623, 255 P.2d 785. The instructions that were given[1] told the jury that if defendants' dog had a propensity to do an act dangerous to person or property and defendants knew of that propensity they were under a duty to restrain or confine it. These instructions, however, did not tell the jury that this duty was an absolute duty, and when viewed in their context with other instructions[2] they set forth a duty of ordinary care. It is clearly apparent from the court's rejection of certain of plaintiff's proposed instructions,[3] its modification of certain of her proposed instructions,[4] and its withdrawal[5] of one of her proposed instructions after reading it to the jury, that the court understood the duty to be one of ordinary care and so instructed the jury.

[2] Although the court erred in rejecting plaintiff's proposed instructions that the keeper of a dog, which he knows to have a dangerous propensity, is under an absolute duty to restrain the dog and in instructing the jury that such a keeper is only under a duty to exercise ordinary care to restrain the dog, we do not believe that the error was prejudicial. The absolute duty to restrain the dog could not be invoked unless the jury found, not only that the dog had the alleged dangerous propensity, but that defendants knew or should have known that it had. In the light of the uncontradicted evidence and the instructions that were given, it is clear that the jury did not believe that the dog had the alleged dangerous propensity or that defendants knew or should have known that it had. Had there been conflicting evidence in this case on the issue of restraint the error would have been prejudicial. The uncontradicted evidence affirmatively shows, however, that defendants did nothing whatever to restrain

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[1] "If the keeper of a dog knows that the dog was accustomed to jump on human beings, the keeper's liability is not affected by the high character of the dog for mildness among the neighbors.

"The intent with which a dog inflicts injury upon a human being is not material.

"If a keeper of a dog knows it to have dangerous propensities, he is under a duty to restrain it or confine it that it may not exercise its propensity to the injury of another.

"It is the duty of the keeper of a dog to inform himself or herself of the habits and disposition of said dog."

[2] They were immediately followed by an instruction that "A keeper of a dog must use that degree of care to restrain it that an ordinarily prudent person would have used in the same or similar circumstances." The jury was also instructed that "under the law of this state every person is bound, without contract, to abstain from injuring the person or property of another or from infringing upon any of his rights, and that everyone is responsible for injury occasioned to another for his want of ordinary care or skill in the management of his property or person. However, defendant was not an insurer of the safety of the plaintiff or the public." (Plaintiff's proposed instruction No. 31, as modified by the court's addition of the last sentence.)

[3] For example, plaintiff's proposed instruction number 2: "The keeper of any dog which he knows or has reason to know to have dangerous propensities is liable without wrongful intent or negligence for damages to other proximately resulting from such a propensity."

[4] See, for example, the modification of plaintiff's proposed instruction number 31, quoted in note 2 supra.

[5] Plaintiff's proposed instruction number 2, quoted in note 3 supra.

the dog and allowed it to roam at will. Had the jury believed that the dog had the alleged dangerous propensity and that defendants knew it or should have known it, they were compelled by the instructions given to return a verdict for plaintiff, for a showing of a complete lack of any care to restrain the dog would show a violation of a duty to use reasonable care to restrain it. It follows that the jury must have found that the dog did not have the alleged dangerous propensity, or that defendants did not know or were not charged with notice of such propensity, and that a contrary result would not have been reached even if all the requested instructions had been given.

The judgment is affirmed.

GIBSON, C. J., and SHENK, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

I had heretofore thought that at least one rule of law remained firmly fixed in the jurisprudence of this state: that a party litigant was, at the very least, entitled to have the jury correctly instructed as to the law as it related to his particular lawsuit. The majority opinion frankly admits that there is no dispute as to what the applicable rule of law is; that plaintiff was entitled to instructions in conformity with the rule; that the jury was clearly misinformed by the court as to that rule of law.

The evidence was sharply conflicting as to whether the dog had dangerous propensities. If the dog did have dangerous propensities, defendant was under an absolute duty to restrain it. The matter is just as simple as that, but the jury was not so instructed. It was instructed that defendant must only exercise ordinary care.

Plaintiff's theory was that the dog had dangerous propensities which were known to defendant. She was entitled to have the jury instructed in accordance with that theory. Buckley v. Silverberg, 113 Cal. 673, 45 P. 804; Ritchey v. Watson, 204 Cal. 387, 268 P. 345; Waniorek v. United Railroads, 17 Cal.App. 121, 118 P. 947; Klamath Lumber Co. v. Co-operative, etc., Co., 25 Cal.App. 678, 145 P. 159; Cassinelli v. Bennen, 110 Cal.App. 722, 294 P. 748; Buckley v. Shell Chemical Co., 32 Cal.App.2d 209, 89 P.2d 453; Lewis v. Western Truck Line, 44 Cal.App.2d 455, 112 P.2d 747; McGowan v. City of Los Angeles, 100 Cal.App.2d 386, 223 P.2d 862, 21 A.L.R.2d 1206; Daniels v. City & County of San Francisco, 40 Cal.2d 614, 255 P.2d 785; Perin v. Nelson & Sloan, 119 Cal.App.2d 560, 259 P.2d 959; Rideau v. Los Angeles Transit Lines, 124 Cal.App.2d 466, 268 P.2d 772; Sills v. Los Angeles Transit Lines, 40 Cal.2d 630, 640, 255 P.2d 795; Petersen v. Rieschel, 115 Cal.App.2d 758, 252 P.2d 986; Summers v. Randall, 123 Cal.App.2d 113, 266 P.2d 217; Nelson v. Angel, 124 Cal.App.2d 861, 269 P.2d 626.

A jury is bound to follow the law as it is given to it in the instructions given by the court. The rule is set forth in 24 Cal. Jur., section 96, page 822, as follows: "As a general rule instructions *excluding issues* or defenses which are supported by evidence are *prejudicially erroneous.*" (Emphasis added.) If the jury is not instructed as to the law applicable to plaintiff's case it must, in effect, find for the defendant. Under the circumstances how can it be said that instructions giving only defendant's theory of the case did not prejudice plaintiff? The majority indulges in speculation in order to decide just what the jury thought in returning its verdict. The trial court was of the opinion that ordinary care was all that was required of defendant and the jury was so instructed. The theory of plaintiff's case was never brought to the attention of the jury and, as a result, she has been denied her day in court.

The judgment should be reversed.

Rehearing denied; CARTER, J., dissenting.

44 Cal.2d 599

CITY OF LONG BEACH, a municipal corporation, Plaintiff-Respondent,

v.

PACIFIC ELECTRIC RAILWAY CO., a corporation, Defendant-Appellant.

L. A. 22899.

Supreme Court of California.
In Bank.
May 27, 1955.

Condemnation proceeding by city to obtain easement for public street purposes over railroad right of way. The Superior Court, Los Angeles County, Carroll M. Counts, J. pro tem., made nominal award of $1, and railroad appealed. The Supreme Court, Shenk, J., held that where easement sought by city for street purposes did not cross railroad tracks but involved land which had been used by railroad's lessee as lumber yard, taking of such strip of land for street purposes would prevent railroad from leasing the land for a lumber yard or other proper purpose, and, therefore, railroad would be entitled to receive more than nominal compensation for such taking, and would also be entitled to recover for cost of relocating poles and other overhead railroad facilities.

Judgment reversed with directions.

Opinion, 273 P.2d 958, vacated.

1. Eminent Domain ⚷128(3)

Where city seeks to condemn an easement for street purposes across railroad tracks or right of way, generally only nominal compensation is required since, when street is laid out across railroad tracks, little if any damage is suffered by railroad which can continue to use tracks as before.

2. Eminent Domain ⚷128(3)

Railroad may use its right of way for commercial purposes unless specifically prevented from doing so, and, therefore, taking of portion of right of way used, or capable of being used, for commercial purposes to create or extend the public street ordinarily would cause more than nominal damage to railroad.

3. Eminent Domain ⚷128(3)

Where easement sought by city for street purposes did not cross railroad tracks but involved land which had been used by railroad's lessee as lumber yard, taking of such strip of land for street purposes would prevent railroad from leasing the land for a lumber yard or other proper purpose, and, therefore, railroad would be entitled to receive more than nominal compensation for such taking and to recover for cost of relocating poles and other overhead railroad facilities.

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C. W. Cornell, San Pedro, E. D. Yeomans, Roger M. Sullivan and Randolph Karr, Los Angeles, for appellant.

Walhfred Jacobson, City Atty., and Joseph B. Lamb, Asst. City Atty., Long Beach, for respondent.

SHENK, Justice.

This is an appeal from a judgment granting a nominal award of one dollar in a condemnation proceeding.

The defendant Pacific Electric Railway Company, hereinafter referred to as the company, is an interurban electric railway corporation. It has a right of way for its tracks along Long Beach Boulevard, a street running north and south in the city of Long Beach and intersecting Willow Street, a street running east and west. It owns an easement for "railroad purposes" on a tract of land located at the northeast corner of the intersection of Long Beach Boulevard and Willow Street. Beginning at Willow Street the easement runs more or less parallel with the company's tracks on Long Beach Boulevard. Nowhere in the record does a precise description of the easement appear, but such a description is not essential to the determination of this appeal.

On January 30, 1951, the Long Beach City Council adopted a resolution of intention to widen Willow Street by moving its northern line twenty feet further north over a portion of the area here involved. The strip sought for widening Willow Street was a part of the company's easement but did not cross its tracks.

The company leased part of its easement, including the twenty foot strip, to a lumber company which operated and owned a building on the property. For the purpose of providing freight transportation for its lessee, the company maintained a spur track on the leased portion of the easement. For its own purposes, the company maintained two poles and connecting overhead facilities on the strip of land in question. At the time of the trial the lumber company building had been removed. Counsel for the company stated that the building removal resulted from negotiations between the city and the lumber company.

By this proceeding, commenced on February 19, 1951, the City of Long Beach sought to obtain an easement for street purposes over the twenty foot strip. The dispute is over the amount of compensation. The city's theory would require the payment of a nominal sum only for the proposed easement. The company maintains that it is entitled to recover the value of the property taken and the cost of moving and relocating the poles and overhead facilities required by the taking. It was stipulated by and between the parties: "That if the property over which plaintiff seeks to acquire an easement for street purposes is to be valued by the Court at other than a nominal valuation * * * the value thereof shall be fixed at the sum of * * * $2,150.00" and "That the widening of Willow Street as proposed will require relocation of two poles and connecting overhead facilities of * * * Pacific Electric * * * at a cost of * * * $914, but will not require any other structural changes in the facilities of the defendants."

The trial court found that public convenience and necessity required the widening of Willow Street by the twenty foot strip; that the city sought the easement for such use; that this was a public use; that subject to the right of the company to operate a railway over the strip the city was entitled to be awarded an easement over the strip; that "the use of said property for street purposes as proposed by the plaintiff will not interfere with its use for railroad tracks and the railroad can exist with the street in place as proposed, except that the area available for use by the defendant Pacific Electric Railway Company for purposes other than railroad tracks is reduced by the amount of area to be taken for a street"; that the company is entitled to one dollar for damages because of the taking of the easement, and that it is not entitled to any damages by reason of the structural changes required by the taking. Judgment was entered accordingly.

The city contends that a public body should be required to pay nominal damages only for an extension of a street across a railroad right of way and that this rule also applies to a widening. The city argues that since the company does not own the fee of the property here involved the entire extent of its easement is a "right of way"; that this right of way may be used only for railroad purposes; that railroad purposes as to this particular easement do not include commercial uses and are here restricted to the use and maintenance of tracks; that the trial court properly awarded nominal damages only for the taking of the easement by the city, and that the court's refusal to award damages for the structural changes required by the taking was proper.

The company contends that the judgment is erroneous as a matter of law; that there is no evidence to support the trial court's finding that the taking here involved was a lateral rather than a longitudinal one; that under the facts it was entitled to full compensation for the property taken because it had the right to use the property, and the property was being used for a commercial purpose relating to the railroad's business, and that it was entitled to damages for having to relocate its poles and overhead facilities away from the 20-foot stretch.

It is noted that the company is claiming for the first time on this appeal that it owns the fee of the entire parcel here under consideration. The basis for this claim is that the deeds by which it acquired its interest in the property and which are in evidence contain language supporting such a construction. However the stipulation entered into between the city and the company states: "That the property sought to be acquired by plaintiff is now owned by Long Beach Amusement Co., a corporation, subject to the easement of defendant Pacific Electric Company, a corporation, for railroad purposes" and in view of the stipulation, which should be deemed binding on the company, the consideration of this question on appeal becomes unnecessary. The pleadings, findings and judgment speak in terms of an easement.

[1] Where a city seeks to condemn an easement for street purposes *across* railroad tracks or a right of way, the general rule requires nominal compensation only. In City of Oakland v. Schenck, 197 Cal. 456, at page 460, 241 P. 545, at page 546, this court said that "* * * one of the incidents of the public use to which a railroad company dedicates its property used as a right of way is the right of the public to construct street crossings wherever and whenever reasonably necessary. * * * If the opening of the street across the railroad tracks in this case does not unduly interfere with the companies' use for legitimate railroad purposes, then their compensation should be nominal." In the ordinary case when a street is laid out across railroad tracks little if any damage is suffered by the railroad because it can continue to use them as before.

[2] But a railroad may use its right of way for many commercial purposes unless specifically prevented from so doing. For example, the following uses for a railroad right of way have been held to be proper since they contribute to the railroad's business: a saw mill, lumber shed, store or boarding house, Grand Trunk R. Co. v. Richardson, 91 U.S. 454, 23 L.Ed. 356; a manufacturing company, Michigan Cent. R. Co. v. Bullard, 120 Mich. 416, 79 N.W. 635; a grain elevator and warehouse, Gurney v. Minneapolis Union Elevator Co., 63 Minn. 70, 65 N.W. 136, 30 L.R.A. 534; a lumber yard, corn crib, grain elevator and warehouses, Illinois Cent. R. Co. v. Wathen, 17 Ill.App. 582.

Since railroads may use their rights of way for certain commercial activities, the taking of a portion of it which is being used, or is capable of being used, for commercial purposes in order to create or extend a public street, ordinarily would cause more than nominal damage to the railroad.

As noted there is a distinction between taking an easement for street purposes over existing tracks, where the use of the tracks is not impaired, and the taking of an easement properly used or usable for other purposes by a railroad. In City of Oakland v. Schenck, supra, 197 Cal. 456, at page 467, 241 P. 545, at page 549, it is stated, quoting from Elliott on Railroads: "'The right to take longitudinally is very different from the mere right to cross, for in the one case the rights of the railway company are materially impaired, while in the other the taking is such that both uses can stand together.'"

[3] In the present case it is undisputed that the easement for street purposes sought by the city does not cross the company's tracks; and that the land proposed to be taken was or had been used by the company's lessee as a lumber yard. It is clear that the taking of the twenty foot strip for street purposes prevents the company from leasing that land for a lumber yard or other proper purpose. Under these circumstances the company's use of its easement is materially impaired and it should be entitled to receive more than nominal compensation for the taking.

The cost of relocating the poles and overhead facilities should also be included as damages. It appears without question that the structural changes will be required if the property is taken.

It thus appears that the trial court erred in not awarding damages to the company for the value of the property sought to be taken and for the cost of the structural changes made necessary by the taking. While the parties have stipulated to these amounts, there is no accurate description of the property in the record. A correct description thereof should be included in the judgment.

The judgment is reversed with directions to the trial court to enter a judgment of condemnation correctly describing the property to be taken, with compensation therefor, and for the cost of structural changes, as specified in the stipulation of the parties.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

44 Cal.2d 604

SUBSEQUENT INJURIES FUND OF STATE OF CALIFORNIA, Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSION of the State of California, and Mary M. Harris, Respondents.

L. A. 23298.

Supreme Court of California.
In Bank.
May 27, 1955.

Proceeding on petition of Subsequent Injuries Fund for writ to review Industrial Accident Commission's apportionment of liability between employer and Fund for total permanent disability suffered by employee, when a pre-existing disability caused by nonindustrial disease was aggravated by industrial injury. The Supreme Court, Schauer, J., held that where greater disability was a product of prior disease and industrial injury aggravating the prior disease, and surgical treatment for the condition growing out of the combination of prior disease and industrial injury, the Commission should have rated the combined disability and then assigned a portion of combined disability to later injury and should have made correlative proportion to pre-existing disability or impairment chargeable against Fund.

Award annulled and matter remanded for further proceeding.

Carter, J., dissented.

Workmen's Compensation ⚷1030

Where employee's later disability was a product of prior disease and industrial injury aggravating the prior disease and surgical treatment for the condition growing out of the combination of prior disease and industrial injury, the Industrial Accident Commission should have rated the combined disability and then assigned a portion of combined disability to later injury and should have made correlative proportion to pre-existing disability or impairment chargeable against Subsequent Industrial Fund. Labor Code, §§ 4662 and (a), 4663, 4750–4755, 4751.

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Edmund G. Brown, Atty. Gen., Donald D. Stoker and W. B. Thayer, Deputy Attys. Gen., for petitioner.

Everett A. Corten, San Francisco, Benjamin L. Rolfe, Los Angeles, and T. Groezinger, San Francisco, for respondents.

SCHAUER, Justice.

This controversy concerns the apportionment of liability between an employer and the Subsequent Injuries Fund. Labor Code, §§ 4750–4755. The employe, Mrs. Harris, before her industrial injury had a permanent partial disability consisting of impairment of the motion of the spine, the result of tuberculosis of the spine which had become quiescent. The industrial injury from a fall, said to be "negligible" in itself, caused aggravation of the previously quiescent disease and, following various courses of treatment including surgery, a complete paralysis of both legs and of the body up to the waist, developed. An original award of 100 per cent permanent disability against the employer was annulled by the District Court of Appeal, Goodwill Industries of San Bernardino & Riverside Counties v. Ind. Acc. Comm. (1952), 114 Cal.App.2d 452, 459–460, 250 P.2d 627 on the ground that "at the time of the [industrial] accident * * * Mrs. Harris had a partial permanent disability and impaired capacity to work resulting from a previous nonindustrial disease," and that the employer was entitled to an apportionment of the 100 per cent rating as between the industrial and the nonindustrial aspects of the disability. The Subsequent Injuries Fund, which up to that time had not been a party, was thereafter joined as a defendant before the Industrial Accident Commission, and following a new hearing the commission rated the pre-existing nonindustrial disability at 46¼ per cent and the total combined disability as 100 per cent. The 46¼ per cent was then deducted from the 100 per cent to arrive at a disability of 53¾ per cent attributable to the industrial injury. An award against the Subsequent Injuries Fund was made for the 46¼ per cent and against the employer for the 53¾ per cent.

The Fund contends that the commission erred in its method of apportioning the disabilities, and that rather than first rating and then deducting the pre-existing disability from the combined disability to arrive at the percentage of industrially caused disability, the industrially caused disability should first be rated and then deducted from the combined disability to arrive at the disability rating chargeable to the Fund.[1] We have concluded that the position of the Fund in this respect is correct, but it does not appear that the Fund is correct in its further contention that it follows that no award may be made against it.

Section 4751 of the Labor Code provides that "If an employee who is permanently partially disabled receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree of disability caused by the combination of both disabilities is greater than that which would have resulted from the subsequent injury alone, and the combined effect of the last injury and the previous disability or impairment is a permanent disability equal to 70 percent or more of total, he shall be paid in addition to the compensation due under this code for the permanent partial disability caused by the last injury, compensation [from the Subsequent Injuries Fund] for the remainder of the combined permanent disability existing after the last injury * * *."

The factors which contribute to the combined disability in the present case are (1) pre-existing disability caused by the nonindustrial disease; (2) the disease itself, which at the time of the industrial injury was quiescent; (3) disability mechanically caused by the industrial injury (negligible); and (4) disability caused by the industrial injury's aggravation of the pre-existing disease.

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[1] The Fund illustrates the claimed materiality of the differing methods by several examples, including the following:

"(2) Assume a man who has but one eye suffers the loss of both legs in a subsequent industrial injury:

"In summary, if we follow the formula required by the Harris decision, the Subsequent Injuries Fund is * * * charged with 25%, and the employer with the remaining 75%.

"On the other hand, if the proper formula is followed, we note that the loss of both legs is rated by the Rating Schedule (page 3) as 100% disability. Subtracting from our hypothetical man's present combined 100% disability the 100% disability attributable to the loss of both legs in the industrial injury, we would have a remainder of zero. The Subsequent Injuries Fund would have no liability, and the employer would bear 100% of the liability.

"(3) Assume that a man with but one eye suffers the loss of his other eye in a subsequent industrial injury:

"Separately rated, the pre-existing loss of one eye would rate 25% standard, and so would the subsequent loss of the other eye rate 25%. * * * According to Labor Code Section 4662, Subsection (a), our hypothetical man is conclusively presumed totally (100%) disabled, as he has lost both eyes. According to Section 4750 of the Labor Code 'The employer shall not be liable for compensation to such an employee for the combined disability, but *only* for that portion due to the *later injury as though no prior disability or impairment had existed.*' (Emphasis added.) According to this last quoted section, the employer should only be charged with 25%. However, if the formula of the Harris case, and the formula applied in the instant case, is applied to our hypothetical case, the employer would be charged with 75%, and the Subsequent Injuries Fund with 25%."

Our quoting of the examples suggested does not imply concurrence with the inferences and conclusions the Fund suggests should follow therefrom.

As to the latter type of disability and the "compensation due [therefor] under this code" as mentioned in section 4751, section 4663 of the Labor Code provides that "In case of aggravation of any disease existing prior to a compensable injury, compensation shall be allowed only for the proportion of the disability due to the aggravation of such prior disease which is reasonably attributable to the injury."

Under section 4750 of the same code, "An employee who is suffering from a previous permanent disability or physical impairment and sustains permanent injury thereafter shall not receive from the employer compensation for the later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with or in relation to the previous disability or impairment.

"The employer shall not be liable for compensation to such an employee for the combined disability, but only for that portion due to the later injury as though no prior disability or impairment had existed."

Thus, as expressed in Edson v. Industrial Acc. Comm. (1928), 206 Cal. 134, 138–139, 273 P. 572, "If the employee has suffered permanent disability by injury or disease prior to the injury for which compensation is sought the statute requires that the percentage of disability on account of the latter injury be computed without reference to any injury previously suffered or any permanent disability caused thereby, except that in the case of aggravation of a pre-existing disease such proportion of the disability due to the aggravation of the prior disease as may be reasonably attributed to the later injury may be considered. * * *"

It follows from these rules that the Fund is correct in its position that its liability should not be fixed by rating the pre-existing disability alone and apart from the subsequent industrial injury. On the other hand it would seem that neither does the statute, when its several pertinent parts are read together, contemplate that in a case such as this (where the later disability is a product of prior disease, an industrial injury aggravating the prior disease, and surgical treatment for the condition growing out of the combination of prior disease and industrial injury) the commission must attempt to rate the disability caused by the later industrial injury entirely independently of the prior existing disease and so fix the employer's liability without respect to either the combined disability or the previously existing disability or impairment. Rather, the more reasonable and workable practice, and one conforming with the intent of the statute, appears to be that which the commission seems to have consistently followed in aggravation cases, viz.: to rate the combined disability (whether it be 70 per cent, 80 per cent, 100 per cent, or some other percentage) and then (as provided by section 4663) assign a proportion (such as ½, ⅔, 80 per cent, etc.) of the combined disability to the later injury and a correlative proportion to the pre-existing disability or impairment. See, e. g., 19 Cal.Comp. Cases (1954) 29–30, 143, 149, 166–167, 173–175; 18 Cal.Comp. Cases (1953) 242–243; 17 Cal.Comp. Cases (1952) 131; 16 Cal.Comp. Cases (1951) 308–309; 15 Cal.Comp. Cases (1950) 169; 11 Cal.Comp. Cases (1946) 225–226, 238–239; 3 Cal.Comp. Cases (1938) 77–78; 2 Cal.Comp. Cases (1937) 67–68. This was also the method followed by the commission and approved by this court in Tanenbaum v. Industrial Acc. Comm. (1935), 4 Cal.2d 615, 616, 52 P.2d 215, in which the employe's permanent disability, rated at 32¾ per cent, was found to have been "partly caused by preexisting dormant disease [arthritis] and partly by said [industrial] injury," and an apportionment was made of 33⅓ per cent to preexisting disease and 66⅔ per cent to the industrial injury.

Although the commission attempts to defend the method of apportionment it followed in this case,[2] rather than to suggest the method described above and followed by it in the numerous instances listed, it appears that the commission was influenced by the statement of the District Court of Appeal, when that court annulled the prior award (Goodwill Industries of San Bernardino & Riverside Counties v. Ind. Acc. Comm. (1952), supra, 114 Cal.App.2d 452, 460, 250 P.2d 627), that "the commission erred in finding that the [industrial] injury * * * caused total disability and in failing to determine and deduct the percentage of total disability allowable to applicant's condition at the time of the injury." However, that court was not then considering the method of apportionment which should be adopted as affecting the allocation of liability between the employer and the Fund but, rather, the question of whether the evidence required some proration of the disability as between the industrial injury and the prior existing disease, as required by the provisions of section 4663, Labor Code; consequently, the court's statement is not to be regarded as delineating any particular method of apportionment either as applicable to the question now at hand or for any other purpose.

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[2] The view of the commission as to the method followed is indicated by a statement in its Report, Exhibit F, "Upon the record of this case and in accordance

Insofar as concerns a combined disability resulting from a later industrial injury (such as loss of the left eye) when added to a prior independent disability (such as loss of the right eye), the method of apportionment advocated by the Fund appears to be correct. In the suggested example, the loss of each eye independently would rate 25 per cent, or a total of 50 per cent. Under subdivision (a) of section 4662 of the Labor Code, however, one who has lost both eyes is conclusively presumed 100 per cent permanently disabled. Thus, deducting the 25 per cent rating for the loss of the second eye from the 100 per cent combined rating would leave a 75 per cent rating chargeable to the Fund. This was the method seemingly followed by the commission and approved by this court in Subsequent etc. Fund v. Ind. Acc. Comm. (1952), 39 Cal.2d 83, 89–90, 244 P.2d 889, in which the employe had a prior disability consisting of loss of vision of his left eye (25 per cent disability), and a later industrial injury to his right eye (rated 24 per cent) and there was a finding of 73¾ per cent combined disability. An award in accord with the rating of 24 per cent was made against the employer's insurer, and after a further hearing at which the Subsequent Injuries Fund was represented the commission made an award against the latter for 49¾ per cent, the remainder of the 73¾ per cent rating for the combined disability.

The award is annulled and the matter is remanded for further proceedings not inconsistent with this opinion.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

It is my opinion that this case was incorrectly decided when on a prior occasion it was before the District Court of Appeal, Goodwill Industries of San Bernardino & Riverside Counties v. Ind. Acc. Comm., 114 Cal.App.2d 452, 250 P.2d 627. I voted for a hearing when a petition for hearing was presented to this court after that decision. There the award of the commission of permanent total disability against the employer alone was annulled on the ground there was not sufficient evidence to show that the total disability was caused by the industrial injury; that on the contrary it was caused in part by a prior tubercular condition suffered by Mrs. Harris, the employee. Contrary to that holding the evidence supported the award because it showed the disease had become quiescent —was no longer disabling. The subsequent industrial injury caused it to become active again and it was that activity and

with the opinion of the District Court of Appeal, 4th District, rendered November 26, 1952, the Commission must determine the percentage of permanent partial disability which pre-existed the industrial injury and deduct from the rating for the present condition such rating as is attributable to the pre-existing condition."

its treatment which caused the total permanent disability. There is therefore no occasion for apportioning the payable compensation between the employer and the fund. Colonial Ins. Co. v. Industrial Acc. Comm., 29 Cal.2d 79, 172 P.2d 884.

I would therefore affirm the award.

44 Cal.2d 642

In re Charles LARSEN on Habeas Corpus.

Cr. 5640.

Supreme Court of California.
In Bank.
May 27, 1955.

Rehearing Denied June 23, 1955.

Proceeding on petition for writ of habeas corpus by state prisoner seeking release from custody. The Supreme Court, Shenk, J., held that commitment under original sentence of one found guilty of first-degree robbery in 1938, after being on probation, was valid, where certified copy of record of proceeding in which commitment was made recited that probation was revoked and that original sentence was ordered in full force and effect.

Application denied.

1. Criminal Law ⊂⇒982

Some form of revocation of suspension of execution of judgment and sentence must appear of record to support commitment under original sentence.

2. Criminal Law ⊂⇒982

Court has discretionary power to grant or revoke probation. Pen.Code, § 1203.2.

3. Criminal Law ⊂⇒982

Commitment under original sentence of one found guilty of first-degree robbery in 1938, after being on probation, was valid, where certified copy of record of proceeding in which commitment was made recited that probation was revoked and that original sentence was ordered in full force and effect. Pen.Code, §§ 1203.3, 1213, 1216.

4. Criminal Law ⊂⇒982

Reinstatement of probation is a matter of clemency, and there is neither a constitutional right nor a statutory right to notice and hearing preceding revocation of probation.

5. Criminal Law ⊂⇒982

Where accused was found guilty of first-degree robbery and placed on probation on condition that he serve first period of such probation in county jail, he was not entitled to deduction from prison sentence subsequently imposed upon revocation of probation for period thus served in county jail during probation period. Pen.Code, §§ 1203.1, 1203.2, 2926.

6. Statutes ⊂⇒47

Indeterminate sentence laws are in legal effect a sentence for maximum term and are not void for uncertainty. Pen.Code, §§ 1168, 3020.

7. Criminal Law ⊂⇒977(1)

Pronouncing of sentence is a judicial act, and punishment which sentence pronounces comes from law itself and is established or provided for by legislature. Pen.Code, §§ 461, subds. 1, 2, 671, 1168.

8. Constitutional Law ⊂⇒270
Criminal Law ⊂⇒1206(1)

Due process of law is not infringed by decision of state court asserting validity of indeterminate sentence law.

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Charles Larsen, in pro. per., and Richard M. Grossberg, Sacramento, for petitioner.

Edmund G. Brown, Atty. Gen., and Doris H. Maier, Deputy Atty. Gen., for respondent.

SHENK, Justice.

Petitioner is now serving sentences at Folsom State Prison under two judgments of conviction, one a 1938 conviction of first degree burglary (Los Angeles Superior Court No. 73864), the other a 1953 conviction of second degree burglary (San Francisco Superior Court, No. 49121). In this petition for the writ of habeas corpus petitioner alleges that he is being illegally restrained of his liberty, first because neither judgment of conviction sets forth the term or duration of the sentence imposed, and secondly because there is no legal commitment to sustain his imprisonment under the 1938 judgment.

On November 2, 1938, petitioner pleaded guilty in the superior court in and for the county of Los Angeles to the crime of first degree burglary and was sentenced to the state prison at San Quentin "for the term prescribed by law." Execution of the judgment and sentence was suspended and petitioner was placed on probation for five years on condition that he serve the first eight months in the county jail. This he did. Thereafter he was arrested in San Francisco for an offense herein undisclosed and committed to the Preston School of Industry. The Los Angeles Superior Court revoked his probation under date of January 25, 1940, issued a bench warrant, and placed the matter off calendar. Upon his release from Preston he was arrested upon the Los Angeles warrant. A hearing was held on December 26, 1940, at which he was present. He was ordered restored to probation for a period of three years. On January 18, 1942, he was convicted of a felony in Texas and sentenced to five years in the Texas state prison. On March 19, 1942, the Los Angeles Superior Court revoked his probation, a bench warrant was issued, and the cause was placed off calendar. On May 5, 1947, he was arrested on the 1942 bench warrant and a hearing was held, petitioner being present. The court restored him to probation for a period of five years on condition that he serve the first year in the county jail. He served the year. On December 6, 1948, his probation was revoked because of his failure to report and a bench warrant was issued. In March, 1949 he was arrested for a violation of the Dyer Act, 18 U.S.C.A. §§ 2311–2313, in Nevada. He was subsequently convicted of that offense in the federal district court in that state and sentenced to federal prison. In August, 1952 he was released. On October 29, 1953 he pleaded guilty in the superior court in and for the city and county of San Francisco to a charge of second degree burglary and was sentenced to San Quentin "for the term prescribed by law." He was forthwith delivered by the sheriff to the Director of Corrections at San Quentin. Upon his arrival he notified the prison officials of the December 6, 1948, bench warrant issued by the Los Angeles Superior Court for violation of probation.

On August 20, 1954, this application in habeas corpus was filed. Petitioner alleged that he had been informed by the prison officials that a commitment under the 1938 Los Angeles judgment had been lodged against him and that he was to serve the sentence contained therein. He alleged that the court records in the Los Angeles action as received at San Quentin showed that the last order entered therein was the order of December 6, 1948, and that there was no order of record thereafter revoking suspension of execution of sentence. He therefore contends that the order suspending execution of judgment and sentence is still operative.

[1, 2] Petitioner is correct in his contention that some form of revocation of the suspension of execution of the judgment and sentence must appear of record to support a commitment under the original sentence. In re Torres, 86 Cal.App.2d 178, 180, 194 P.2d 593; In re Giannini, 18 Cal. App. 166, 122 P. 831. The court has discretionary power to grant or to revoke probation. In re Dearo, 96 Cal.App.2d 141, 143, 214 P.2d 585. Section 1203.2 of the Penal Code provides that probation may be revoked if the court in its judgment shall have reason to believe that the person placed on probation is engaging in criminal practices or has become abandoned to a vicious life, and that upon such revocation the court may revoke a suspension of execution "whereupon the judgment shall be in full force and effect". The subsequent convictions of the petitioner would furnish sufficient grounds for revocation. Under Section 1203.3 the court has authority at any time during the period of probation to revoke, modify or change its order of suspension.

[3] In his return the Attorney General has transmitted to this court certified copies

of the record in the Los Angeles action. This record shows that a minute order was entered on November 30, 1953, reading as follows: "Deputy District Attorney Kenneth J. Thomas is present. Defendant is not present being in San Quentin. Probation having been heretofore revoked, the sentence imposed on November 2, 1938, committing this defendant to the State Prison for the term prescribed by law is ordered in full force and effect. This sentence is ordered to run *concurrently* with sentence Defendant is now serving. Defendant is remanded into the custody of the Director of Corrections at the California State Prison at San Quentin." Under Penal Code, Section 1213 a certified copy of the abstract of judgment constitutes the commitment. Such a certified copy was placed in the hands of the warden at San Quentin. Penal Code, § 1216. It therefore appears that a valid commitment under the 1938 judgment was duly issued.

[4] Petitioner urges that he is wrongfully deprived of his liberty under the 1938 judgment because he received no notice or hearing before revocation of his probation and suspension. After his probation was revoked on two prior occasions he was given notice and was present in court at the hearings held thereon. In each instance his probation was reinstated. However such reinstatement is a matter of clemency. There is neither a constitutional right, Escoe v. Zerbst, 295 U.S. 490, 55 S.Ct. 818, 79 L.Ed. 1566, nor a statutory right, In re Davis, 37 Cal.2d 872, 873–875, 236 P.2d 579, to notice and hearing preceding revocation of probatio

[5] There is no merit in petitioner's contention that he is entitled to deduction from his prison sentence of the 20 months he served in the county jail during probation. Section 1203.2 of the Penal Code provides that upon revocation of suspension a probationer shall be delivered to the proper officer "to serve his sentence, less any credits herein provided for." However the legislature in 1947 recognized "the inconsistency of applying a statutory system of credits to a prison term fixed under the indeterminate sentence law" and abolished the system in the prisons of this state, Stats.1947, ch. 1381, § 1. Section 2926, Penal Code, 1941, am. 1947, provides that no person received at any state prison on or after January 1, 1948, shall receive or be allowed any credits theretofore provided. People v. Roberts, 1934, 136 Cal.App. 709, 29 P.2d 432, relied upon by petitioner was concerned with the provision of section 1203, subdivision (1) of the Penal Code which formerly allowed credit to a probationer against his state prison sentence for the time served by him in a county jail during probation. This provision was deleted by the legislature in 1935. See In re Hays, 120 Cal.App.2d 308, 260 P.2d 1030. As this was prior to petitioner's original judgment of conviction, no "ex post facto" question is presented.

[6] Petitioner contends that the legislature has no power under our state constitution to enact sections 1168 and 3020 of the Penal Code, and that these sections violate the constitutional provision for division of governmental powers. Art. III, § 1, State Const. In In re Lee, 177 Cal. 690, 171 P. 958, it was held that Section 1168 was not a delegation of either legislative or judicial authority to the Board of Prison Directors. Section 1168 at that time provided that the court in imposing a sentence to the state prison "shall not fix the term or duration of the period of imprisonment"; that the period of confinement shall not exceed the maximum or be less than the minimum term of imprisonment provided by law for the public offense of which such person was convicted; that the governing authority of the prison, or any board hereafter given authority so to do, shall determine after the expiration of the minimum term of imprisonment has expired, what length of time, if any, such person shall be confined; and that if it be determined that such person be released before the expiration of the maximum period for which he is sentenced, he shall be released at such time as the governing board or other authority may determine. Section 3020 of the Penal Code [1941] now contains some provisions formerly in Section 1168, and states the power of the Adult Authority (which replaces the former

"board") to determine and redetermine after the expiration of six months from the actual commencement of imprisonment what length of time, if any, a convicted person should be imprisoned. Section 1168 and similar statutes adopted by other states have been uniformly held to be in legal effect a sentence for the maximum term and therefore not void for uncertainty. 15 Am.Jur. 169.

[7] The pronouncing of sentence is a judicial act. The punishment which the sentence pronounces comes from the law itself and is established or provided for by the legislature. The act does not confer upon the Adult Authority the right to determine the punishment that any given crime shall bear. The legislature has prescribed the minimum time for first degree burglary, "by imprisonment in the State prison for not less than five years", § 461, Penal Code, subd. 1, but not the maximum; the maximum time is therefore regarded as being for life, § 671, Penal Code; People v. Wells, 33 Cal.2d 330, 335, 202 P.2d 53. The time prescribed by law for second degree burglary is "in the State prison for not less than one year or more than fifteen years." § 461, subd. 2, Penal Code. In sentencing petitioner "for the term prescribed by law" the Los Angeles court therefore sentenced petitioner to a term from five years to life; the San Francisco court sentenced him to a one to five year term.

Petitioner contends that the indeterminate sentence law subjects him to an arbitrary punishment at the uncontrolled discretion of the Adult Authority. However, no abuse of discretion or arbitrary action on the part of the Authority has been alleged.

[8] The contention that the indeterminate sentence law deprives petitioner of due process of law is likewise without merit. It has been held that the due process of law guaranteed by the Fourteenth Amendment is not infringed by the decision of a state court asserting the validity of an indeterminate sentence law. Dreyer v. Illinois, 187 U.S. 71, 23 S.Ct. 28, 47 L.Ed. 79; See Ughbanks v. Armstrong, 208 U.S. 481, 28 S.Ct. 372, 52 L.Ed. 582; In re Smith, 33 Cal.2d 797, at page 804, 205 P.2d 662.

For the reasons above stated the order to show cause heretofore issued is discharged and the application for the writ of habeas corpus is denied.

GIBSON, C. J., and CARTER, TRAYNOR and SPENCE, JJ., concur.

SCHAUER, J., concurs in the judgment.

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133 Cal.App.2d 214

Henry C. HICKS, Plaintiff and Appellant,

v.

CITY OF LOS ANGELES, a municipal corporation; the Board of Civil Service Commissioners of said city, et al., Defendants and Respondents.

Civ. 20898.

District Court of Appeal, Second District, Division 2, California.

May 24, 1955.

Rehearing Denied June 8, 1955.

Hearing Denied July 20, 1955.

Action brought by discharged municipal employee to have set aside the order removing him from his position. The Superior Court, Los Angeles County, James G. Whyte, J., entered a judgment of dismissal, and plaintiff appealed. The District Court of Appeal, Fox, J., held, inter alia, that the plaintiff had been guilty of laches.

Affirmed.

1. Municipal Corporations 🔑192

Where city charter gave Los Angeles Civil Service Commission authority to reevaluate evidence in examiner's report and to modify his findings or reject them and make other findings and draw its own conclusions, court, in which it was sought to have set aside commission order removing plaintiff from position of building operating engineer, would have to presume, in absence of any allegation to contrary, that commission had made appropriate examination of examiner's written report. West's Ann.Code Civ.Proc. § 1963, subd. 15.

2. Municipal Corporations ⚷192

Where city charter gave Los Angeles Civil Service Commission authority to re-evaluate evidence in examiner's report and to modify his findings or reject them and make other findings and draw its own conclusions, the commission's order removing individual from position of building operating engineer could not be successfully attacked on grounds that commission had practiced an "extrinsic fraud" on individual by substituting its conclusion for examiner's findings, even though commission failed to keep its record precisely accurate by showing that the conclusion was its own rather than that of the examiner. West's Ann.Code Civ.Proc. § 1963, subd. 15.

3. Municipal Corporations ⚷218(9)

Considerations of public policy require that an employee of a public body who claims to have been improperly or illegally discharged must act with utmost diligence in asserting his rights.

4. Municipal Corporations ⚷218(9)

Where plaintiff had delayed for period of two years and two months, after order discharging him from municipal employment had been sustained by Los Angeles Civil Service Commission, before filing his complaint to have removal order set aside, his complaint was vulnerable to defense of laches.

5. Municipal Corporations ⚷218(11)

Failure to file demand for reinstatement within 90 days after discharge from municipal employment, as required by Los Angeles City Charter, constituted bar to action to compel reinstatement, absent any adequate excuse.

6. Constitutional Law ⚷205(1), 238(1)
Municipal Corporations ⚷218(11)

Los Angeles charter provision requiring that demand for reinstatement be made as prerequisite to any action to compel such reinstatement applies to all civil service employees of city and is therefore not violative of federal or state constitutions for discrimination or denial of equal protection of laws. U.S.C.A.Const. Amend. 14; Const. art. 1, § 21.

7. Municipal Corporations ⚷218(9)

Discharged city employee's explanation, of delay in instituting suit to set aside removal order, that he had been making complete investigation of records and proceedings of commission in his case and law pertaining thereto was conclusory and wholly insufficient to explain delay.

8. Evidence ⚷83(1)

In absence of allegation that action of Civil Service Commission, of which discharged municipal employee complained, had not been recorded in its minutes or that it had in any way been concealed from him, it would have to be presumed, since removal proceeding was an official act of that body, that it had been recorded in its minutes.

9. Equity ⚷70
Evidence ⚷66

A party is presumed to know whatever he might with reasonable diligence have discovered; and when fundamental facts upon which an alleged fraud rests are matters of public record, open to his inspection, ignorance of fraud will not excuse his laches.

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Cryer & Jones, George E. Cryer, R. Alston Jones, Los Angeles, for appellant.

Roger Arnebergh, City Atty., Bourke Jones, Asst. City Atty., George William Adams and John F. Feldmeier, Deputy City Attys., Los Angeles, for respondents.

FOX, Justice.

Plaintiff appeals from a judgment of dismissal after defendants' demurrer to his third amended complaint was sustained without leave to amend in a proceeding entitled "Action in Equity, to Vacate, Annul and Set Aside Final Order of Civil Service Commission of the City of Los Angeles Sustaining Charges against Plaintiff and Removing Him from his Position, on the Ground that said Order was Obtained by Extrinsic Fraud."

Briefly stated, the alleged facts are that defendant Board of Public Works, on November 30, 1951, discharged plaintiff from the position of building operating engineer in the department of public works on the following charge: "Unsatisfactory performance of duties in that he permitted the water in the boiler to get so low that the gas automatically shut off, thereby cutting off steam in laundry and kitchen, and it was twenty-five minutes after power shut-off before Hicks heard the alarm. A failure of the automatic controls would have jeopardized the entire plant. He was adjudged at fault in a similar incident in 1948."

Plaintiff, pursuant to section 112(a) of the Charter of the City of Los Angeles, filed a demand with the Civil Service Commission for a hearing on said charge. A hearing was held by a hearing examiner appointed by the Commission. Thereafter the examiner prepared and filed with the commission a report on the hearing containing findings and a recommendation that plaintiff's discharge be sustained. On April 15, 1952, the Civil Service Commission entered an order sustaining the discharge.

The hearing examiner's report is not pleaded or attached as an exhibit. The amended complaint does not contain any allegation that the evidence was insufficient to support the hearing examiner's report and recommendation that the discharge be sustained or to support the action of the commission in sustaining the discharge.

The sole allegation upon which plaintiff bases his claim of extrinsic fraud is that the Civil Service Commission eliminated from the hearing examiner's report the "Findings" contained therein and substituted in place thereof its own "Conclusion." The findings of the examiner read as follows:

"Mr. Hicks was not suspended in 1948 for an incident in the boiler room *which caused a fire*. His superior testified he tried to give him another chance.

"With respect to the October 13, 1951 incident: Just why Mr. Hicks did not hear the alarm that the gas was off, is not for us to decide. Mr. Hiser, the cook, testified he heard the whistle when he went down to the boiler room to see why there was no steam at 5:30 a. m. The fact remains that Mr. Hicks testified he did not hear the alarm.

"The water in the boiler was low, whether from a defective float or not; the steam was shut off from approximately 5:30 to 7:00 a. m. and the entire plant was jeopardized." The recommendation was: "Your hearing examiner recommends that the discharge be sustained."

After submission of the report the commission deleted said findings and without having heard or received any evidence relative to the charges against plaintiff adopted and inserted in said report the following:

"From the evidence your hearing examiner concludes that the fuel shut-off and the resulting cutting off of steam to the laundry and kitchen on October 13, 1951, occurred because of the failure of Mr. Hicks to perform his duties in a satisfactory manner. If he had been attending to his duties properly, the incident would not have occurred. If the automatic controls had failed to function, the entire plant would have been jeopardized."

The amended complaint alleges that the commission "well knew" when it inserted this conclusion that the hearing examiner had not so found or concluded, and that the statement was inserted for the purpose of making it appear that the hearing examiner had found from the evidence the facts which the said Civil Service Commission regarded as necessary to support an order sustaining the charge against plaintiff; that the hearing examiner had not made the findings or conclusion set forth in the report as adopted by the commission.

It was not until April 5, 1954, or almost two years after the date of the Civil Service Commission order sustaining the discharge, that plaintiff filed his demand for reinstatement with that commission and a claim for compensation with the City Clerk. He filed his original complaint herein on June 17, 1954.

[1, 2] Section 89 of the City Charter authorizes the appointment of a hearing

examiner to conduct hearings and take evidence, and to submit his written report giving his conclusions and recommendations. It provides in subdivision (c) that the commission "may adopt, reject *or modify* the report of any examiner in whole or in part, *or may reconsider the matter in whole or in part*: * * *" (Italics added.) Under this Charter provision it is clear that the commission had authority to re-evaluate the evidence in the examiner's report and to "modify" his findings or "reject" them and make other findings and draw its own conclusions. In so doing we must presume, in the absence of any allegation to the contrary, that the commission made appropriate examination of the examiner's written report. Code Civ.Proc. § 1963(15): Pacific Indem. Co. v. Industrial Acc. Comm., 28 Cal.2d 329, 339, 170 P.2d 18. While it would have kept the record more precisely accurate if the commission had shown that the "Conclusion" was its own rather than attribute it to the examiner, plaintiff was not prejudiced by such procedure. While it is true that the "Conclusion" is expressed in somewhat different language from that of the findings of the examiner, it is essentially of similar import and reaches the same result. From the examiner's recommendation it is clear he concluded that plaintiff was at fault and that the evidence sustained the charge against him. The "Conclusion" simply expressed the same idea in more succinct and appropriate language. There is no showing that the evidence in the examiner's report was not sufficient to justify either the examiner's recommendation or the commission's "Conclusion." It is patently farfetched, therefore, to contend that an administrative tribunal, charged with the final responsibility of decision, practiced an "extrinsic fraud" on plaintiff by substituting its "Conclusion" for the examiner's findings. There is nothing repugnant to any constitutional or equitable concept in such procedure. The City Charter (section 89) on its very face provides the agency with authority to do this very thing.

The Supreme Court had an analogous situation before it in National Automobile & Casualty Ins. Co. v. Industrial Acc. Comm., 34 Cal.2d 20, 206 P.2d 841, 846. There the Industrial Accident Commission made a determination contrary to that of the referee although, as here, it did not hear the testimony or observe the witnesses but, also as here, relied on the record. Labor Code, section 5315 then provided that "'Upon the filing of the report of the referee, the commission may confirm, adopt, modify, or set aside the same, or any part thereof and may, with or without further proceedings, and with or without notice, enter its order, findings, decision, or award based in whole or in part upon the report of the referee, or upon the record in the case.'" It will be observed that while the authority there conferred on the Industrial Accident Commission with respect to the report of its referee is spelled out in greater detail, it is nevertheless basically the same as that conferred on the city commissions by section 89(c) of the Charter relative to their examiner's reports. At page 28 of the last cited case, 34 Cal.2d, at page 845 of 206 P.2d, the court stated that "* * * the commission may make a factual determination contrary to that of a referee although the testimony is conflicting and it did not itself hear the testimony or observe the witnesses, but did examine the evidence and record." At page 29 of 34 Cal.2d, at page 846 of 206 P.2d, the court pointed out that pursuant to the provisions of the Labor Code it had held in Pacific Indem. Co. v. Industrial Acc. Comm., supra, that "it was proper for the commission to grant a rehearing although the hearing referee recommended against it, and to direct him to reach a different result when he still entertained different views on the sufficiency of the evidence." These authorities sustain, a fortiori, the right of the Civil Service Commission to take the action it did, in view of the authority conferred by the charter provision, relieved of any taint of fraudulent conduct. For whether the commission's order was based solely on its adoption *in toto* of the examiner's report or upon its own modification of some phase of that report after a review of the record, plaintiff had a right to redress under section 112½ of the City Charter if he felt his dismissal was unjustified. As will appear, plaintiff slept on that right. Having belatedly awakened, he cannot now recrudesce his rights by the transparent device of characterizing as extrinsic fraud the commission's legitimate exercise of the discretionary authority vested in it.

Laches

[3, 4] "Considerations of public policy require that an employee of a public body who claims to have been improperly or illegally discharged must act with utmost diligence in asserting his rights." Jones v. City of Los Angeles, 120 Cal.App.2d 858, 859, 861, 262 P.2d 37, 39; Campbell v. City of Los Angeles, 47 Cal.App.2d 310, 315, 117 P.2d 901. In Hayman v. City of Los Angeles, 17 Cal.App.2d 674, 62 P.2d 1047, where there was a delay of nine months in filing suit, during which time plaintiff had attempted to obtain reinstatement to his position by negotiation, the court stated, 17 Cal.App.2d at page 680, 62 P.2d at page 1050: "It is to be presumed that, where one has been dismissed from an active position in the public service, some one else has been chosen to take his place. The work has to be done and it has to be paid for." See, also, to the same effect, Pacheco v. Clark, 44 Cal. App.2d 147, 151, 112 P.2d 67, and Newbury v. Civil Service Comm., 42 Cal.App. 2d 258, 261, 108 P.2d 745. In the Campbell case, supra, it is said "Unless facts be alleged which constitute a sound excuse for a delay of 15 months, such delay in commencing the action is absolutely indefensible" and deprives "petitioner of all rights to equitable consideration." 47 Cal.App.2d at page 315, 117 P.2d at page 904.

Here plaintiff delayed for a period of two years and two months after his discharge was sustained by the Civil Service Commission on April 15, 1952, before filing his original complaint. He states he received notice of the commission's order sustaining his discharge. He does not allege that there was any delay in the transmission of such notice. His complaint contains no allegation that during this period of two years and two months he had been encouraged to believe that he would be reinstated or that he was dissuaded from resorting to legal action by any promises or conduct of the defendants. It is apparent, therefore, that under the foregoing principles and authorities the third amended complaint is vulnerable on its face to demurrer on the theory of laches, which is one of the grounds relied on by defendants.

Failure to Comply with Section 112½ of the City Charter

[5, 6] The failure of plaintiff to file a demand for reinstatement within 90 days after his discharge, as required by section 112½ of the City Charter[1] constitutes a bar to any action to compel reinstatement in the absence of an adequate excuse therefor. Plaintiff brings himself squarely within the provisions of the foregoing Charter provision. He claims that his discharge was unlawful and prays that he be restored to his position and that he recover full back-salary to the date of his restora-

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[1] Section 112½ of the Los Angeles City Charter provides:

"Whenever it is claimed by any person that he has been unlawfully suspended, laid off or discharged, and that such lay-off, suspension or discharge is ineffective for any reason, any claim for compensation must be made and a demand for reinstatement must be presented in writing within ninety days following the date on which it is claimed that such person was first illegally, wrongfully or invalidly laid off, suspended or discharged. Such demand for reinstatement must be filed with the Board of Civil Service Commissioners and such claim for compensation for such allegedly wrongful, illegal or erroneous discharge must be filed with the City Clerk. Failure to file such demand for reinstatement within the time herein specified shall be a bar to any action to compel such reinstatement and proof of filing such a demand for reinstatement must be completed and proved a condition precedent to the maintenance of any action for reinstatement. Proof of filing the claim for compensation within the time and in the manner herein specified shall be a condition precedent to any recovery of wages or salary claimed to be due on account of said lay-off, suspension or discharge. Except as herein specified, such claims for compensation shall conform to the requirements of Sections 363, 369 and 376 of this charter."

tion to duty. But it appears by his amended complaint that his demand for reinstatement and his claim for salary were not filed until almost two years after the final action of the Civil Service Commission sustaining his discharge. Hence, his failure to file within the period of 90 days specified in section 112½ of the Charter constitutes on its face a bar to this action. Moreno v. Cairns, 20 Cal.2d 531, 536, 127 P.2d 914; Temple v. Horrall, 92 Cal.App. 2d 177, 179, 206 P.2d 909; Varela v. Board of Pol. Comm'rs., 107 Cal.App.2d 816, 822, 238 P.2d 62; Tennant v. Civil Service Comm., 77 Cal.App.2d 489, 494–496, 175 P.2d 568.

In an attempt to excuse his failure to comply with section 112½ of the Charter plaintiff asserts that the section violates the 14th Amendment of the United States Constitution and Article 1, section 21, of the Constitution of California, on the ground that it does not apply to all employees in the classified service of the city and consequently discriminates against plaintiff and every member of a large group of Civil Service employees and denies to them the equal protection of the law. Specifically, he asserts that only employees who are "subject to trial by the Civil Service Commission for misconduct in their positions" must file a demand for reinstatement within 90 days and that firemen and policemen who are removed under sections 135 and 202 of the Charter are not required to do so.

The argument that section 112½ is discriminatory and unconstitutional for the reasons stated by plaintiff is completely answered by the recent decision in Stoker v. Bowron, 129 Cal.App.2d 671, 277 P.2d 439 (hear. den.) where it was held that the section does apply to all civil service employees of the city, including firemen and policemen. To the same effect see the Moreno, Temple and Varela cases, supra, in all of which it was held that section 112½ applied to firemen and policemen of the city of Los Angeles.

The failure of plaintiff to file claims as required by sections 112½ of the City Charter constitutes a bar to his recovery of any back salary in the absence of facts excusing his failure to comply therewith. Section 112½ quoted in the footnote, *infra*, specifically requires proof of filing a claim for compensation within 90 days as a condition precedent to any recovery of wages or salary claimed to be due on account of any discharge.

Plaintiff's Excuse for his Delay

[7–9] In an attempt to excuse and explain his long delay in seeking judicial relief, plaintiff alleges, in substance, that he is a man of advanced years and that the impact upon him of notice of the action of the Civil Service Commission in removing him from his position was severe, since it involved not only the loss of his salary and means of livelihood, but also his pension rights; that while he had no information relative to the legality of his discharge, and while he was not in possession of any facts upon which he could base a claim that the action of the commission in discharging him was unlawful, and while he did not at that time make any such claim, nevertheless, he resolved to and did cause to be made a full, complete and thorough investigation of the records and proceedings of the commission in his case and of the law pertaining thereto. He does not, however, specify the date on which he commenced his investigation but the fact remains that a period of approximately two years elapsed after his discharge was sustained on April 15, 1952, before he finally filed his demand for reinstatement and his claim for salary.

In Jones v. City of Los Angeles, supra, 120 Cal.App.2d at page 862, 262 P.2d at page 39 this court, after referring to a similar allegation, to wit, that the petitioner and his attorneys had been " 'diligently' working on and preparing his petition and gathering necessary data therefor," said: "This allegation is merely a conclusion and wholly insufficient to explain or excuse petitioner's long delays for it is completely devoid of any factual support."

That the reasons advanced by the plaintiff to excuse or explain his delay are wholly insufficient is made crystal clear by reference to charter provisions requiring the

Civil Service Commission to maintain a public record of its official acts. In the first place, it is obvious that the commission was exercising powers conferred upon it by the Charter when it sustained the plaintiff's discharge after a hearing pursuant to section 112(a) and when it was called upon to "adopt, reject or modify" the hearing examiner's report pursuant to section 89(c). In the second place, the commission was required to record these official acts in its minutes in conformity with the provisions of section 76 of the Charter.[2] It is significant that plaintiff has not alleged that the action of the Civil Service Commission of which he complains was not recorded in its minutes or that it was in any way concealed from him. In the absence of such an allegation it must be presumed, since it was an official act of that body, that it was recorded in its minutes. Nilsson v. State Personnel Board, 25 Cal.App.2d 699, 704, 78 P.2d 467; Code Civ.Proc. § 1963(15).

In such circumstances a party is presumed to know whatever he might, with reasonable diligence, have discovered; and when the fundamental facts upon which his alleged cause of action rests are matters of public record, open to his inspection, ignorance of such facts will not excuse his laches. Hecht v. Slaney, 72 Cal. 363, 367, 14 P. 88; Lady Washington Consol. Co. v. Wood, 113 Cal. 482, 487, 45 P. 809; Hildreth v. James, 109 Cal. 301, 303, 41 P. 1039.

It follows, therefore, that plaintiff's explanation is wholly insufficient to excuse his delay in seeking judicial relief. Whether or not he knew of the alleged substitution of the commission's "Conclusion" for the "Findings" of the hearing examiner, he, like all other members of the public, had the means of knowledge and he must be held to have known what he could have ascertained by the exercise of only such diligence as would have been required to walk into the office of the Civil Service Commission and inspect its minutes.

The judgment is affirmed. The purported appeal from the order sustaining defendants' demurrer without leave to amend is dismissed.

McCOMB, Acting P. J., concurs.

Hearing denied; CARTER, J., dissenting.

133 Cal.App.2d 250

Rajo Jack DE SOTO, Plaintiff and Appellant,

v.

Ruth King DE SOTO, Defendant and Respondent.

Civ. 20633.

District Court of Appeal, Second District, Division 3, California.

May 25, 1955.

Husband's action for divorce. Wife cross-complained for divorce. The Superior Court, Los Angeles County, Arthur Crum, J., gave judgment for wife. Husband appealed. The District Court of Appeal, Parker Wood, J., held that where wife's cross-complaint alleged that home was community property, and asked that it be apportioned between the parties and for all proper relief, and husband, in his amended complaint, alleged that home was held in joint tenancy upon certain conditions, and property was his separate property, an issue was presented as to nature and character of the property, and declaration of court that property was joint tenancy property was not beyond scope of pleadings or prayers and was within jurisdiction of court.

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[2] Section 76 of the Charter (Stats.1925, p. 1057) reads:

"The powers conferred by this charter upon each of the boards shall be exercised by order or resolution adopted by a majority of its members and recorded in the minutes with the ayes and noes at length. Such action shall be attested by the signatures of the President or Vice-President, or two members of the board, and by the signature of the Secretary of the board."

Judgment affirmed.

1. Husband and Wife ⚷266

In husband's action for divorce there was no evidence to support allegation that wife by exercise of undue influence had prevailed upon husband to change his separate property to community property.

2. Divorce ⚷249(3)

In husband's action for divorce, where wife counterclaimed for divorce, and record title showed that property was held in joint tenancy, but husband contended that property was actually his separate property, court had jurisdiction to determine that property was joint tenancy property, and declaration to that effect was not an award of separate property of either spouse to the other spouse.

3. Divorce ⚷203

Where wife's cross-complaint in husband's divorce action alleged that home was community property and prayed that it be apportioned between parties, and husband's amended complaint alleged that property was held in joint tenancy upon a certain condition and was his separate property, pleadings presented issue as to nature and character of property and court's declaration that property was joint tenancy property was proper.

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Gladys Towles Root and Joseph M. Rosen, Los Angeles, for appellant.

James M. Coleman and Sam S. Silverstein, Los Angeles, for respondent.

PARKER WOOD, Justice.

In this divorce action, commenced by the husband, the wife obtained an interlocutory decree upon her cross-complaint which alleged extreme cruelty. The husband appeals and contends only that the court erred in ordering that certain real property (house and lot) be held in joint tenancy by the parties hereto.

Plaintiff alleged in his complaint that the property was his separate property. Defendant alleged in her cross-complaint that it was community property.

The parties were married in August, 1949. They separated in January, 1953. Plaintiff purchased the property in 1933 and paid for it before the marriage. About three months after the marriage there was a discussion about the real property.

Respondent (wife) testified that the house needed to be repaired and remodeled; she was working and was willing to help in getting those things done; she told appellant that she would help if she had some security; he replied that he would put her name on the deed, that he would put the property in both names, community property; she paid for the venetian blinds, linoleum, bathtub, and part of the bill for stuccoing the house; she paid approximately $1,000 for improvements on the house.

On November 2, 1949, appellant made a deed conveying the property to himself and respondent as joint tenants.

Appellant testified that about one month after the marriage respondent asked him to put the property in her name and his name; he made no reply; about one month later he said that he would put the property in both names on condition that the "place will always stay as it is and it will never be broken up in case there is a misunderstanding between" them; he said further that due to the dangerous business he was in, automobile racing, he wanted to protect her in case anything happened to him. In response to a question as to whether anything was said about putting in the deed "joint tenancy or community property," he said: "Well, joint tenancy, I guess." He testified further that he went with her to have the deed made, and the property was put in joint tenancy.

[1,2] Appellant argues that the court did not have jurisdiction to determine that the character of the property was other than separate or community, and it did not have jurisdiction to determine that it was held in joint tenancy; that since a court, in a divorce action, does not have jurisdiction to award the separate prop-

erty of one party to the other party, the ruling herein that the property was held in joint tenancy was erroneous because it was in effect the making of an award of separate property. It is not disputed that the fact is that the title to the property stands of record in the names of the parties as joint tenants. Although plaintiff alleged in his amended complaint that defendant by the exercise of undue influence "prevailed upon plaintiff to change the property to community property," he introduced no evidence in support of such allegation, and the evidence does not support the allegation. Evidence was received regarding the circumstances surrounding the execution of the deed. Under the evidence here, the court was not required to find that even though the record title to the property was in joint tenancy the property was in fact the separate property of plaintiff or the community property of the parties. The judge, in rendering his oral decision at the close of the trial, said: "I am simply going to hold that the property is now vested in joint tenancy in these two parties. It is not community property. * * * The property evidenced by the deed, Plaintiff's Exhibit A, is held by the parties in joint tenancy and is not community property. The community personal property is awarded to the Plaintiff but he is to pay Defendant $100 for her share thereof." The formal written decree stated, in part, that it is adjudged "cross-complainant is entitled to a decree of divorce from the cross-defendant * * * that * * * cross-defendant be entitled to all of the personal community property; that * * cross-defendant pay to * * * cross-complainant One Hundred Dollars ($100.-00); that the real property described * * be held in joint tenancy by the parties hereto." In Siberell v. Siberell, 214 Cal. 767, at page 773, 7 P.2d 1003, at page 1005, it was said: "A joint tenancy is one estate, and in it the rights of the spouses are identical and coextensive." Where spouses hold the title to property in joint tenancy each one "is the owner of an undivided one-half interest therein in his separate right." Barba v. Barba, 103 Cal.App.2d 395, 396, 229 P.2d 465, 466. In a divorce action, "the court is not authorized to assign the separate property of one of the spouses to the other". Fox v. Fox, 18 Cal.2d 645, 646, 117 P.2d 325, 326. In the present case the court did not assign or make an award of the real property. An issue was presented as to the nature or character of that property, and the court made a declaration, in accordance with the uncontroverted record title, to the effect that the property was held in joint tenancy. No separate property of either spouse was awarded to the other spouse. It has been determined in some divorce cases that property was held in joint tenancy. See: Searles v. Searles, 99 Cal.App.2d 869, 229 P.2d 938; Barba v. Barba, 103 Cal.App.2d 395, 229 P.2d 465; Jenkins v. Jenkins, 110 Cal.App.2d 663, 664, 243 P.2d 79. The court had jurisdiction to determine that the property was joint tenancy property.

[3] Appellant also argues that the court ordered relief which was beyond the scope of the pleadings and the prayer of the cross-complaint. He refers (1) to the allegations of the cross-complaint wherein respondent alleged that the property was community property, and (2) to the prayer wherein she asked that the community property be apportioned between the parties. He argues further that since the court declared "it to be joint tenancy property," the court granted relief that was inconsistent with and beyond the scope of the pleadings and prayer. It is to be noted that the prayer of the cross-complaint was also "For all proper relief." Appellant alleged in his amended complaint that the property was held in joint tenancy upon a certain condition and that the property was his separate property. As above stated, the pleadings presented the issue as to the nature and character of the property. The declaration of the court that the property was joint tenancy property was not beyond the scope of the pleadings or the prayers.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

133 Cal.App.2d 367

Morris PIZER, individually and as International President and William Gilbert, individually and as International Representative of and Members and representatives of the members of the United Furniture Workers of America, a voluntary unincorporated association, Alex O. Rivera, Frank Jones, George B. Tripp, Frances Carr, Chris Lagutaris, and Ethel Kiggins, individually and as members of and representatives of the members of Local Union 576, United Furniture Workers of America, CIO, a voluntary, unincorporated association, Plaintiffs, Cross-Defendants and Respondents,

v.

Gus O. BROWN and Oscar Castro, individually and as Business Agents of Local Union 576, United Furniture Workers of America, CIO, a voluntary unincorporated association; Ernest Marsh and Henry B. Holmes, individually and as organizers of Local Union 576, United Furniture Workers of America, CIO, a voluntary, unincorporated association; Kruger Clark, Lawrence Turner, Jacob Lehman, Sol Steinhardt, Dan Quijarda, Peter Beekes, Louisa Tocci, Mark Robinson, Joe N. Oliver, and Robert Burri, individually and as officers and agents of Local Union 576, United Furniture Workers of America, CIO, a voluntary unincorporated association, Furniture Workers, Upholsterers and Wood Workers Union, Local 576 (Independent), a voluntary unincorporated association; Louis Cota, Jr., individually and as President thereof, Guillermo Navarros, individually and as Financial Secretary thereof; Henry Mobley, individually and as Treasurer thereof; Doe One Bank to Doe Five Bank, inclusive, Defendants, Cross-Complainants, Appellants,

Brown-Saltman Furniture Company, Hollycraft Furniture, Inc., J. Isenberg & Sons, Inc., and Blockson & Co., Defendants and Cross-Defendants and Respondents.

Civ. 20224.

District Court of Appeal, Second District, Division 2, California.

May 31, 1955.

Rehearing Denied June 16, 1955.

Hearing Denied July 27, 1955.

Action to enjoin the officers of a local union from disbursing and concealing funds and to prevent their use of the property of such local. A preliminary injunction was granted and judgment was rendered for plaintiff in the Superior Court, Los Angeles County, Joseph W. Vickers, J., and the defendants appealed. The District Court of Appeal, Moore, P. J., held that where the International chartered a new local union for the purpose of absorbing the anticommunist members of the old union and preserving their membership to the International, there was no breach of contract by the International under the Constitution, that the International had the better title to the property of a disbanded union, that there were no reversible trial errors, and that the International did not appear before the trial court with unclean hands.

Judgment affirmed.

1. Labor Relations 🔑147

The International Union has a better title to the property of a disbanded union than a newly formed independent even though some of the membership might remain therein.

2. Labor Relations 🔑797

Where a new local union was chartered by the International for the purpose of absorbing the anticommunist members of the union and preserving their membership to the International and officers of the original union established an independent union, the International was entitled to an injunction to prevent the newly formed union from disbursing and concealing the funds and appropriating the name of the old union.

3. Labor Relations 🔑142

Where the International chartered a new local union for the purpose of absorbing the anticommunist members of the old local and preserving their membership to the International, and the International's action was necessary in protecting its membership from communistic influences, there was no breach of contract by the International with the local union, where under the Constitution, the individual worker was entitled to be protected from communistic influences of officers of the local union, and it was individual workers of the local to whom the International owed a duty, and not the local as such.

4. Labor Relations ⚷142

Where the International issued a charter to a local union in order to preserve the membership thereof to the CIO from communistic influences and to absorb anticommunist members of the old local, the International by issuing a new charter to local union did not breach its contract with the old union, where it was common practice to have more than one local union in the same area.

5. Labor Relations ⚷797

Where new local union was chartered by the International to absorb the anticommunist members of the old local and to preserve their membership to the International, trial court did not err in enjoining the use of the name of the old union by the new independent union, and in preserving the name as property to the International, in view that the name was the property of the International and a likelihood of confusion in use of similar names.

6. Appeal and Error ⚷1056(4)

Excluding purported statement of International union officer made in 1948 that the International was obligated to the local union to help it retain its membership was not prejudicial in view of finding that one of the main purposes of the International's action chartering a new union was to preserve the local membership of the union to the International and prevent their defection to a rival organization.

7. Appeal and Error ⚷1170(1)

Burden rests on the complaining party to show not only error but error which is sufficient to justify a reversal. West's Ann. Const. art. 6, § 4½.

8. Labor Relations ⚷991

In suit to enjoin local union from disbursing and concealing funds, action of the trial court on accounting in charging defendants for uncollected receivables, refund of wage deductions, legal retainers, interest and expenses was not improper on the ground that such amounts were unliquidated where defendant had the use of the money and the claims of the plaintiff were capable of being made certain by calculations within meaning of the statute. West's Ann.Civ. Code, § 3287.

9. Labor Relations ⚷991

In action to enjoin local union from disbursing and concealing funds where the only necessity for an accounting was the result of the defendants' failure properly to account for the funds allegedly converted, defendants were not entitled to complain that the trial judge improperly charged them for uncollected accounts receivable, refund of wage reductions, legal retainers, interest and expenses. West's Ann.Civ. Code, § 3287.

10. Appeal and Error ⚷1010(1)

In action to enjoin union from disbursing and concealing funds where it could be ascertained from the record that there was no miscarriage of justice in the accounting record, the Appellate Court would uphold the findings of the trial court.

11. Equity ⚷65(1)

In action by the International Union to enjoin the officers of a local union from disbursing and concealing funds and to prevent local union use of the property, relief was not to be denied International on the ground that it came into court with unclean hands.

Margolis, McTernan & Branton, Los Angeles, for appellants.

Wirin, Rissman & Okrand, Robert R. Rissman, Los Angeles, for respondents.

MOORE, Presiding Justice.

Respondents sued appellants to enjoin the officers of appellant, independent Union 576, from disbursing and concealing the funds of Local 576, CIO, and to prevent appellants' use of the property of such Local. The International Union is an unincorporated association and a labor union which exists for the purpose of representing workers in collective bargaining, for establishing wage standards and for improving the economic and social welfare of its members and of working people generally. Local 576 is also an unincorporated voluntary association existing by virtue of a charter issued to it by the International Union. Its purposes are the same as those of the International. Respondents brought the action individually and as officers of the International and as representatives of Local Union 576, United Furniture Workers of America, CIO.

In the latter part of 1949, the Congress of Industrial Organizations (herein called CIO) held a convention in Cleveland, Ohio, where an amendment to their constitution was adopted allowing the CIO Executive Board to expel any International Union "whose policies and activities are consistently directed towards the achievement of the program or the purposes of the Communist Party or other totalitarian movements." In accordance with this new amendment, charges were brought before the executive board of CIO against respondent herein, The United Furniture Workers of America (hereinafter called International) for the purpose of expelling respondent International on the grounds that the International had consistently followed the Communist Party line. Immediately following these charges, the International president, Morris Pizer, publicly announced that he was supporting the CIO policy with the result that the charges by the CIO were deferred until after the forthcoming meeting of the International in June of 1950. After a great deal of debate and inner strife, the International adopted Pizer's resolution endorsing a pro-CIO, anticommunist policy and defeated the opposing resolution that was anti-CIO.

Local Union 576, United Furniture Workers of America, CIO, (herein referred to as Local 576) was chartered by and affiliated with the International. When the national conference of June, 1950 was held, Local 576 sent as its representative to the conference, appellant Gus Brown. He supported and voted for the anti-CIO resolution. The convention delegates voted in favor of the pro-CIO, anticommunist resolution 25,524 to 6,307. Appellant Brown as representative of Local 576 therefore lost. It was assumed by the International that the local unions, as satelites of the International, would abide by the parent organization's decision and remove any Communistic leadership that existed in their respective groups. Such, however, was not the case here and Local 576 continued to follow the policy that had been banished by the International. When the attitude of the leaders of 576 became generally known, its membership began appreciably to decline numerically. Requests were made to the International to issue a new charter. Finally, the regional CIO director informed respondent Pizer that the CIO had rid itself of Communistic leadership in the California State CIO Council and in the Los Angeles CIO Council, and that it was now up to the International to provide some relief to its own members in Los Angeles. A petition was received by Pizer from certain members of 576 stating that the local was no longer able to give the proper protection to its members; that their bargaining power was sacrificed because the local was too easily attacked on the communist issue by the employers; that "its officers have appointed shop stewards against the wishes of the members and have prevented the elected shop stewards from functioning." As the danger of losing its membership to the AF of L was imminent, Pizer as president of the International, with the approval and consent of its General Executive Board, on August 1, 1950, issued a charter to Local 1010, United Furniture Workers of America, in order to preserve the membership of Local 576 to the CIO. This new Local 1010 was chartered for the purpose of absorbing the anticommunist members of Local 576 and preserving their membership to the International. On August 16 the officers of 576 formally established the independent union, also known as 576, herein referred to as "Independent 576." CIO funds of Local 576 were immediately disbursed by the new union as back pay, advance legal fees, prepayments to the accountant, etc. On September 14, 1950, respondents filed the instant action and asked for an injunction to prevent the Independent 576 from disbursing and concealing the funds and from appropriating the name of CIO 576. A preliminary injunction was granted December 26, 1950, substantially complying with plaintiffs' request. Subsequently, the case came to trial resulting in a judgment for plaintiffs. This appeal is from that judgment.

Appellants contend that the trial court erred in finding that there was no breach of contract by the International; that under the local's constitution, the International was obligated to support Local 576; instead of this support, the International attempted to destroy Local 576 by chartering Local 1010 in the same area; that 576 had finally to withdraw from the International to protect itself from destruction although Local 576 actually wished to stay with the International.

Such contention brings us face to face with the principal issue, to wit, whether a group of members of a local union may secede from the parent body and take with it the name, funds, properties and other assets of the original local. It is stipulated by appellants that they violated the constitution in their disaffiliation from the International. They contend however, that the contract had already been breached by the International's conduct, thus relieving appellants of the obligation to follow the constitution. By reason of such stipulation, a complete interpretation of the constitution is unnecessary. Article XXXIX of the local's constitution, section 2, states that so long as seven members continue their affiliation with the International, all property and funds shall remain with the local. If less than seven members continue their affiliation with the local, all property and funds shall revert to the parent organization. Section 3 states that no funds shall be distributed or divided among the members of the local in contemplation of secession or disaffiliation with the International. Findings 6 and 7 declare that the provisions of Article XXXIX were violated.

[1, 2] In a case directly in point, even to the requirement that seven members must remain affiliated for the local to function, it was held that the new independent local was not entitled to the funds or the collective bargaining agreements upon seceding from its parent organization. Morrison v. Majestic Laundry System, Sup., 103 N.Y.S.2d 791, 797; see also Federation of Insurance Employees v. United Office and Professional Workers, 77 R.I. 210, 74 A.2d 446, 449. The law is well settled in this state that the International had a better title to the property of the disbanded union than the newly formed independent even though some of the membership might remain the same. Brown v. Hook, 79 Cal.App.2d 781, 795, 180 P.2d 982.

[3] The trial court found herein that there was no breach of contract on the part of the International, that under the constitution, the individual worker was entitled to be protected from the communistic influence of the officers of the local; that it was the individual workers of the local to whom the International owed a duty and not the local as such. The preamble of the constitution refers to the wage earners and Article III, section 1, reads, "The jurisdiction of the United Furniture Workers of America shall consist of *all workers* employed in or about the plants." Appellants' authorities are distinguished on their facts. Local 1140, United Electrical, Radio and Machine Workers v. United Electrical, Radio and Machine Workers, 232 Minn. 217, 45 N.W.2d 408, 23 A.L.R.2d 1197. In the case at bar, the International was not expelled from the CIO and there was no question about the direct relationship of Local 576 to the CIO. Even if the situation were such as to present the question of affiliation with the CIO through the parent International, appellants' contentions are answered by Seslar v. Union Local 901 Inc., D.C., 87 F.Supp. 447, 450 which held that the only contact the local has with the CIO is through the International. Respondents' action was reasonable, legal and necessary in protecting its membership from the communistic influence which, the local's membership felt, was discouraging the acquisition of new members and was, itself, misrepresenting Local 576. It has been held that the Communist party seeks its members especially in the labor unions in which it can compel employers to accept and retain its members. Black v. Cutter Laboratories, 43 Cal.2d 788, 278 P.2d 905. The trial court was entitled to find from the facts

proved that this was the situation which the International was trying to prevent.

[4] Appellants contend that the International breached its contract by issuing a new charter to 1010 in the territory of 576. It was proved to be common practice to have more than one local in the same area. Examples were Burlington, Vermont, and Jamestown, Buffalo and New York City. Nowhere do appellants specify the section of the constitution that contains such a provision as would restrict an area to one local. The constitution limited the jurisdiction of 576 to furniture workers but did not forbid the International to grant future charters. The trial court held that the International was justified, not in setting up a rival organzation, but in attempting to protect the local's present membership by the means to which it resorted.

[5] Appellants contend that the court erred in enjoining the use of the name "576" to the new independent and in preserving the name as property to the International. In Brown v. Hook, supra, 79 Cal.App.2d at page 796, 180 P.2d at page 991, the court held that the names of the two locals are the same; that the name is the property of the International and that the respondents were entitled to an injunction to protect their right to its exclusive use, because of the "confusion and misleading that must necessarily follow". Ibid, 79 Cal.App.2d at page 800, 180 P.2d at page 993.

Appellants state, "If there was any doubt in the trial Judge's mind about the financial * * * support given to appellant local * * *" such records should have been produced. It is not for this court to surmise upon the possibility of doubt in the mind of the trial judge. Nowhere does it appear in the record that any such doubt prevailed in the making of the findings. They are positive, clear and concise, indicating no vacillation or uncertainty.

[6] Appellants contend that the trial court should have allowed the introduction into evidence of a purported statement of respondent Pizer made in 1948 to the effect that the International was obligated to the local to help it retain its membership. The refusal of the trial court to admit a purported statement made in 1948 under entirely different circumstances and policy could hardly be said to be prejudicial, especially in the light of the finding that one of the main reasons and purposes of the International's action was to preserve the local membership of 576 to the International union and prevent their defection to a rival organization.

[7, 8] Appellants contend that (1) the court erred in ruling as hearsay what was said at the organization of Independent 576 and (2) that it erred in admitting a letter into evidence purportedly signed by appellant Brown. It is not shown how either ruling caused prejudice or influenced the court's determination of the case. In the absence of such showing, this court will not indulge in a lengthy discussion of the trial court's ruling. Although appellants specify numerous alleged errors in the admission and rejection of evidence, "it is considered unnecessary to enumerate them for the reason that error under our law is no longer deemed prejudicial * * *" unless resulting in a miscarriage of justice. Const. § 4½, Art. VI. The burden rests on the complaining party to show not only error but error which is sufficient to justify a reversal. This the appellants have failed to do. Coleman v. Farwell, 206 Cal. 740, 741, 276 P. 335.

[9, 10] Appellants contend that the trial judge committed prejudicial error with respect to the accounting by charging appellants (1) for uncollectable accounts receivable, (2) for refund of wage deductions, (3) for legal retainer, (4) for interest commencing October 6, 1950, and (5) for expenses after August 15, 1950. The basis for these contentions is mainly that the amounts due are unliquidated and therefore uncertain and thus cannot be awarded by the court. In similar circumstances, it was held that although the exact amounts of indebtedness were not known at the time the complaint was filed, this fact did not render a claim unliquidated. Appellant had the use of the money and it would be unjust and inequitable not to charge him with interest from the time the action

was brought. The claims of respondent were capable of being made certain by calculations within the meaning of section 3287, Civil Code. Petersen v. Lyders, 139 Cal.App. 307, 309, 33 P.2d 1032. Furthermore, the only necessity for an accounting was the result of the appellants' failure properly to account for the funds it had converted. Meyers v. Texas Company, 6 Cal.2d 610, 618, 59 P.2d 132. As it can be ascertained from the record that there is no miscarriage of justice in the accounting rendered, we shall uphold the findings of the trial court. Whann v. Doell, 192 Cal. 680, 684, 221 P. 899.

[11] Respondents' action in all respects has been reasonable, legal and necessary and they did not appear before the trial court with unclean hands.

The judgment is affirmed.

McCOMB and FOX, JJ., concur.

Charles KORNOFF and Eleanor Kornoff,
Husband and Wife, Plaintiffs and
Respondents,
v.
KINGSBURG COTTON OIL COMPANY, a
corporation, Defendant and Appellant.
Civ. 4943.

District Court of Appeal, Fourth District, California.

May 25, 1955.

Rehearing Denied June 16, 1955.

Hearing Granted July 20, 1955. [*]

Action for damages to plaintiffs' persons and property arising from operation of defendant's cotton gin. The Superior Court, Fresno County, Phillip Conley, J., entered judgment on verdict for plaintiffs and defendant appealed. The District Court of Appeal, Mussell, J., held that where jury, at previous trial, had determined that plaintiffs suffered no injury to person and trial court had granted, without disturbing this finding, defendant's motion for new trial on issue of damages, instructing jury on second trial that it could include damages for discomfort and annoyance was prejudicial error.

Judgment reversed.

Appeal and Error 🔑1072
New Trial 🔑172

In action for damages to plaintiffs' persons and property arising from operation of defendant's cotton gin, wherein jury, on first trial, had determined that plaintiffs suffered no injury to persons and trial court had granted, without disturbing this finding, defendant's motion for new trial on issue of damages, instructing jury on second trial that it could include damages for discomfort and annoyance was prejudicial error. West's Ann.Code Civ.Proc. § 657.

David S. Davis and Charles Ray Barrett, Fresno, for appellant.

L. Kenneth Say, N. Lindsay South and James C. Janjigian, Fresno, for respondents.

MUSSELL, Justice.

Defendant corporation owns and operates a cotton gin situated on real property at the northeast corner of Belmont and Norton Avenues in Fresno county. This gin was constructed and put in operation by the defendant in September, 1951. Plaintiffs reside on contiguous real property fronting on Madera Avenue, which runs north and south, and their residence is approximately 130 feet from said gin. Plaintiffs also have a planing mill adjoining their residence and said mill is approximately 120 feet from said gin. Plaintiffs' mill and residence were constructed in 1948 and plaintiffs have resided on the property since that year.

On September 4, 1953, plaintiffs filed their first amended complaint herein in which it is alleged, among other things, that in the course of ginning operations conducted by defendants on their property large quantities of fumes, vapors, dust, dirt, sediment, lint and waste materials were emitted into the atmosphere, penetrating into the house and dwelling of plaintiffs and into their shop, covering the same with an offensive, injurious and adhesive coating of dust, lint and ginning waste; that by reason thereof the health of plaintiffs and their family has been impaired, and the house and furniture damaged; that their property had been damaged in the sum of $20,000; and that they had suffered damages to their persons in the sum of $5,000.

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[*] Opinion vacated 288 P.2d 507.

A jury trial resulted in the following verdict:

> "We, the jury in the above entitled action, find for the plaintiffs, Charles Kornoff and Eleanor Kornoff, and against the defendant, Kingsburg Cotton Oil Company, a corporation, and assess the damages to their real property in the sum of $10,000.00.
>
> "But, find that the plaintiff, Charles Kornoff suffered no damage to his person; and
>
> "That plaintiff, Eleanor Kornoff suffered no damage to her person."

Following the entry of judgment on this verdict defendant filed a motion for a new trial upon all the grounds specified in section 657 of the Code of Civil Procedure. The trial court granted this motion "Upon the grounds that the evidence is insufficient to justify the verdict as to the issue of damages only" and granted the defendant a new trial "In respect to the issue of the amount of the damages assessed, and the verdict of the jury is hereby set aside and held for naught in that respect only." It was further ordered that defendant's motion for a new trial upon the other grounds alleged in the motion be denied. No appeal was taken from the order granting the limited new trial and the cause was again tried. At the conclusion of the second trial the jury returned the following verdict:

> "We, the Jury in the above entitled action, assess plaintiffs' damages in the sum of $9541.00; and our verdict is for the plaintiffs, Charles Kornoff and Eleanor Kornoff, husband and wife, and against the defendant, Kingsburg Cotton Oil Company, a corporation, for said amount."

Judgment was entered in accordance with this verdict. Defendant again moved for a new trial. This motion was denied and defendant appeals from the verdict and the judgment thereupon entered for plaintiffs.

It is stated in appellant's opening brief that the pivotal question on this appeal is "What is the proper measure of damages recoverable by plaintiffs in this action as damages to their real property?" In this connection the court instructed the jury as follows:

> "If, under the Court's instructions, you should find that plaintiffs are entitled to a verdict for a sum greater than merely nominal damages, then you shall determine the items of claimed detriment which I am now about to mention, provided you find each of such items to have been suffered by plaintiffs, and provided further that you find each of such items to have been suffered by plaintiffs as the proximate result of the act or acts of trespass complained of:
>
> "1. Such sum as will reasonably compensate the said plaintiffs for the damage to their real property. That sum is equal to the difference in the fair market value of the real property immediately before and after the injury; provided, however, that if the injury has been repaired, or be capable of repair, so as to restore the fair market value of plaintiffs' real property as it existed immediately before the injury, at an expense less than such difference in value, then the measure of damage is the expense of such repair, rather than such difference in value.
>
> "2. Such sum as will reasonably compensate plaintiffs as the owner-occupants of the land, including members of their household, for discomfort and annoyance to them, if any, proximately caused by the act or acts of trespass

> complained of. The amount of damages to be awarded for this element of the injury, if any, is left to the sound judgment and discretion of the jury based upon the evidence, and without the necessity of any witness having given his opinion with respect to the amount of such damages, if any."

Appellant argues that it was error to admit evidence of plaintiffs' "discomfort and annoyance" and in instructing the jury in that regard.

In Alonso v. Hills, 95 Cal.App.2d 778, 787–788, 214 P.2d 50, 57, in an action for damages resulting from blasting operations and for injunctive relief brought by an owner and occupant of land and a dwelling house against the owners and operators of a quarry, the court held that:

> "The recovery for such invasion of his rights in the real property to which the owner-occupant is entitled includes discomfort and annoyance. Restatement, Torts, § 929(c); Judson v. Los Angeles Suburban Gas Co., 157 Cal. 168, 172, 106 P. 581, 21 Ann.Cas. 1247, 26 L.R.A.,N.S., 183; Dauberman v. Grant, 198 Cal. 586, 590, 246 P. 319, 48 A.L.R. 1244; Green v. General Petroleum Corp., 205 Cal. 328, 337, 270 P. 952, 60 A.L.R. 475. Commenting on § 929(c) of the Restatement, supra, reads in part: '*Discomfort and other bodily and mental harms.* Discomfort and annoyance to an occupant of the land and to the members of his household are distinct grounds of compensation for which in ordinary cases the person in possession is allowed to recover in addition to the harm to his proprietary interest.' The same rule with respect to nuisances, under the definition of which blasting as here involved comes, § 3479, Civ.Code, is found in 39 Am.Jur. 398; Baltimore & Potomac R. R. Co. v. Fifth Baptist Church, 108 U.S. 317, 2 S.Ct. 719, 27 L.Ed. 739; United States Smelting Co. v. Sisam, 191 F. 293, 301, 112 C.C.A. 37, 37 L.R.A.,N.S., 976."

The instruction was a correct statement of the law applicable in that case. However, there had not been a previous trial and verdict of a jury, as in the instant case, in which the jury found that the plaintiffs suffered no damages to their persons.

In Karallis v. Shenas, 97 Cal.App.2d 280, 283, 217 P.2d 436, this court held that where there are several issues of fact which are distinct and separable, the court is authorized to grant a new trial as to one issue only, and deny the motion as to all other issues and when such a new trial is granted it opens for examination all the facts and circumstances relative to that one issue and as to other issues there shall be no retrial or examination of the facts. (Citing cases.)

Since in granting the new trial the court specifically limited it "to the issue of the amount of damages assessed" and did not disturb the finding that plaintiffs had suffered no damage to their persons, it was improper to instruct the jury that it could assess damages for "discomfort and annoyance". In the second verdict the jury did not specify what amount was awarded for damages to property and made no segregation of the items of damage. We are unable to determine from the record whether damages were included therein for "discomfort and annoyance" in the total amount assessed. Evidence was admitted, over objection of counsel, as to the discomfort and annoyance of plaintiffs and the jury may have included damages for these items in their verdict in accordance with the court's instruction. We conclude that the questioned instruction was prejudicially erroneous under the circumstances shown by the record and that the judgment should, therefore, be reversed.

In view of our conclusions it is unnecessary to pass upon the other points raised upon this appeal.

The judgment is reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

133 Cal.App.2d 323

In re Rudy BERGMANN, Petra Bergmann and Nancy Bergmann, on habeas corpus.

Cr. 3147.

District Court of Appeal, First District,
Division 1, California.

May 31, 1955.

Habeas corpus proceedings. The District Court of Appeal held that where Michigan court, having jurisdiction of persons and subject matter, had rendered decree granting custody of three children to father and ordering mother to deliver them to father, and where there was no evidence of change of conditions after date of Michigan decree, children would be ordered delivered to father.

Ordered accordingly.

Habeas Corpus 🔑99(1)

In habeas corpus proceedings, where Michigan court, having jurisdiction of persons and subject matter, had rendered decree granting custody of three children to father and ordering mother to deliver them to father, and where there was no evidence of change of conditions after date of Michigan decree, children were ordered delivered to father. U.S.C.A.Const. art. 4, § 1.

◆

Harris & Reinheimer, Frederick S. Reinheimer, San Jose, for petitioners.

Stanley J. Bell, San Francisco, for respondent Geneva Bergmann.

PER CURIAM.

It is the unanimous opinion of this Court that inasmuch as it appears from the record here that on May 13, 1955 the Michigan Court rendered a decree granting custody of the three children to the father, and it ordered the mother to deliver them to the father, and it further appearing that the Michigan Court had jurisdiction of the persons and the subject matter, and it being stipulated that the Respondent has no evidence of any change of conditions occurring between May 13, 1955 and the date of this hearing; under the full faith and credit clause Const.U.S. art. 4, § 1, this Court must order that the children, Rudy Bergmann, Petra Bergmann and Nancy Bergmann be delivered to the petitioner Hermann Bergmann. It is so ordered.

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133 Cal.App.2d 237

CALIFORNIA MOTOR EXPRESS, Limited, a corporation, Plaintiff and Respondent,
v.
STATE BOARD OF EQUALIZATION, Defendant and Appellant.

Civ. 16193.

District Court of Appeal, First District,
Division 2, California.

May 25, 1955.

Rehearing Denied June 24, 1955.

Hearing Denied July 20, 1955.

Suit by motor express company against state board of equalization to determine whether property of express company was to be assessed by board under constitution of California. The Superior Court, City and County of San Francisco, George W. Schonfeld, J., gave judgment for motor express company and state board of equalization appealed. The District Court of Appeal, Draper, J. pro tem., held that motor express company was "stage line" within constitutional provision authorizing state board of equalization to assess "railroad, steamboat, vessel or stage line" property.

Judgment reversed.

1. Constitutional Law 🔑20

Reenactment of constitutional provision which has meaning well established by administrative construction is persuasive that intent was to continue same construction previously recognized and applied.

2. Statutes 🔑219

Contemporaneous and practical construction of statute by those whose duty it is to carry it into effect, plus acquiescence by persons having interest in matter, is sufficient to justify court in resolving any doubt as to meaning of language employed in favor of such long unquestioned interpretation.

3. Constitutional Law ⚷20

Failure of any interested party to challenge state board of equalization's administrative construction of constitutional provision over many years is factor entitled to much weight in judicial determination of provision.

4. Constitutional Law ⚷20

Administrative construction of constitutional provision which is clearly erroneous will not govern interpretation by court.

5. Appeal and Error ⚷1008(1)

In suit by motor express company against state board of equalization, trial court's finding that vehicle hauling only freight was not "stage" in generally accepted and commonly understood meaning of word could only be regarded as one among various sources of information to which District Court of Appeal could resort for the purpose of ascertaining what framers of constitution intended by terms they have employed.

6. Taxation ⚷142

Motor express company which picked up shipments from and delivered them to freight terminal but did not itself transport goods between terminals and which transported only property, not passengers, was "stage line" within constitutional provision authorizing state board of equalization to assess "railroad, steamboat, vessel or stage line" property. West's Ann.Const. art. 13, § 14; Public Utilities Code, § 225.

See publication Words and Phrases, for other judicial constructions and definitions of "Stage Line".

Edmund G. Brown, Atty. Gen., James E. Sabine, Asst. Atty. Gen., Ernest P. Goodman, Deputy Atty. Gen., Eugene B. Jacobs, Deputy Atty. Gen., for appellant.

Norman A. Eisner, Haskell Titchell, San Francisco, Douglas Brookman, San Francisco, for respondent.

DRAPER, Justice pro tem.

This is an action in declaratory relief to determine whether the property of plaintiff express company is to be assessed by defendant State Board of Equalization under section 14 of Article XIII of the Constitution of California. Defendant appeals from judgment for plaintiff.

The applicable portion of the constitutional provision is: "All property, other than franchises, owned or used by * * * (3) companies doing express business on any railroad, steamboat, vessel or stage line in this State * * * shall be assessed annually by the State Board of Equalization, at the actual value of such property."

The trial court held that this provision has no application to Motor Express. Thus the properties of the company would be assessed by the assessors of each of the several political subdivisions in which it has property, rather than by the board on a uniform statewide basis. Neither levy nor collection of the tax is affected by the constitutional provision, which deals only with assessment.

Motor Express is an express corporation as defined in the Public Utilities Code. It arranges for transportation of goods at rates fixed by it, picks up the shipments from and delivers them to its freight terminals, but does not itself transport the goods between terminals. This transportation is performed wholly over truck lines which it does not own or operate. These lines are highway common carriers of property only. None carry passengers.

Motor Express does no business on any railroad, steamboat or vessel. Thus its property is assessable by the state board under the above provision only if the truck lines which carry goods for it are "stage lines". The company argues at length that a "stage line" operates vehicles carrying passengers, with only incidental carriage of baggage and express packages. Vehicles carrying goods only do not, says the company, constitute a stage line.

This argument is bolstered by historical discussion of the nomenclature of transportation in the days of horsedrawn vehicles, and by testimony of three transportation experts as to trade usage of the terms "stage" and "stage line" in California in and near 1910, when Wells Fargo & Co. was the principal express company operating in this state. In our view, however, the meaning which the term had acquired by 1933 is determinative.

Section 14 of Article XIII was added to our constitution in 1910. It then provided for a gross receipts tax, payable to the state, upon many public service businesses, including "companies doing express business on any railroad, steamboat, vessel or stage line in this State."

The evidence is clear that all express companies were taxed under this provision. As automotive equipment came into use in the transportation business, all express companies, including those using automotive highway carriers, were so taxed. No distinction was made between carriers transporting passengers and those transporting property only. There was no protest by any express company so taxed. Motor Express itself was taxed under this provision in 1931, 1933 and 1934, and paid these taxes without protest.

In 1933 an amendment to this section was proposed by the Legislature and adopted by vote of the people. This amendment, which became effective in 1935, repealed the gross receipts tax, returned the physical properties of the affected companies to the tax rolls of the political subdivisions of the state, and provided for assessment of these properties by the State Board of Equalization.

The amendment, as had the 1910 enactment, applied to "companies doing express business on any railroad, steamboat, vessel or stage line."

[1] Reenactment of a provision which has a meaning well established by administrative construction is persuasive that the intent was to continue the same construction previously recognized and applied. Coca-Cola Co. v. State Board of Equalization, 25 Cal.2d 918, 922, 156 P.2d 1; Universal Engineering Co. v. State Board of Equalization, 118 Cal.App.2d 36, 43, 256 P.2d 1059.

Motor Express obviously recognized this principle. In every year since 1935, when the amendment adopted in 1933 became effective, it has been assessed by the board. It paid its taxes under these assessments without protest until 1951, when it made the protest which gave rise to this action.

The record is clear that all express companies have been similarly assessed continuously since 1935. This practice has been applied to express companies whose goods were transported by carriers of property only. In fact, the record shows that few, if any, of the express companies held subject to section 14 (both before and after its amendment) have moved their goods over lines carrying any passengers. Yet the unvarying administrative practice was to hold all express companies subject to the provision, and the unvarying practice of the industry was to accept these administrative rulings without protest.

[2] "* * * (C)ontemporaneous and practical construction of a statute by those whose duty it is to carry it into effect, plus acquiescence by persons having an interest in the matter, is sufficient to justify the court in resolving any doubt as to the meaning of the language employed * * * in favor of such long unquestioned interpretation." Prichard v. Southern Pacific Co., 9 Cal.App.2d 704, 706, 51 P.2d 428, 429; see also People v. Southern Pacific Co., 209 Cal. 578, 290 P. 25.

[3] Failure of any interested party to challenge the board's construction over many years is a factor entitled to much weight. "Not lightly vacated is the verdict of quiescent years." Cardozo, J., in Coler v. Corn Exchange Bank, 250 N.Y. 136, 164 N.E. 882, 884, 65 A.L.R. 879.

[4] Of course, such guides are not conclusive, and a clearly erroneous administrative construction will not govern interpretation by the court. Whitcomb Hotel, Inc., v. California Employment Commission, 24 Cal. 2d 753, 757, 151 P.2d 233, 155 A.L.R. 405.

Here, however, the words involved are not sharply defined and immutably certain in common usage. Certainly we cannot say that the legislature and the voters of 1933 intended the phrase "stage line" as clearly excluding freight-carrying vehicles. Legislative use of the word "stage" has itself indicated uncertainty. A 1927 amendment to the Public Utilities Act, now section 225, Public Utilities Code, defines "passenger stage". Obviously this was to assure differentiation from those vehicles which carried property, and negatives a definition of "stage" which clearly limited that term to a vehicle carrying passengers.

The true purpose of the 1933 amendment was to return to local tax rolls the properties which, since 1910, had been subject to tax, upon a different basis, for state purposes only. To effectuate this transfer, and to assure against inequality, assessment was to be made by the state board. Such procedure might well result in higher assessments, in some political subdivisions, than would appraisal by local assessors. But that result is inherent in the concept of statewide assessment, and is consonant with the purpose of the 1933 amendment. Southern California Telephone Co. v. Los Angeles County, 45 Cal.App.2d 111, 123–124, 113 P.2d 773.

It may be that for the 16 years before its first protest, Motor Express properties were assessed lower than would have been the case under local assessments. The record shows that it desires to change now because it feels the assessments of the state board are, in some cities, higher than local assessments. This is not a sound reason for changing the long accepted construction of the constitutional provision.

Motor Express argues that this court is bound by the trial court's finding of fact that "A vehicle which is not designed for the carriage of passengers, but solely for the hauling of freight, is not a stage in the generally accepted and commonly understood meaning of the word." There is no question that this finding is supported by the testimony of three transportation industry experts called by Motor Express.

[5] However, this finding and evidence "can only be regarded as one among various sources of information to which the court may resort for the purpose of ascertaining a fact of purely judicial cognizance. Whatever may have been the evidence in the superior court, and whatever effect it may have been allowed, this court must now decide, as matter of law, what the framers of the constitution intended by the terms they have employed * * *." Sheehy v. Shinn, 103 Cal. 325, 328, 37 P. 393.

[6] We conclude that there is no reason to give the term "stage line" the limited definition urged by Motor Express. This contention is supported, at most, by the terminology of 1910, when the original provision including the term was added to the constitution. To adopt it would be to make of stale usage a strait-jacket confining our constitutional grants of power, and would be directly contrary to the view of the constitution as a document expanding " 'to meet the advancing affairs of men' ". People v. Western Air Lines, Inc., 42 Cal.2d 621, 635, 268 P.2d 723, 731.

Respondent Motor Express is an express company subject to section 14 of Article XIII of the constitution.

The judgment is reversed.

NOURSE, P. J., and KAUFMAN, J., concur.

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133 Cal.App.2d 324

In re Louis FORREST on habeas corpus.

Cr. 3149.

District Court of Appeal, First District,
Division 1, California.
May 31, 1955.

Frederick S. Reinheimer, San Jose, for petitioner Louis Forrest.

Edmund G. Brown, Atty. Gen., of the State of California, Clarence A. Linn, Asst. Atty. Gen., for respondent Clark T. Sullivan, Dist. Supervisor, Dept. of Corrections, Division of Adult Paroles.

PETERS, Presiding Justice.

It appearing from the return filed by the Attorney General that petitioner is lawfully incarcerated by reason of an order made by the Adult Authority of the State of California suspending the parole of petitioner, it is the unanimous opinion of this Court that the writ of habeas corpus be discharged and petitioner be remanded to the custody of the Chief of Police of the City and County of San Francisco. Copies of the transcript of the hearing in the lower court, filed in this Court this date, may be returned to petitioner. It is so ordered.

133 Cal.App.2d 231

Harriet A. CHAMBERS and Ethelyn Chambers Yore, Plaintiffs and Respondents,

v.

Emil SPADA and Ralph Worthey Stephens, individually and doing business as Spada and Stephens, a partnership, and William Lund, Defendants and Appellants.

Travelers Insurance Company, a corporation, Plaintiff in Intervention and Respondent.

Civ. 8576.

District Court of Appeal, Third District, Division 3, California.

May 24, 1955.

Action for wrongful death of driver of panel truck which was struck by overtaking truck-trailer. The Superior Court, Stanislaus County, Sherrill Halbert, J., gave judgment for mother and sister of decedent. Truck-trailer owners appealed. The District Court of Appeal, Van Dyke, P. J., held that where truck-trailer struck panel truck in heavy fog when panel truck turned left as truck-trailer driver was attempting to pass it, question of negligence of driver of truck-trailer and question of contributory negligence of driver of panel truck were for jury.

Judgment affirmed.

1. Automobiles 🔑245(15)

In action for wrongful death of driver of panel truck which was struck by overtaking truck-trailer when truck-trailer attempted to pass panel truck and panel truck turned left, question of negligence of driver of truck-trailer was for jury.

2. Automobiles 🔑245(15)

In action for wrongful death of driver of panel truck which was struck by overtaking truck-trailer as truck-trailer driver attempted to pass panel truck and panel truck turned left, whether or not blinking of lights on truck-trailer was sufficient signal that driver of truck-trailer was about to pass, when visibility was reduced by fog, was question of fact. Vehicle Code, § 671.

3. Death 🔑58(1)

Where alleged negligence of a decedent is at issue and where evidence concerning the acts and conduct of such decedent must necessarily be produced by witnesses other than deceased, the presumption that deceased exercised ordinary care for his own concern is operative unless dispelled by uncontradicted testimony which is wholly irreconcilable with presumption and which is produced by party invoking presumption.

4. Automobiles 🔑169

Under statute requiring that a person shall not turn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety and after giving of appropriate signal, duty to refrain from moving right or left upon roadway until movement can be made with reasonable safety does not mean that an automobile driver is required to know that such a movement can be made in safety but means that driver shall take precautions which a reasonably prudent person would take under circumstances reasonably appearing to him at the time. Vehicle Code, § 544(a).

5. Automobiles 🔑245(81)

In action for wrongful death of driver of panel truck which was struck by overtaking truck-trailer passing when panel truck driver was turning left, question of contributory negligence of driver of panel truck in turning was for jury.

Wyman & Finell, Beverly Hills, for appellants.

Leonard, Hanna & Brophy, San Francisco, for plaintiff in intervention.

George W. Hauer, J. Adrian Palmquist, Oakland, Erskine, Erskine & Tulley, San Francisco, Zeff & Halley and E. Dean Price, Modesto, for respondents.

VAN DYKE, Presiding Justice.

Defendants have appealed from a judgment rendered against them in the trial court arising out of a collision between a truck-tractor with semi-trailer operated by defendant Stephenson (sued herein as Stephens) and a panel truck driven by decedent, William Chambers. Respondents, Harriet A. Chambers and Ethelyn Chambers Yore, mother and sister of decedent, brought action to recover damages for decedent's death which they alleged had been caused by the negligence of appellants. The cause was tried to the court sitting without a jury.

The accident occurred about 5:30 A.M. on February 18, 1949, and the place of the accident was about one and a half miles south of the City of Turlock in Stanislaus County, on U. S. Highway 99, a main arterial highway in the San Joaquin Valley. At this point the highway was divided into two 12-foot lanes, one northbound, one southbound, the division being marked with a broken white line. On each side of the traveled roadway was a 6-foot shoulder and on each side of the highway there were scattered farm houses located some distance back. Traffic was light. It was dark and there was fog along the highway. Decedent was in the employ of a mortuary establishment whose vehicle he was driving. He was accompanied by a fellow employee, Rex Brunner. They had been sent out to pick up a body, their destination being a farm house along the road. In the dark and the fog they had several times failed to locate the farm house and were making a fourth try. They were driving slowly, Brunner, a witness for respondents, giving the speed as 15 to 20 miles per hour. As they drove they watched for the farm road which would lead them to the farm house. Both vehicles were going north. Appellants' rig was overtaking the panel truck. The farm house they sought was located west of the highway and to reach it, when located, decedent would have to drive his panel truck across the southbound lane. Appellants' rig, traveling substantially faster than the panel truck, his speed being given at about 40 miles an hour, was put into a passing maneuver by its driver. He testified that as he overtook the panel truck he determined to pass it and, as a signal of such intention, changed his headlights from low beam to high beam and back to low beam. He moved into the southbound lane and continued his passing maneuver at the speed at which he had been traveling. As he came closer to the panel truck decedent turned that vehicle across the southbound lane. While it was in that lane it was hit by appellants' truck. Decedent was killed.

[1, 2] Appellants assert that the driver of their truck was not negligent and that this is established as a matter of law by the evidence. The contention cannot be sustained. There was evidence of skid marks which could have been taken by the trier of fact as showing a greater speed than that testified to by witnesses. The skid marks left by appellants' truck when its driver applied his brakes to avoid imminent collision, were all within the southbound lane of traffic, and extended for 80 feet. The record is not clear that this meant the rig, which was 60 feet in length, had progressed 80 feet from the point where the brakes were applied, since it does not appear that only the rear wheels had brakes; nevertheless the length of the skid marks extending 80 feet to the point of collision could be taken as indicating a greater speed than 40 miles per hour. It was a question of fact as to whether or not, under all the circumstances, executing a passing maneuver under the conditions as to visibility which existed was negligent conduct. In addition to this, and of considerable importance, as will be further shown, no audible warning of the intention to pass was given by the driver of appellants' rig. Section 671 of the Vehicle Code requires vehicles to be equipped with a horn kept in good working

order and capable of emitting sound audible under normal conditions from a distance of not less than 200 feet and requires of the driver that the horn be sounded whenever reasonably necessary to insure safe operation. That the situation was one which the trier of fact could have held required such audible signal is quite apparent. There is testimony that, due to the darkness and the fog, visibility was very poor, one witness describing it as "practically zero", another saying that one could see about 70 feet. Under such conditions the signal given by the rig's driver, a visual signal, might well have been unnoticed by decedent. The trier of fact could have held the visual signal to have been inadequate. It cannot be said that, even though the decedent missed the visual signal, he would not have been alerted by an audible signal. Decedent's companion, riding in the seat with him, testified he did not see the visual signal and heard no sound. The significance of these considerations is well illustrated in the cases. See Cleveland v. Petrusich, 117 Cal.App. 71, 3 P.2d 384; Erickson v. Grady, 119 Cal.App. 596, 6 P.2d 1002; Young v. Tassop, 47 Cal.App.2d 557, 118 P.2d 371; De La Motte v. Rucker, 55 Cal.App.2d 226, 130 P.2d 444; Ducat v. Goldner, 77 Cal.App.2d 332, 175 P.2d 914. We hold that a sufficient case of negligence constituting a proximate cause of the collision appears from the evidence.

[3–5] Appellants next contend that decedent's conduct as a matter of law constituted contributory negligence. In discussing this contention it must be borne in mind that where the alleged negligence of a decedent is at issue and where the evidence concerning the acts and conduct of such decedent must necessarily be produced by witnesses other than the deceased, the presumption that the deceased exercised ordinary care for his own concerns is operative, unless dispelled; that this presumption in a case such as this can only be dispelled by uncontradicted testimony, wholly irreconcilable with the presumption, produced by the party seeking to invoke the presumption under circumstances which afford no indication that the testimony is the product of mistake or inadvertence; that this presumption is by statute declared to be evidence and unless dispelled is sufficient by itself to support the verdict of a jury or a finding of a court sitting without a jury, and may outweigh positive evidence adduced against it. Scott v. Burke, 39 Cal.2d 388, 394, 247 P.2d 313, and cases cited. The only testimony in the record as to decedent's conduct, given by witnesses for the respondents, who of course herein rely upon the presumption of due care, was that given by Brunner, the decedent's companion in the panel truck, and by a police officer who was an arriving witness. The officer testified as to the skid marks and as to their location upon the surface of the southbound traffic lane and as to the condition of fog and darkness which he found when he had arrived at the scene. The testimony of Brunner we have already given, but for convenience we will restate it in substance. The panel truck was proceeding slowly 15 to 20 miles per hour. Visibility was bad due to darkness and fog. Brunner himself saw no signal from the truck indicating an intention to pass and was not in fact aware of the truck's approach. The force of the collision was great, sufficient, so he said, to catapult him from the front seat and land him on his back on the floor of the panel truck. Decedent, as he drove along the highway, was, along with Brunner, watching across the road to the west, looking for the farm road. Brunner did not see decedent give any signal to the appellants' driver and decedent's vehicle had no mechanical device for signaling a turn. Decedent was wearing a coat of dark material. After the collision and after the decedent's vehicle had been removed to a garage in Turlock, Brunner observed that the window on the driver's side was up, closing the aperture, and the door had been wired shut by a wire leading from the handle to the back of the seat. When the panel truck was within 10 to 30 feet of the intersection of the farm road with the highway he heard decedent say "there it is". Decedent at once turned his vehicle across the southbound lane and the collision occurred in that lane and almost immediately. Brunner said in substance: We were pretty close to it (the driveway) when we saw it, not over 30 feet; we were traveling under 20 miles an hour; our turn was gradual; we were not almost opposite the driveway when we saw it; we were on an angle; as soon as decedent said "there it is" he began his turn. There is nothing in this testimony produced by respondents that dispels the presumption of due care. On the contrary, it left that issue one of fact for the trial court. Brief consideration will demonstrate this. Though decedent was looking for the farm driveway that fact does not force the conclusion that he did not, before making his turn, reasonably endeavor to ascertain that the turn could be made in safety. It was his duty to do that under the mandate of Section 544(a) of the Vehicle Code, which provides that no person shall turn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety; and then only after the giving of an appropriate signal in the event any other vehicle may be affected by such movement. This duty to refrain from moving right or left upon a roadway until such movement can be made with reasonable safety means this: "An automobile driver is not required to know that such a movement of an automobile can be made in safety. The requirement is that the driver take the precautions which a reasonably prudent person would take under the circumstances reasonably appearing to him at the time." Sunseri v. Dime Taxi Corp., 57 Cal.App.2d 926, 933, 135 P.2d 654, 658; see, also, Spear v. Leuenberger, 44 Cal.App. 2d 236, 247, 112 P.2d 43. Brunner's testimony does not preclude the possibility that the decedent looked in his rear view mirror and in the darkness and the fog and at a time when the appellants' rig may have been turning left into the southbound lane missed the headlights and did not observe that the truck was overtaking him. Brunner's testimony does preclude the possibility of any signal having been made by decedent so far as a mechanical signal is concerned, but it does not preclude the possibility that he gave a hand signal which by reason of the dark clothes he was wearing, and momentary inadvertence of appellants' driver, was not seen by him. Testimony of an arriving witness that when he came to the panel truck the driver's window was up was not produced by respondents. On this subject of the signal all Brunner said was that he saw no signal given, but he said this while saying that both he and decedent were looking for the farm road. We conclude that the presumption of due care was not dispelled and, therefore, that the trier of fact could find, as it did, that decedent had not been contributorily negligent.

The judgment is affirmed.

PEEK and SCHOTTKY, JJ., concur.

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284 PACIFIC REPORTER
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44 Cal.2d 611

Harold Donald MURRAY, Petitioner,

v.

SUPERIOR COURT of the State of California IN AND FOR CITY AND COUNTY OF SAN FRANCISCO, and Honorable Milton D. Sapiro, and Honorable Harry J. Neubarth, as Judges thereof, Respondents. Donald N. Uthus, Real Party in Interest.

S. F. 19217.

Supreme Court of California.
In Bank.

May 27, 1955.

Rehearing Denied June 23, 1955.

Proceeding on writ of certiorari to determine lawfulness of an order of civil arrest. The Supreme Court, Carter, J., held that allegations of affidavits supporting application for order sustained implied finding that defendant's intended departure from country was with intent to defraud his creditors.

Order affirmed.

Opinion, 276 P.2d 661, vacated.

1. Arrest 🔑28

That copy of complaint, stating a cause of action in indebitatus assumpsit, was attached to affidavits supporting application for civil arrest satisfied requirement that affidavit show that a sufficient cause of action exists. West's Ann.Code Civ.Proc. § 481.

2. Arrest 🔑28

Affidavit supporting application for order of civil arrest contained sufficient facts from which a judge could determine that a sufficient cause of action existed between parties. West's Ann.Code Civ.Proc. § 481.

3. Arrest 🔑22

Where complaint in action was on file at time order for civil arrest was issued, that complaint had not been on file at time applicant's affidavit, which stated that complaint was already on file, was signed, did not render affidavit insufficient. West's Ann.Code Civ.Proc. §§ 479–481.

4. Certiorari 🔑64(1)

On certiorari to review propriety of order of civil arrest, scope of review was limited to determination as to whether there was sufficient evidence, in form of allegations in supporting affidavits, to support the order.

5. Appeal and Error 🔑1008(1)

A reviewing court will not disturb implied findings of fact made by a trial court in support of an order, any more than it will interfere with express findings upon which a final judgment is predicated.

6. Appeal and Error 🔑931(3), 1008(1, 3)

When evidence is conflicting, it is presumed that trial court found every fact necessary to support its order that evidence would justify, and its implied findings are conclusive, whether evidence is oral or documentary.

7. Appeal and Error 🔑1008(3)

In consideration of an order made on affidavits involving questions of fact, reviewing court is bound by same rule as where oral testimony is presented for review, and it is only where order rests on undisputed facts from which only one conclusion can be drawn that reviewing court is not bound thereby.

8. Appeal and Error ⚷996, 1011(2)

Where an issue is tried on affidavits, rule on appeal is that those affidavits favoring contention of prevailing party establish not only the facts stated therein but also all facts which reasonably may be inferred therefrom, and where there is a substantial conflict in facts stated, a determination of controverted facts by trial court will not be disturbed.

9. Arrest ⚷29

In proceeding on application for order of civil arrest, allegations of affidavits supporting application for order sustained implied finding that defendant's intended departure from country was with intent to defraud defendant's creditors. West's Ann. Code Civ.Proc. § 479, subd. 1.

10. Arrest ⚷29

To support an order of civil arrest under statute permitting same in actions upon contract when defendant is about to depart from state with intent to defraud creditors, there must be positive averment of fraud or positive evidence of facts from which fraud can be inferred. West's Ann. Code Civ.Proc. §§ 479–481.

11. Arrest ⚷27

Affidavit supporting application for order of civil arrest in action to recover money allegedly due under contract was not subject to claimed objection of failing to state facts upon which allegations on information and belief were founded. West's Ann.Code Civ.Proc. § 481.

12. Arrest ⚷25

Affidavits supporting application for order of civil arrest sufficiently alleged that applicant had attempted to ascertain whereabouts of defendant's assets prior to resorting to remedy of civil arrest.

13. Arrest ⚷25

That applicant, who sought order of civil arrest, was shown to have known of defendant's whereabouts on date subsequent to the signing of applicant's affidavit wherein he stated that he had been unable to locate defendant did not render applicant's allegation untruthful.

14. Arrest ⚷29

Affidavit supporting application for order of civil arrest did not allege sufficient facts with respect to defendant's disposition of his property to justify relief under statute permitting civil arrest when defendant has removed or disposed of his property, or is about to do so, with intent to defraud creditors. West's Ann.Code Civ.Proc. § 479, subd. 5.

15. Appeal and Error ⚷1129

Where affidavit supporting application for order of civil arrest was sufficient under statute setting forth one ground for such relief, order of arrest was affirmed although affidavit was insufficient to warrant the relief on another statutory ground. West's Ann.Code Civ.Proc. §§ 479, subds. 1, 5, 480–504.

◆

Frank J. Perry and George Olshausen, San Francisco, for petitioner.

No appearance for respondents.

Dan L. Garrett, Jr., San Francisco, for real party in interest.

CARTER, Justice.

Harold Donald Murray, petitioner, seeks by writ of certiorari to review the lawfulness of an order of civil arrest issued by respondent court on August 12, 1954. Respondent court denied a motion to quash said order on August 16, 1954, and this petition followed.

Donald N. Uthus, real party in interest, filed an action against Murray on August 12, 1954, seeking to recover various amounts of money totaling $10,124.39 allegedly loaned by Uthus to Murray at his instance and request and which he had promised but failed and refused to repay. On the same day, Uthus filed his affidavit and that of William Stelter on an application for an order of civil arrest of Murray. The order was issued by the Superior Court of the City and County of San Francisco and directed that Harold Donald Murray be arrested and held for bail in the sum of $10,124.39. The order recited that a surety company bond in the sum of $2,500 had been previously filed in accord with the provisions of section 482 of the Code of Civil Procedure.

On August 16, 1954, petitioner Murray, having been released after posting bail in the sum specified, moved the court to quash the order for civil arrest and to exonerate the bail that had been posted. The petitioner's motion was denied on August 16, 1954.

Subdivision (1) of section 479 of the Code of Civil Procedure permits civil arrests in an action for the recovery of money on a cause of action arising upon contract express or implied "* * * when the defendant is about to depart from the State with intent to defraud his creditors"; subdivision (5) of the same section permits such arrests "When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors."

Sections 480 through 504, Code of Civil Procedure, provide the procedure and requirements to be met when an order for civil arrest is sought and made. So far as is here pertinent, section 480 provides that the order must be obtained from a judge of the court in which the action is brought; section 481 provides that the plaintiff, or some other person, must make it appear to the judge, by affidavit "* * * that a sufficient cause of action exists, and that the case is one of those mentioned in Section 479. The affidavit must be either positive or upon information and belief; and when upon information and belief, it must state the facts upon which the information and belief are founded."

It is contended by petitioner here that the complaint and affidavits upon which the order was issued were insufficient to authorize the order to issue and that therefore the order is void because it was beyond the jurisdiction of respondent court. It is argued that the affidavits fail to show that Uthus had a cause of action against petitioner; that the affidavits failed to show that petitioner removed or disposed of his property, or was about to do so, with intent to defraud his creditors; that the affidavits failed to show that petitioner was about to depart from the state with the intent to defraud his creditors; that the affidavits include statements made on information and belief without stating the facts on which the information and belief were based.

The affidavit of Donald N. Uthus, notarized on August 6, 1954, and filed on August 12, 1954, sets forth the following information:

"That affiant at all times mentioned herein has been, and now is, the owner and operator of an export-import business in the City of Washington, D. C.; and

"That during the month of September, 1952, affiant hired and employed the defendant Harry Donald Murray to work for affiant on a commission basis, and affiant agreed with said Harry Donald Murray that affiant would loan to him such sums of money as said defendant needed for living and travel expenses during the time required for defendant to establish himself in the business. It was agreed that affiant was entitled to reimburse himself for such loans out of commissions earned by said defendant; and

"That beginning on September 15, 1952, and continuing to and including December 30, 1953, affiant loaned to defendant as and for his living expenses and travel expenses, the sum of $10,124.39, over and above all off-sets to be credited against said loans on account of commissions earned by said defendant.

"Prior to defendant's employment with affiant, defendant and his wife had resided in the State of Virginia, and defendant had owned the family residence therein. During the month of May, 1954, defendant sold said home, and informed affiant that defendant received approximately $40,000.00, net, from the sale of said home. At or about said time, defendant booked passage upon the S.S. President Monroe, a ship owned and operated by the American President Lines, for himself and his wife, to depart from the City and County of San Francisco, State of California, on August 17, 1954, for a round-the-world trip, which said trip is due to return to the City of New

York, State of New York, during the month of October, 1954; and

"That affiant is represented by Byron N. Scott, Esquire, as affiant's legal counsel, in Washington, D. C., and that at or about the time [of] the sale of defendant's said family residence, said counsel, at affiant's request, conferred with defendant with regard to an accounting for, and repayment of, monies loaned to defendant by affiant. On said occasions, defendant stated that he could not discuss the matter at that time, but that he would call said counsel at an early date and discuss the matter. Defendant has failed and refused to discuss the matter further with said counsel, and has left Washington, D. C., and the State of Virginia, as hereinafter described; and

"Following the sale of said family residence, affiant demanded of defendant that he make payment on account of said loans and defendant at said time stated to affiant that he would see what he could do. During the next meeting between affiant and defendant, which occurred during late June or early July, 1954, affiant again demanded payment on account of said loans, and on said occasion, defendant informed affiant that defendant had transferred all of his funds to his wife's name and that he was therefore unable to pay affiant; and

"That during the month of June and to and including July 9, 1954, defendant's visits to affiant's offices became very infrequent, and were customarily made when affiant was absent therefrom. On or about July 7, 1954, affiant questioned defendant as to his plans, and on said occasion, defendant stated to affiant that so far as he knew, he would return to Washington, D. C., from his round-the-world trip and would pick up where he left off with regard to his employment with affiant; and that he would leave Washington, D. C., on July 15th, 1954, to drive to the City and County of San Francisco, State of California, in order to arrive in time to sell his automobile prior to embarking upon the S.S. President Monroe on August 17, 1954. During said conference of July 7, 1954, affiant advised defendant that it was urgent that a discussion be held with regard to an accounting for, and repayment of, said loans to defendant, and defendant agreed that he would meet with affiant on the following day, July 8, 1954, to settle the matter. Defendant, however, did not appear for said meeting, and affiant instructed his counsel, Byron N. Scott, Esquire, to contact defendant. Said counsel tried without success to contact defendant, and July 9, 1954, affiant found a note in defendant's handwriting addressed to affiant which had been left at affiant's offices sometime after the close of business on July 8, 1954, which read as follows:

"'Dear Don:

"'I have decided to leave a little sooner than I contemplated. Am enclosing all the keys for office and desk and have left everything as far as files are concerned, etc.

"'As I told you the other day, I believe I will look for something to do out of Washington when I come back. I have made no plans, and have no idea where I will wind up. If we have another war, perhaps I will come back here.

"'I know you disapprove of this trip and there has been considerable resentment in evidence around the office, that is one reason I have spent so little time there.

"'In any event, I wish you the best of everything, and thank you for your many kindnesses.

"'In the end I am sure it will be much better this way, and perhaps someday you will know the entire story of what prompted this action in [sic] my part.

"'Sincerely,
Don'

"That prior to this time, affiant at no time was advised, or had any indication that defendant did not intend to return to his said employment with affiant at the termination of his trip; and affiant has been unable to locate or contact defendant since that time; and

"That defendant has made application to the American President Lines to interrupt his said round-the-world trip at an Italian Port unknown to affiant, to permit himself and wife to travel in Europe for an indefinite period of time; and

"That prior hereto, affiant has filed suit and said suit is now pending against defendant in the Superior Court, in and for the County of San Francisco, State of California, for the recovery of said sum of $10,124.39, and a copy of said complaint on file herein is attached hereto, and made a part hereof; and that all the allegations of said complaint are true; and

"That based upon the foregoing facts, affiant fears, and believes, and therefore alleges upon the basis of such belief that defendant is about to depart the jurisdiction of this Court, and to depart from the State of California and from the Continental Limits of the United States with the intent to defraud his creditors; and that defendant has removed, disposed of, and concealed his property, and is about to remove said property from the United States with the intent to defraud his creditors; * * *."

The affidavit of William Stelter shows that he is a licensed private investigator in the City and County of San Francisco; that he was employed by the San Francisco counsel for Donald N. Uthus and that during the night of August 9, 1954, the defendant Murray registered at the St. Francis Hotel in San Francisco; that he personally observed the defendant Murray in the St. Francis Hotel and in the offices of the American President Lines in San Francisco.

Petitioner contends that Uthus' affidavit was insufficient by reason of its failure to include therein the allegations of the complaint. In Ex parte Howitz, 2 Cal.App. 752, 755, 84 P. 229, 230, it was held:

> "Before an order of arrest can be made it must appear by affidavit that a sufficient cause of action exists (Code Civ.Proc. § 481). In this regard the affidavit states 'that a copy of the verified complaint in this action filed to-day is hereto annexed and made a part of this affidavit; and that the cause of action therein set forth exists in favor of the plaintiff and against said defendant, and affiant avers that the allegations contained therein are true.' A copy of the complaint was attached to the affidavit, stating a cause of action in *indebitatus assumpsit.*
>
> [1] "* * * in the case at bar a copy of the complaint is annexed to the affidavit, and the affiant makes oath that the allegations contained therein are true. We think that this fully complies with the requirements of the law that it must appear from the affidavit that a cause of action exists."

In Peterson v. Nesbitt, 11 Cal.App. 370, 372, 105 P. 135, 136, relied upon by petitioner, the affiant had not sworn to the allegations of the complaint but, as said the court, averred that a good and sufficient cause of action existed. "This is but the statement of the opinion of the affiant that the complaint states a good and sufficient cause of action. It is not a statement of the affiant that the matters set forth in the complaint are true. We apprehend that no prosecution for perjury would lie against the affiant predicated upon the falsity of any of the matters set forth in the complaint."

[2] In addition to the copy of the complaint which the affiant "made oath" was true, the affidavit itself contained sufficient facts from which a judge could determine that a sufficient cause of action existed between the parties. Code Civ.Proc. § 481.

[3] Petitioner contends that the affidavit is insufficient because it refers to the complaint as "already on file" and that such was not the case.[1] It would appear to be a sufficient answer that at the time the order was issued, the complaint was on file. Further, sections 479, 480, 481 do not specifically provide that the complaint must be filed prior to the time the affidavit is signed.

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[1] The complaint was *not* on file at the time Uthus' affidavit was signed, but was on file when the affidavit was filed and at the time the order of civil arrest was issued. A copy of the complaint was attached to the affidavit and it was averred in the affidavit that "* * * all of the allegations of said complaint are true; * * *."

In Ex parte Cohen, 6 Cal. 318, 320–321, it was held that an order of arrest issued prior to the time the complaint was filed was void for lack of jurisdiction. It was said: "Until there is a suit instituted, there can be no defendant, and consequently no authority, under the statute, to issue an order of arrest. * * * It appearing that no such action had been instituted at the time of issuing the order, it was void for want of jurisdiction." It appears, therefore, that since the complaint was filed prior to the time the order was issued, petitioner's contention is without merit.

Petitioner next contends that the affidavits are insufficient under section 479(1) of the Code of Civil Procedure. That section provides that civil arrest is allowed when the defendant is about to depart from the state "with intent to defraud his creditors." Petitioner does not seriously contend that the affidavits are insufficient to show his imminent departure from the state, but does contend that Uthus' affidavit is insufficient to show that he intended to defraud his creditors.

[4–6] The scope of appellate review in a case such as the one here under consideration is limited to a determination as to whether there was sufficient evidence, in the form of allegations in the supporting affidavits, to support the order made by the trial court. An appellate court will not disturb the implied findings of fact made by a trial court in support of an order, any more than it will interfere with express findings upon which a final judgment is predicated. When the evidence is conflicting, it will be presumed that the court found every fact necessary to support its order that the evidence would justify. So far as it has passed on the weight of the evidence, its implied findings are conclusive. This rule is equally applicable whether the evidence is oral or documentary.

[7] In the consideration of an order made on affidavits (as here) involving a question of fact, the appellate court is bound by the same rule as where oral testimony is presented for review. People v. Western Meat Co., 13 Cal.App. 539, 544, 110 P. 338; Maselli v. E. H. Appleby & Co., Inc., 117 Cal.App.2d 634, 638, 256 P.2d 618; Jones v. Lindsey, 114 Cal.App.2d 237, 239, 250 P.2d 153; Schreiber v. Hooker, 114 Cal.App.2d 634, 640, 251 P.2d 55; Hayutin v. Rudnick, 115 Cal.App.2d 138, 140, 251 P.2d 707; Paulekas v. Paulekas, 117 Cal.App.2d 73, 77, 254 P.2d 941; Globe Dairy Lunch Co. v. Joint Executive Board of Culinary Workers, 117 Cal.App.2d 190, 193, 255 P.2d 94. Only where an order rests on undisputed facts from which only one conclusion can be drawn, is an appellate court not bound thereby. In re Estate of Burnett, 11 Cal.2d 259, 263, 79 P.2d 89.

[8] When an issue is tried on affidavits, the rule on appeal is that those affidavits favoring the contention of the prevailing party establish not only the facts stated therein but also all facts which reasonably may be inferred therefrom, and where there is a substantial conflict in the facts stated, a determination of the controverted facts by the trial court will not be disturbed. Hayutin v. Rudnick, supra, 115 Cal.App.2d 138, 140, 251 P.2d 707. Viewing the allegations of the affidavit of Uthus in the light of the above stated rule, we see that petitioner sold his home for approximately $40,000; that when payment of petitioner's debt to Uthus was demanded, petitioner informed the affiant that he had transferred all his funds to his wife and that he was therefore unable to pay; that he evaded meetings with either Uthus or his counsel and avoided meeting petitioner in his office; that he made plans to make a round-the-world trip with a planned (but not disclosed to affiant) stop-over for an indefinite time in Europe; that he informed affiant that he would return to affiant's employ upon his return from such trip; that when urged for payment, he advanced the time of departure for his trip leaving affiant a note stating that he would not be returning to his employ or to the city of Washington, D. C., and that he had made no plans, and had "no idea" as to where he would wind up.

In Ex parte Yonetaro Fkumoto, 120 Cal. 316, 321, 52 P. 726, 728, the court said: "It is not enough to assert such fraudulent intent in general terms. Like the statement or proof of a cause of action for fraud, the specific facts relied on must be shown, that the court itself may deduce the fraud, and not leave the question of the sufficiency of his facts to be passed upon by the party. [Citation.] If this is so in cases not involving the liberty of the citizen, *a fortiori* is it demanded in a proceeding such as this." See, also, In re Gillett, 47 Cal.App. 107, 111, 190 P. 209.

[9] From the above stated allegations, the trial court could reasonably infer that the sale of petitioner's home, the proposed European tour, taken together with the evasive conduct of petitioner in avoiding contact with Uthus, were accomplished with intent to defraud Uthus, petitioner's creditor. In Southworth v. Resing, 3 Cal. 377, 378, a case involving a civil arrest, the court said: "To entitle a party to the remedy of arrest, it is not necessary he should show positively the commission of a fraud. It is sufficient if the circumstances detailed will induce, in a reasonable mind, the belief that a fraud was intended to be perpetrated. And as a matter of practice, it is safest to award an arrest, even in cases of doubt, because the defendant is protected against the abuse of the process by the undertaking of the plaintiff, which the law requires to that effect, while on the other hand, frauds are proverbially concocted with so much artfulness and ingenuity as render them at all times difficult to be exposed; and when such a case actually exists, the plaintiff is remediless, without the process of arrest. A different rule would almost, if not certainly, destroy its efficiency as a legal remedy."

Petitioner contends that all presumptions are against fraud. He cites Ex parte Yonetaro Fkumoto, supra, 120 Cal. 316, 319, 52 P. 726, 727, for the proposition that when the language of such a statute as the one under consideration is departed from the "party must, at his peril, employ words of equivalent import; and a failure in this respect is fatal." As heretofore set forth, the language used by affiant reasonably and logically set forth facts from which the trial court could have inferred a fraudulent intent on the part of petitioner to evade payment of his debts. Petitioner cites the Fkumoto case, supra; Neves v. Costa, 5 Cal.App. 111, 89 P. 860, and In re Miller, 60 Cal.App. 39, 42, 212 P. 54, as proof of his statement that the facts set forth by affiant were not susceptible of the inference of a fraudulent intent. It would appear that each of these cases was decided on its own facts as this one must be; that here the trier of fact could, and did, impliedly find in issuing the order that petitioner was guilty of a fraudulent intent. Matter of Application of Caples, 26 Cal.App. 786, 788, 148 P. 795; Matter of Application of La Due, 161 Cal. 632, 635, 120 P. 13.

[10, 11] It is next argued that section 481 of the Code of Civil Procedure provides that the affidavit must either be positive or upon information and belief; that when made on information and belief, the facts must be stated on which the information and belief are founded. Affiant Uthus alleged that "based upon the foregoing facts, affiant fears, and believes, and therefore alleges upon the basis of such belief that defendant is about to depart the jurisdiction of this Court, and to depart from the State of California and from the Continental Limits of the United States with the intent to defraud his creditors; * * *." Petitioner relies on the rule set forth in Neves v. Costa, supra, 5 Cal.App. 111, 115–116, 89 P. 860, 862, that "'While the affidavit may state generally the grounds of the application upon belief only, we understand the rule to be well settled that, to show the grounds of his belief, he must set forth such facts and circumstances *within his own knowledge* as will authorize the officer who is to issue the warrant to *find* such a state of *facts* as required by the statute to authorize the proceeding, and, if the plaintiff is not himself personally cognizant of the facts and circumstances relied upon, he must procure the affidavit of some one who is thus personally cognizant of them. The warrant cannot be issued upon hearsay, nor upon any statement, however positive, founded upon hearsay.' Proctor v. Prout, 17 Mich. [473] 475." (Emphasis that of the court.) The heretofore summarized portion of the affidavit of Uthus sets forth certain "facts and circumstances within his own knowledge" which are sufficient without reference to any facts alleged that may have been based on hearsay. As noted by the court, the affidavit in the Neves case "contains no positive allegation of fraudulent intent, and the only statement of the debtor's intention to leave the state is that he told M. Macedo so. * * * If the affiant had heard the plaintiff tell Macedo, it would have been competent evidence." Uthus here alleges among other things, positively, that petitioner *told him,* and *wrote him,* and that petitioner had evaded *him*—not that *someone* had told Uthus that petitioner had sold his home, transferred the proceeds to his wife's name, or was about to depart the state. It has been held that where no prosecution for perjury would lie against the affiant, predicated upon the falsity of any matters set forth in the complaint, it is radically insufficient, Peterson v. Nesbitt, supra, 11 Cal.App. 370, 372, 105 P. 135; and that a warrant of arrest cannot be issued on hearsay, nor upon any statement, however positive, founded upon hearsay, Lay v. Superior Court, 11 Cal.App. 558, 560, 105 P. 775; In re Gillett, supra, 47 Cal. App. 107, 111, 190 P. 209; and that such a warrant of arrest cannot be made upon the mere statement of a conclusion of law. However, in In re Keene, 34 Cal.App. 263, 267, 167 P. 194, 195, it was held that "While some of the expressions therein [affidavit] contained may be construed as stating the conclusions of the affiant, there remain substantial statements of facts, apparently within the knowledge of Whitefield and of Bennett, which we think are legally sufficient to have authorized the order of arrest." There must be positive averment of fraud or positive evidence of facts from which fraud can be inferred. Fkumoto v. Marsh, 130 Cal. 66, 62 P. 303, 509. It would appear that the affidavit of Uthus contains sufficient positive averments of fact, together with the inferences to be drawn therefrom, to justify the action of the trier of fact.

[12] Petitioner argues that there is no averment that Uthus made any attempt to ascertain the whereabouts of petitioner's assets prior to resorting to the remedy of civil arrest. Ex parte Yonetaro Fkumoto, supra, 120 Cal. 316, 320, 52 P. 726. In the Fkumoto case, affiant had averred that a part of defendant's goods had been carried away to a place unknown to the affiant. The court stated that it did not appear that plaintiff had made any effort, by inquiry or otherwise, to ascertain their destination. Affiant here stated that he and his counsel had tried to locate petitioner. The affidavit of Stelter, a private investigator, shows that he was employed by counsel for Uthus to find petitioner and that he located him in the City and County of San Francisco on August 9th. We must, on this review, assume that these allegations were considered sufficient by the trier of fact to justify the action taken by him. In re Keene, supra, 34 Cal.App. 263, 267, 167 P. 194.

Petitioner contends that the transfer of the proceeds of the sale of the house to his wife does not necessarily show a fraudulent intent; that avoidance or postponement of payment of a debt does not necessarily show a fraudulent intent; that the change in the date of departure was not necessarily fraudulent; that Uthus' "inability to locate" petitioner was insufficiently alleged. These contentions may be disposed of by reference to the rule that the inferences to be drawn from the facts alleged in the affidavits were for the trier of fact. Hayutin v. Rudnick, supra, 115 Cal. App.2d 138, 140, 251 P.2d 707.

[13] There is no merit in petitioner's contention that the allegations concerning Uthus' inability to locate petitioner are untruthful. The Uthus affidavit was signed on August 6th and he stated therein that he had been unable to locate petitioner since July 9th. Petitioner argues that the affidavit of the private investigator shows that petitioner was, to Uthus' knowledge, in San Francisco on August 9th. Uthus' allegations consist of knowledge had by him up to and including the time the affidavit was signed.

[14] Petitioner also contends that the allegations of the affidavit of Uthus are insufficient under subdivision (5) of section 479 of the Code of Civil Procedure. Under that subdivision, a civil arrest is per-

mitted when the defendant has removed or disposed of his property with the intent to defraud his creditors. Uthus averred that petitioner had informed him that he had transferred all of his funds to his wife's name and that he was therefore unable to pay affiant. The question is whether such a disposal is the type of disposal contemplated by the first requirement of the subsection. Petitioner relies upon the statement in Ex parte Yonetaro Fkumoto, supra, 120 Cal. 316, 320, 52 P. 726, 727, that "the removal or disposition contemplated is a taking or attempting to take the goods or property without the reach of the process or jurisdiction of the court, either territorially, or by concealing or disposing of them where they cannot be found" as authority for the proposition that his transfer of his funds to his wife was not the disposal of property contemplated by the section. In this we agree with petitioner. There is no allegation in the affidavit that such a transfer put the property "without the reach of the process or jurisdiction of the court" or that such transfer was done with a fraudulent intent, Ex parte Yonetaro Fkumoto, supra, 120 Cal. 316, 52 P. 726, 727, although Uthus does allege later generally, on information and belief, that such disposal was accomplished by petitioner for that purpose. There is no allegation that Uthus sought to set aside the transfer of funds, nor that he made any effort, by inquiry or otherwise, to ascertain the whereabouts of petitioner's wife so as to take the proper legal steps for setting aside the transfer to her, Ex parte Yonetaro Fkumoto, supra, 120 Cal. 316, 320, 52 P. 726. It follows that Uthus has not followed the language of the statute, Matter of Application of Caples, supra, 26 Cal.App. 786, 788, 148 P. 795, or set up sufficient facts to justify his belief that petitioner had disposed of his property with the intent to defraud his creditors and that, therefore, the affidavit is insufficient on its face to show a compliance with the provisions of section 479(5), Code of Civil Procedure. Neves v. Costa, supra, 5 Cal.App. 111, 115, 89 P. 860; Lay v. Superior Court, 11 Cal.App. 558, 559, 105 P. 775.

[15] However, since the affidavit was sufficient under section 479(1) of the Code of Civil Procedure to confer jurisdiction to issue the order of arrest, the order must be, and is, therefore, affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

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44 Cal.2d 630

William R. HARDEN, Pearl B. Harden, his wife, Chester N. Harden and Virginia Hart Harden, his wife, Petitioners,

v.

SUPERIOR COURT of the State of California, IN AND FOR THE COUNTY OF ALAMEDA, Respondent.

City of Hayward, Real Party in Interest.

S. F. 19244.

Supreme Court of California.
In Bank.
May 27, 1944.

Prohibition proceeding to restrain further proceedings in eminent domain action brought against landowners by city. The Supreme Court, Jesse W. Carter, J., held that where statutes did not expressly authorize city to take land by eminent domain outside corporate boundaries, word purchase in statute providing that legislative body of city may purchase lease or receive real estate situated inside or outside city limits did not expressly authorize city to take private property for off-street parking outside city's boundaries by eminent domain proceedings, and prohibition would lie as trial court had no jurisdiction to proceed in eminent domain action.

Writ issued.

1. Prohibition 🔑10(1)

The constitutionality of a statute or ordinance may be tested by prohibition on the ground that invalidity of the legislation goes to the jurisdiction of the court to proceed to try the case.

2. Prohibition 🔑10(1)

In prohibition, Supreme Court is limited by statute to proceedings without or in excess of jurisdiction, and when trial court has heard and determined that it has jurisdiction, prohibition will lie to prevent the exercise thereof when that jurisdiction is challenged in that court by demurrer, motion, plea or other objection of some kind. West's Ann.Code Civ.Proc. § 1102.

3. Prohibition 🔑10(1)

When trial court has heard and determined the jurisdictional challenge and has decided in favor of its own jurisdiction and then proceeds to try the cause on its merits, it may then be claimed that a court without jurisdiction is purporting to exercise it, and jurisdiction to determine jurisdiction has been exercised and the higher courts will restrain the lower court from acting in excess of its jurisdiction. West's Ann.Code Civ.Proc. § 1102.

4. Prohibition 🔑3(5)

The fact that an appeal is available does not, in and of itself, necessarily preclude resort to prohibition, and writ may issue, even though an appeal may be taken, if the remedy by appeal is inadequate. West's Ann.Code Civ.Proc. § 1103.

5. Prohibition 🔑3(5)

Remedy in the ordinary course of law by an appeal from the judgment at the end of the trial is not adequate when the court has no jurisdiction to proceed with the action and no appeal is available before final judgment, and writ of prohibition may issue. West's Ann.Code Civ.Proc. § 1103.

6. Prohibition 🔑3(5)

Where an order is not appealable but is reviewable only upon appeal from a subsequent judgment, various factors, such as expense of proceeding with a trial and prejudice resulting from delay, may operate to make that remedy inadequate and prohibition may issue. West's Ann.Code Civ.Proc. § 1103.

7. Appeal and Error 🔑102

There is no appeal from an order overruling a demurrer.

8. Prohibition 🔑3(5)

Where landowners' demurrer to complaint in city's eminent domain action was overruled, and it appeared that before time that landowners could appeal from final judgment rendered in action, that landowners' partially constructed building would suffer destruction from elements, thieves and vandals, and that landowners would be required to shore up walls of building and such expense would not be recoverable in eminent domain action, landowners did not have speedy and adequate remedy by appeal, and writ of prohibition would issue. West's Ann.Code Civ.Proc. §§ 1103, 1249.

9. Prohibition 🔑17

Before remedy by prohibition is available, jurisdiction of the trial court must be challenged in that court by demurrer, motion, plea or other obstruction of some kind.

10. Pleading 🔑193(3), 203

A demurrer reaches only matters appearing on the face of pleading to which it is directed, and a demurrer to the jurisdiction of a court of general jurisdiction lies only where the want of jurisdiction appears affirmatively on the face of the complaint. West's Ann.Code Civ.Proc. § 430.

11. Prohibition 🔑10(2), 28

The sufficiency of the complaint will not be inquired into on application for writ of prohibition, and where a demurrer is erroneously overruled the litigant's only relief is an appeal from the final judgment, but when it is shown that the court, in overruling the demurrer, is proceeding without jurisdiction over the subject matter of the action, prohibition may issue.

12. Eminent Domain 🔑172

A court would be acting in excess of its jurisdiction in trying an eminent domain action where the municipal corporation seeking to condemn did not have statutory authority to do so.

13. Municipal Corporations 🔑57, 59

Power of a municipality to act outside of its boundaries is dependent entirely upon legislative grant, and does not exist unless expressly granted, necessarily or fairly implied in or incident to powers expressly granted, or essential to the declared objects and purposes of the corporation.

14. Eminent Domain ⚿9

A municipal corporation has no inherent power of eminent domain and can exercise it, if at all, only when expressly authorized by law. Government Code, §§ 37351, 37353; West's Ann.Civ.Code §§ 14, 1001; West's Ann.Code Civ.Proc. § 1238.1.

15. Eminent Domain ⚿9

Statute permitting city to purchase land outside city for municipal purpose, statute permitting city to exercise right of eminent domain, and statute providing that any person may acquire private property for any public use, do not indicate that subject of boundaries is extraneous to exercise of power of eminent domain except in statute providing that ordinance of public interest and necessity shall not be conclusive evidence of necessity as to taking of property located outside municipal limits. Government Code §§ 37351, 37353; West's Ann. Civ.Code, § 1001; West's Ann.Code Civ. Proc. §§ 1238, 1241, subd. 2.

16. Municipal Corporations ⚿57, 59

A municipal corporation possesses and can exercise the following powers and no others: (1) those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; and (3) those essential to the declared objects and purposes of the corporation, not simply convenient but indispensable.

17. Municipal Corporations ⚿57

Any fair, reasonable, and substantial doubt concerning the existence of a power in a municipality is resolved by the courts against the municipality and the power is denied.

18. Eminent Domain ⚿9, 172
Prohibition ⚿10(2)

In statute providing that legislative body of municipality may purchase real estate situated outside city limits necessary and proper for municipal purposes, word "purchase" did not expressly authorize city to take private property for off-street parking outside its boundaries by eminent domain proceedings, court did not have jurisdiction over such proceedings, and writ of prohibition against them was issued. Government Code, § 37351.

See publication Words and Phrases, for other judicial constructions and definitions of "Purchase".

◆

Popper & Burnstein and Robert C. Burnstein, Oakland, for petitioners.

J. F. Coakley, Dist. Atty., R. Robert Hunter, Chief Asst. Dist. Atty., and Richard H. Klippert, Deputy Dist. Atty., Oakland, for respondent.

John W. Scanlon, Hayward, City Attorney, Breed, Robinson & Stewart and Bestor Robinson, Special Counsel, Oakland, for Real Party in Interest.

CARTER, Justice.

Petitioners, William R. Harden and Pearl B. Harden, his wife, Chester N. Harden and Virginia Hart Harden, his wife, seek a writ of prohibition to restrain further proceedings in an eminent domain action brought against them and other property owners by the city of Hayward.

Petitioners own certain land in Alameda County, lying adjacent to, but outside the corporate boundaries of, the city of Hayward. On June 28, 1954, petitioners obtained a building permit from the County of Alameda which authorized them to erect a department store building upon the land owned by them. Immediately after the building permit had issued, petitioners contracted with licensed contractors for the erection of their building at a cost exceeding $100,000. Construction was from 25 to 30 per cent completed when the City Council of Hayward, a municipal corporation of the sixth class, on October 5, 1954, passed a resolution authorizing the city attorney to proceed by eminent domain to acquire the property of petitioners together with that belonging to others for the purpose of establishing an off-street parking area. Upon the passage of this resolution, the city notified petitioners to desist from further construction of the building and petitioners thereupon ceased construction. When over two weeks elapsed without the filing of an action in eminent domain, petitioners again began construction of the building. The city then filed on October 26, 1954, its complaint in eminent domain to which petitioners demurred. The demurrer was overruled on November 22, 1954, and petitioners were given 10 days within which to answer the complaint. This petition for a writ of prohibition followed.

In addition to the above mentioned facts, petitioners allege that all work has been stopped on the building; that the partially constructed building is in danger of being lost or destroyed by reason of the elements, theft or vandalism and that if such destruction occurs, they will suffer a loss in excess of $40,000; that the County of Alameda has ordered them to support laterally the masonry walls of the partially constructed building because of the abandonment of the construction pending the determination of the condemnation suit. Petitioners also allege that the loss they will suffer from the destruction of the existing structure is not compensable as damages in an eminent domain action and that if forced to support laterally the masonry walls, they will suffer additional expenses. It is contended that the city's complaint shows, on its face, that the action in eminent domain is not maintainable because a city of the sixth class may not exercise the power of eminent domain as to property outside its corporate limits; that if the superior court proceeds with the action, petitioners will suffer great loss; that an appeal from an adverse judgment is not an adequate remedy, and that a writ of prohibition should therefore issue. The city filed a memorandum in opposition, contending that the petition should be denied because an adequate remedy exists by way of appeal from the judgment; and that the complaint is not defective on its face because a city of the sixth class may exercise the power of eminent domain outside its corporate limits.

[1-3] We said in Rescue Army v. Municipal Court, 28 Cal.2d 460, 462, 171 P.2d 8, 10, that "The constitutionality of a statute or ordinance may be tested by prohibition on the ground that invalidity of the legislation goes to the jurisdiction of the court to proceed to try the case. See Whitney v. Superior Court, 182 Cal. 114, 187 P. 12; Levy v. Superior Court, 105 Cal. 600, 38 P. 965, 29 L.R.A. 811; Arfsten v. Superior Court, 20 Cal.App. 269, 275, 128 P. 949; * * *." We also said that "In prohibition, however, we are limited by statute to proceedings without or in excess of jurisdiction (Code Civ.Proc., § 1102) and we are therefore squarely confronted with the problems referred to above." We went on to hold that when the trial court has heard and determined that it has jurisdiction, prohibition will lie to prevent the exercise thereof when that jurisdiction is challenged in that court "by demurrer, motion, plea or other objection of some kind." When the trial court has heard and determined the jurisdictional challenge and has decided in favor of its own jurisdiction, and then proceeds to act—to try the cause on its merits, it may then be claimed that a court without jurisdiction is purporting to exercise it. Then, jurisdiction to determine jurisdiction has been exercised and the higher courts will restrain the lower court from acting in excess of its jurisdiction. Greenberg v. Superior Court, 19 Cal.2d 319, 121 P.2d 713; Abelleira v. District Court of Appeal, 17 Cal.2d 280, 109 P.2d 942, 132 A.L.R. 715; Jackson v. Superior Court, 10 Cal.2d 350, 74 P.2d 243, 113 A.L.R. 1422.

[4] The city contends that prohibition will not lie in that petitioners have a speedy and adequate remedy by way of appeal. As was held in Gorbacheff v. Justice's Court, 31 Cal.2d 178, 180, 187 P.2d 407, 409, the fact that an appeal is available does not, in and of itself, necessarily preclude resort to prohibition. Section 1103 of the Code of Civil Procedure authorizes the issuance of the writ, even though an appeal may be taken, if the remedy by appeal is inadequate. In the usual situation an appeal is considered an adequate remedy, "but no hard and fast rule can be laid down to determine in

advance whether it fully meets the requirements of justice in a particular case."

[5–8] We said in Providence Baptist Church v. Superior Court, 40 Cal.2d 55, 60, 251 P.2d 10, 13, that "It is the general rule 'that the remedy in the ordinary course of law by an appeal from the judgment at the end of the trial is not adequate when the court has no jurisdiction to proceed with the action and no appeal is available before final judgment. Tomales Bay, etc., Corp. v. Superior Court, 35 Cal.2d 389 (392), 217 P.2d 968.' City of San Diego v. Superior Court, supra, 36 Cal.2d 483, 485, 224 P.2d 685, 686. * * * 'Where an order is not appealable, but is reviewable only upon appeal from a subsequent judgment, various factors, such as expense of proceeding with a trial and prejudice resulting from delay, may operate to make that remedy inadequate.' Phelan v. Superior Court, 35 Cal. 2d 363, 370, 217 P.2d 951, 955." There is no appeal from the order overruling the demurrer, Gossman v. Gossman, 74 Cal.App. 2d 233, 168 P.2d 495; Southern California Telephone Co. v. Damenstein, 81 Cal.App. 2d 216, 183 P.2d 675, hence, petitioners would be forced to go through the expense of the trial of the eminent domain action before an appeal from the judgment rendered therein was available to them and before it would be possible for an appellate court to test the city's right to exercise the power of eminent domain outside its corporate limits. In the interim, petitioners allege that the partially constructed building will suffer destruction from the elements, thieves and/or vandals, and that they have been ordered by the county to provide support laterally for the walls of said partially constructed building at an increased cost. It is also alleged that in the event the city should prevail in the eminent domain action, this additional expense would not be compensable as damages. The city argues that since values are fixed as of the date of issuance of summons, Code Civ.Proc. § 1249, it is immaterial whether the existing concrete block walls deteriorate or collapse. This contention does not answer petitioners' argument that the expense to which they will have been subjected by complying with the county's order to support the walls is not compensable, and it appears that it would not be. Petitioners also allege that the land belonging to them is a parcel of a larger area encompassed in the city's resolution and that others besides themselves will be affected by the city's allegedly unauthorized exercise of its power of eminent domain. We held in City & County of San Francisco v. Superior Court, 38 Cal.2d 156, 160, 238 P.2d 581, that prohibition would lie in a case where it appeared that otherwise a failure of justice would occur in a matter of public importance by a wrongful or excessive exercise of jurisdiction. It would appear, therefore, that petitioners do not have a speedy and adequate remedy by appeal under the circumstances here presented.

[9, 10] With regard to the merits of the jurisdictional question involved, it appears that the city of Hayward, a city of the sixth class, acting under the general law, sought by resolution to institute an action in eminent domain to acquire property outside its corporate limits for off-street parking. Primarily, it should be noted that the city contends that petitioners failed to demur on the ground that the court had no jurisdiction or that the plaintiff had not the legal capacity to sue. Code Civ.Proc. § 430. Petitioners demurred on the ground (I) that the complaint failed to state facts sufficient to state a cause of action against defendants; and (II) that plaintiff's complaint was uncertain (III) ambiguous and (IV) unintelligible because (e) "it cannot be ascertained from plaintiff's complaint on file herein whether plaintiff is attempting to exercise the right of eminent domain in its capacity solely as a city of the Sixth Class, as the same is defined under the Constitution and Laws of the State of California, or whether it is exercising or attempting to exercise eminent domain as a 'City' under the Vehicle Parking District Law of 1943, the Parking Law of 1949 or the Parking District Law of 1951." The complaint alleged that plaintiff was a municipal corporation of the sixth class; that its legislative body had adopted a resolution by which it sought to condemn certain real property (described) owned by defendants located outside of its corporate boundaries; that the use for which the property was needed was one authorized by law. We said in the Rescue Army case, supra, that the jurisdiction of the trial court must be challenged in that court "by demurrer, motion, plea or other objection of some kind." A demurrer reaches only matters appearing on the face of the pleading to which it is directed, 21 Cal.Jur., p. 94; and a demurrer to the jurisdiction of a court of general jurisdiction lies only where the want of jurisdiction appears affirmatively on the face of the complaint, Doll v. Feller, 16 Cal. 432; 41 Am. Jur., § 213, p. 443, 444. It may be said here that the lack of jurisdiction appears from the city's allegation that the action involved land outside its corporate limits without alleging its authority to so condemn.

[11] Petitioners did demur on the ground that the complaint failed to state a cause of action. It is ordinarily said that the sufficiency of the complaint will not be inquired into on application for a writ of prohibition, 41 Cal.L.Rev. 124 et seq.; Lange v. Superior Court, 11 Cal.App. 1, 103 P. 908, and that where a demurrer is erroneously overruled, the litigant's only relief is an appeal from the final judgment. However, when it is shown that the court, in overruling the demurrer is proceeding without jurisdiction over the subject matter of the action, prohibition may issue. In Ophir Silver Mining Co. v. Superior Court, 147 Cal. 467, 478, 479, 82 P. 70, the court was prohibited from trying title to land in another state. In People v. Superior Court, 29 Cal.2d 754, 756, 178 P.2d 1, 2, prohibition was held available at the pleading stage because a matter of considerable public importance was at issue. The court said: "A preliminary question concerns the propriety of the present proceeding. In the return to the alternative writ it is contended that prohibition is here sought for the purpose of correcting judicial error and that the petitioner should be relegated to the remedy by appeal." We said: "The defense of sovereign immunity from suit presents a jurisdictional question. * * * Prohibition may therefore be invoked under the conditions prescribed by section 1102 et seq., of the Code of Civil Procedure. Assuming that there would be a remedy by appeal in the pending action, the importance of the principal question is sufficient to support the present proceeding to the end that the issue speedily be determined. Rescue Army v. Municipal Court, 28 Cal.2d 460, 467, 171 P. 2d 8. The fact that the peremptory writ may be denied in no way forecloses the court from exercising its constitutional and statutory power to entertain the proceeding." In Northwestern Pac. R. Co. v. Superior Court, 34 Cal.2d 454, 211 P.2d 571, prohibition was granted because of the failure of the plaintiff to comply with statutory preliminaries to maintain an eminent domain action in obtaining approval of the Public Utilities Commission before taking property used for a public utility service.

[12] If it appears that there was, as contended by petitioners, neither express statutory authority, nor case law, authorizing the city to proceed in eminent domain against property located outside its corporate limits, it would seem that prohibition would lie inasmuch as the trial court would then have no jurisdiction to proceed in the eminent domain action against these petitioners. In Redlands, etc., School Dist. v. Superior Court, 20 Cal.2d 348, 360, 125 P.2d 490, the court was concerned with a discussion of the difference between errors of law as distinguished from an excess of jurisdiction. It appears that the trial court in the instant case erroneously passed on its own jurisdiction in overruling petitioners' demurrer. It would be acting in excess of its jurisdiction in trying an eminent domain action where the municipal corporation seeking to condemn did not have statutory authority so to do.

[13, 14] The city contends that it has the implied power to prosecute an eminent domain action against property outside its municipal boundaries and relies upon the City of Pasadena v. Stimson, 91 Cal. 238, 27 P. 604, 606. The Pasadena case involved a proceeding under section 1237 et seq. of the Code of Civil Procedure by the city to con-

demn a right of way for an outfall sewer from the City of Pasadena to a tract of land outside the city limits. The court there pointed out that one "main proposition" relied upon was that a municipal corporation of the fifth or sixth class must, as a condition precedent to invoking the exercise of the power of eminent domain, make an unavailing effort to agree with the owner of the property or right which it seeks to acquire, and consequently that it must, in any condemnation proceeding, allege and prove that it has made that effort. The court held that this condition destroyed the uniform operation of a general law "and is special in a case where a general law not only can be made applicable, but in which a general law had been enacted, and in which there is no conceivable reason for discrimination." The court cited section 1001 of the Civil Code which provides that any person may acquire private property for any use specified in section 1238 of the Code of Civil Procedure; and section 14 of the Civil Code which provides that a private or public corporation is a "person," and section 1238 of the Code of Civil Procedure which includes "sewerage" as one of the purposes for which private property may be taken. While the power of Pasadena to exercise eminent domain outside its corporate limits was not discussed in the opinion, the case inferentially stands for the proposition that it does have the power. However, in Mulville v. City of San Diego, 183 Cal. 734, 737, 192 P. 702, 703, the question of the power of a city to exercise eminent domain outside its boundaries was directly involved. It was there said: "In general, a municipality is competent to act beyond its boundaries only in those cases in which it is so empowered by legislative authority and it is necessary, in passing upon the validity of acts of a municipality performed beyond its boundaries, to look to the general laws and municipal charter for the requisite authority. In certain instances, owing to the urgency of extreme expediency or necessity, express authority is dispensed with and the power of the municipality to perform certain acts beyond its boundary is implied as incidental to the existence of other powers expressly granted. Thus, it has been held that, where a municipality has power to construct sewers, it may, as an implied incident to such power, extend the same beyond its boundaries when necessary or manifestly desirable. McBean v. City of Fresno, 112 Cal. 159 [44 P. 358, 31 L.R.A. 794, 53 Am.St.Rep. 191]; City of Coldwater v. Tucker, 36 Mich. 474; Cochran v. Village of Park Ridge, 138 Ill. 295, 27 N.E. 939; McQuillin on Municipal Corporations, vol. 4, § 1434. McQuillin, in his work on Municipal Corporations, states the rule as follows: 'The general rule is that without legislative grant the authority of the municipal corporation is confined to its own area; hence its acts and ordinances have no force beyond its corporate limits. Thus, in the absence of such grant the municipality cannot open a street, repair a highway, grade an avenue, or aid in the construction of a plank road or bridge beyond its boundaries. Sometimes authority to act outside of the municipal boundaries may be implied on the ground of necessity, as, for example, to obtain outlets for sewers and drains. * * * Likewise a municipality possessing power to supply its inhabitants with water, may acquire for that purpose a water supply without its territory. * * *' McQuillin on Municipal Corporations, vol. 4, § 1824." The court continued: "Therefore, in a case of a municipality, power to act outside of the boundaries of the municipality is dependent entirely upon legislative grant; it does not exist unless expressly granted, necessarily or fairly implied in or incident to the powers expressly granted, or essential to the declared objects and purposes of the corporation. Hyatt v. Williams, 148 Cal. 585, 587, 84 P. 41; [City of] South Pasadena v. Pasadena Land, etc., Co., 152 Cal. 579, 590, 93 P. 490. By analogy the same rule applies in determining whether or not bonds of a municipal improvement district may be issued, the proceeds of which are to be used in the construction of public works outside of the boundaries of the district." It was concluded that the act involved provided for and permitted only such public improvements as might be constructed wholly within the district. We said in City & County of San Francisco v. Ross, 44 Cal.2d 52, 55, 279 P.2d 529, 531, "A municipal corporation has no inherent power of eminent domain and can exercise it, if at all, only when expressly authorized by law. Alexander v. Mitchell, 119 Cal.App.2d 816, 821, 260 P.2d 261; Mackay v. City of Los Angeles, 136 Cal.App. 180, 183, 28 P.2d 706; City of Los Angeles v. Koyer, 48 Cal.App. 720, 725, 192 P. 301; 10 Ruling Case Law 196, and cases there cited."

[15–17] The city relies on section 1238.1 of the Code of Civil Procedure which provides:

"Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses:

"1. Off-street parking. Off-street motor vehicle parking places, including property necessary or convenient for ingress thereto or egress therefrom, established by any city or city and county for public use."

The city's argument is that the above section of the Code of Civil Procedure, taken together with sections 37351 and 37353 of the Government Code, authorize it to acquire property outside its corporate boundaries. Section 37351 provides in part: "The legislative body *may purchase, lease, or receive such personal property and real estate* situated *inside or outside* the city limits as is necessary or proper for municipal purposes. * * *" (Emphasis added.) Section 37353 provides in part: "The legislative body may acquire property needed for: (a) Parking motor vehicles." It is claimed that these sections and section 1001 of the Civil Code show that the subject of boundaries is extraneous to the exercise of the power of eminent domain except for the situation set forth in subdivision 2 of section 1241. Section 1241 provides that when two-thirds of the legislative body of certain municipal corporations, including cities, pass a resolution or ordinance finding that the public interest and necessity require the taking, that finding is conclusive evidence on the question of necessity as to property within the city. The section also provides that "said resolution or ordinance shall *not* be such conclusive evidence in the case of the taking by any county, city and county, or incorporated city or town, or school district, or irrigation, public utility, or water district, of property located *outside* of the territorial limits thereof." (Emphasis added.) It is contended that by "clear implication," the sections authorize the exercise of the power outside the corporate limits. Another section relied upon by the city is section 40404 of the Government Code which provides in part that "The legislative body may acquire private property by condemnation or otherwise when it is necessary to take or damage such property for: * * * (f) Any other purposes authorized by law." It should be noted that in none of the sections cited by the city is the taking of property outside the corporate boundaries specifically authorized. In City of Madera v. Black, 181 Cal. 306, 312, 184 P. 397, 401, which involved Madera, a city of the sixth class, the city attempted by ordinance to impose a monthly sewage rate, or charge, for each dwelling house occupied by a single family. The court held that an ordinance which imposed sewer rates for purposes additional to that of paying the expenses of repairs and maintenance was void. It was said: "It is the settled law of this state and the general rule everywhere that—'language purporting to define the powers of a municipal corporation is to be strictly construed, and that any "fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied."' 1 Dillon on Municipal Corporations, § 89. It is declared 'as a "general and undisputed proposition of law," * * * that "a municipal corporation possesses and can exercise the following powers and no others: (1) Those granted in express words; (2) Those necessarily or fairly implied in or incident to the powers expressly granted; and (3) Those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable.' Oro Electric Co. v. Railroad Commission, 169 Cal. [466] 477, 147 P. [118], 122. The court in that case cited Von Schmidt v. Widber, 105 Cal. 151, 38 P. 682, and Hyatt v. Williams, 148 Cal. 585, 84 P. 41, both of which fully sustain the quotations above made. Similar expressions are found in San Christina, etc., Co. v. San Francisco, 167 Cal. [762], 771, 141 P. 384, 52 L.R.A.,N.S., 676, Connelly v. [City and County of] San Francisco, 164 Cal. [101], 105, 127 P. 834, [City of] Redondo Beach v. Cate, 136 Cal. 146, 68 P. 586, and Low v. [Mayor, etc., of City of] Marysville, 5 Cal. 214." In City of Salinas v. Pacific Tel. & Tel. Co., 72 Cal. App.2d 494, 499, 164 P.2d 905, it was again held, citing Von Schmidt v. Widber, 105 Cal. 151, 157, 38 P. 682; Hyatt v. Williams, 148 Cal. 585, 84 P. 41; Oro Electric Co. v. Railroad Commission, 169 Cal. 466, 477, 147 P. 118; City of Long Beach v. Lisenby, 175 Cal. 575, 576, 166 P. 333, City of Madera v. Black, 181 Cal. 306, 312, 184 P. 397; Miller v. City of Los Angeles, 185 Cal. 440, 444, 197 P. 342, that any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied.

[18] A liberal construction of the word "purchase" found in section 37351 of the Government Code could, conceivably, lead to the conclusion that the City of Hayward had statutory authority to exercise its power of eminent domain outside its corporate limits. However, if we are to follow the rule of strict construction found in the case of City of Madera v. Black, supra, 181 Cal. 306, 312, 184 P. 397 (as heretofore set forth), we cannot say that the word "purchase" *expressly* authorizes the city to take private property for off-street parking outside its boundaries by eminent domain proceedings.

Let the writ issue as prayed for.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

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133 Cal.App.2d 457

John W. NEVAROV and Anna J. Nevarov, Plaintiffs and Respondents,

v.

Jack A. NEVAROV and Anna A. Nevarov, Defendants and Appellants,

Bank of America National Trust and Savings Association, Defendant.

Civ. 4947.

District Court of Appeal, Fourth District, California.

June 7, 1955.

Action was brought for partition of realty and for an accounting, and defendants filed a cross complaint. On appeal by defendants from the judgment, the District Court of Appeal, 117 Cal.App.2d 581, 256 P.2d 330 modified the judgment. The Superior Court of Kern County, W. L. Bradshaw, J., entered an order confirming the sale of the realty and the report of the referees, and the defendants appealed. The District Court of Appeal, Barnard, P. J., held that where both parties alleged that the only liens or encumbrances were the lien of bank under trust deed, and bank was made a party to the action, and the Superior Court entered order of sale, a new order of sale after confirmation was not necessary because there were liens and cross demands, arising pendente lite, which had not been adjudicated.

Judgment modified and, as modified, affirmed.

1. Appeal and Error ⚿1096(3)

Where portion of judgment ordering defendants to vacate realty involved in action for partition and for accounting by February 28, 1952 or pay rent of $2,400 for that year was not mentioned on former appeal by defendants, that portion of the judgment was binding on defendants on subsequent appeal, and rule that each cotenant is entitled to possession and that one may not collect rent from the other, in absence of an agreement, was not applicable.

2. Partition ⚷107

Where both parties alleged, in action for partition of realty and for an accounting, that the only liens or encumbrances were the lien of bank under trust deed, and bank was made a party to the action, and court entered order of sale, a new order of sale after confirmation was not necessary because there were liens and cross demands, arising pendente lite, which had not been adjudicated

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Siemon & Siemon, Bakersfield, for appellants.

Baker, Palmer, Wall & Raymond, Bakersfield, for respondents.

BARNARD, Presiding Justice.

This is an action for partition of real property and for an accounting. The parties owned 160 acres of land as tenants in common. They farmed the land as partners from 1944 to 1947, and the defendants farmed it thereafter. This action was brought in May, 1948. The complaint alleged common ownership of the land; that the Bank of America held a trust deed as security for a loan of $10,000; that there were no other liens or encumbrances; that both parties had advanced money for the benefit of the common property; and that the defendants had failed to account for rents and profit received. The prayer was for a partition and for an accounting. The defendants filed a cross-complaint alleging that the property was held by the parties as tenants in common, and that there were no liens and encumbrances other than the trust deed held by the Bank of America. The prayer was for a partition of the real property, that the liens and encumbrances be determined, and for an accounting as to the partnership operations and as to the advances for the common property made by the respective parties. No lis pendens was filed by either party.

The court found, among other things, that the parties owned the land as tenants in common; and that the plaintiffs had contributed $25,237.63 and the defendants had contributed $1,698.75. A judgment was entered on February 6, 1952, ordering the land and certain described personal property sold, and appointing a referee for that purpose. It was further ordered that the proceeds be applied to the debts and expenses and all liens, including that of the Bank of America and the amount which might be found due to S. P. Gregory; to the payment of $1,000 allowed as attorneys fees to the attorneys for each party; to the payment of $25,237.63 to the plaintiffs and $1,698.75 to the defendants; and the balance to be distributed one-half to the plaintiffs and one-half to the defendants. It was further ordered that the defendants should vacate the property on or before February 28, 1952, and that if they failed to do so they should pay the plaintiffs $2,400 as rent for the year 1952, this amount to be deducted from any amount payable to the defendants and paid to the plaintiffs.

The defendants appealed from that judgment, the only points raised being that the court had erred in allowing certain credits which affected the amounts held by the court to have been advanced by the respective parties for the benefit of the property. On that appeal, this court, 117 Cal.App.2d 581, 256 P.2d 330, modified the judgment so as to provide that after the payment of the expenses and encumbrances mentioned in the judgment there should be paid to the plaintiffs the sum of $22,166.65 and paid to the defendants the sum of $15,727.77, before the remainder was equally divided.

Because of the death of the referee thus appointed the court, on December 7, 1953, made an order appointing three persons as referees, ordering them to sell the property and from the proceeds to pay the claims and liens, as authorized by the prior judgment, to report to the court, and that "all other proceeds shall be held pending an accounting by the referees." On December 11, 1953, the plaintiffs moved for an order adjudging that the defendant should pay them $2,400 rent for 1952, as required by the judgment, to be deducted from the defendants' share of the proceeds of the sale. On January 14, 1954, an order was made reciting that evidence had been received, finding that the defendants did not vacate the property but remained in possession throughout the year 1952, and ordering them to pay the plaintiffs $2,400, to be deducted from their share of the proceeds. A motion for a new trial on that order was made and denied. On February 2, 1954, an order was made appointing an appraiser and an appraisement was later filed, appraising the real property at $28,000 and the personal property at $1,320.

On April 13, 1954, the report of the referees was filed reporting that they had sold the land to the plaintiffs for $25,200 cash, that this was the best bid that could be obtained and was more than 90% of the appraised value, and that if the sale was confirmed the proceeds should be applied to the payment of the expenses, the taxes, the redemption from a tax sale, the balance due the Bank of America, and the attorneys' fees, as provided in the judgment, before any payment to the parties. On April 23, 1954, the court made an order confirming this sale. On May 6, 1954, the plaintiffs gave notice of a motion to vacate this order confirming the sale on the ground that less than ten days' notice of the motion to confirm had been given; and also filed a new notice of motion for an order confirming the sale and directing the payment of the various expenses and liens, and the division of the balance of the proceeds. The plaintiffs then filed an affidavit for an order to show cause, alleging that four crop mortgages given by the defendants had been recorded and were liens on the property, that $919.76 had been deposited in court which should be ordered paid to a pump company, and seeking an order that the defendants' share of the proceeds be used to pay these crop mortgages and that the $919 be turned over to the pump company. The defendants filed an affidavit in opposition to this motion alleging that part of the crop mortgages were paid and part not, that the crop mortgages were not a lien on the land, and that the parties had paid various sums for improvements subsequent to the entry of the judgment of February 6, 1952. They also filed objections to any further proceedings for partition of the property until amended pleadings were filed, notice of lis pendens given, and a new decree entered determining the condition of the title and the final contributions of the parties. On June 7, 1954, the court entered an order vacating the prior order confirming the sale, and entered an order confirming the sale of the real property to the plaintiffs for $25,200 and the report of the referees, and further ordering that from the proceeds the referees should pay the expenses of sale; all taxes and sums necessary to redeem from tax sales; the unpaid balance of the note to the Bank of America; the judgment in favor of S. P. Gregory in the sum of $738.59; certain sums to the auditor and to the attorneys; and to distribute to the plaintiffs 22,166.65/37,894.42 and to the defendants 15,727.77/37,894.42 of the cash remaining, and from the sum so payable to the defendants to pay to the plaintiffs the sum of $2,400 pursuant to the prior judgment. The defendants have appealed from this order confirming the sale of the real property.

[1] It is first contended that the charge of $2,400 against the appellants for failure to vacate the property, as required by the judgment of February 6, 1952, is unauthorized and void. It is argued that appellants, being codefendants, were not chargeable with rent under the familiar rule that each cotenant is entitled to possession and one may not collect rent from the other in the absence of an agreement. On the former appeal a similar contention was upheld with respect to rental for the years 1949, 1950 and 1951 since there was no agreement for those years. The portion of the judgment of February 6, 1952, which ordered the appellants to vacate the property by February 28, 1952, or in the event they did not do so to pay $2,400 for that year, was not mentioned on the former appeal and was not there considered. This action was not only one for partition but also one for an accounting. The question now raised could have been raised on that appeal and the judgment of February 6, 1952, as modified, became final. The court in that judgment ordered the land to be sold and also passed upon the accounting

issue as then presented. As a part of the issues, it had the jurisdiction to end the appellants' right of occupancy of the land, to enable the land to be sold, and to fix the value of the rent for that year in the event of appellants' failure to promptly surrender possession. If there was error in this particular order it should have been raised on the former appeal. That part of the judgment is now binding on the appellants, and the usual rule with respect to the right of one cotenant to collect rent from the other cotenant is not applicable under the circumstances now appearing.

It is further contended that the title to the real property being partitioned was not in the condition required by law to authorize a sale; that there are liens and cross-demands arising pendente lite which have not been adjudicated; and that new proceedings for the sale of the property, the determination of the liens, and a full accounting should be had. It is argued that the court could not order a sale of the real property without determining the liens and bringing in any necessary parties; that it appears that subsequent liens have been filed, the amount and extent of which have not been determined; that it appears from the record that various amounts have been paid by the parties subsequent to the judgment of February 6, 1952, upon the bank's trust deed and for the benefit of the properties, which have not been determined by the court; and that the personal property which the court ordered to be sold has not been sold.

It was admitted by the pleadings that the Bank of America had a lien under its trust deed and the bank was made a party to the action. Both parties alleged that there were no other liens or encumbrances. Apparently, it appeared at the trial that a judgment lien had accrued in favor of S. P. Gregory but the court, in its judgment of February 6, 1952, merely ordered the payment of this lien without specifying the amount. From the affidavits filed shortly prior to the order confirming the sale it appears that there may or may not be other liens, the existence or amounts of which have not been determined or passed upon by the court. It also appears that certain payments on the trust deed, and otherwise, may have been made by the parties subsequent to the judgment of February 6, 1952. So far as indicated by the record, these matters were not determined or passed upon by the court. There is nothing in the record indicating that the personal property ordered to be sold has ever been sold, or its value considered.

[2] There is nothing in the record to indicate that the court was without jurisdiction to enter its original order of sale contained in the judgment of February 6, 1952. The pleadings and the evidence at that time disclosed no lack of jurisdiction, and no complaint was made with respect to that matter on the appeal from that judgment. We therefore hold that a new order of sale is not necessary. It does appear, however, that several matters arising subsequent to that judgment were not determined before the order confirming this sale was made. The personal property should be sold and accounted for, and further proceedings should be had determining the other matters above mentioned before a final order is made determining the proportionate interest of the parties in any balance remaining from the proceeds of this sale.

The judgment is affirmed except for that portion of the last paragraph thereof which distributes certain percentages of the balance remaining from the proceeds of the sale to the respective parties; that portion is reversed with instructions to sell the personal property, with an accounting in that connection; to determine whether or not there are any other liens which should be paid; to determine what credits and charges the parties are entitled to since the accounting accepted in the judgment of February 6, 1952, as modified; and to then determine what percentage of the balance each of the parties is entitled to in the light of such further findings. The appellants to recover costs on appeal.

GRIFFIN and MUSSELL, JJ., concur.

133 Cal.App.2d 471

Ted MAYR, as Administrator of the Estate of Cesar Arana, deceased, Defendant, Cross-Complainant, Cross-Defendant and Appellant,

v.

Bernardina ARANA, Defendant, Cross-Defendant, Cross-Complainant and Respondent.

Civ. 20799.

District Court of Appeal, Second District, Division 2, California.

June 8, 1955.

Interpleader action by insurer of decedent for interpretation of life policy. The Superior Court, Ventura County, Charles F. Blackstock, J., entered judgment for final beneficiary named in policy and heirs of primary beneficiary appealed. The District Court of Appeal, McComb, J., held that where terms of life policy designated insured's wife as primary beneficiary, his children successor beneficiaries, and his mother as final beneficiary, and included provision that if at any time there be no primary beneficiary living, then present value of any guaranteed amounts unpaid would be paid to final beneficiary, and where, in automobile accident, insured and wife were both killed, wife surviving husband by but one hour and no children survived, final beneficiary, and not heirs of insured's wife, was entitled to proceeds of policy.

Affirmed.

1. Insurance ⇨585(1)

Where terms of life policy designated insured's wife as primary beneficiary, his children as successor beneficiaries, and his mother as final beneficiary, and included provision that if at any time there be no primary beneficiary living, then present value of any guaranteed amounts unpaid would be paid to final beneficiary, and where, in automobile accident, insured and wife were both killed, wife surviving husband by but one hour, and no children survived, final beneficiary, and not heirs of insured's wife, was entitled to proceeds of policy.

2. Husband and Wife ⇨265

While it is true that husband cannot make gift of community property without his wife's consent, unless wife desires to void gift and takes action to set it aside, gift is valid.

3. Husband and Wife ⇨265

Where life policy designated insured's wife as primary beneficiary, his children as successor beneficiaries, and his mother as final beneficiary, fact that premiums on such policy were paid with community funds did not entitle estate of insured's wife to community interest in proceeds of policy as result of death of both insured and wife, where wife, knowing terms of policy, failed to take any steps to assert her community rights thereunder.

◆

James C. Hollingsworth, Ventura, for appellant.

Gibbs & Gideon, San Francisco, for respondent.

McCOMB, Justice.

From a judgment in favor of respondent Arana in an interpleader action interpreting an insurance contract, plaintiff appeals.

Facts: In September, 1952, Cesar Arana took out an $8,000 life insurance policy in which he named his wife as primary beneficiary, his children as successor beneficiaries, and his mother as final beneficiary.

On February 21, 1953, Cesar Arana and his wife, Ramona, were killed in an automobile accident near Ventura, California. Mr. Arana died instantly; she died an hour or two later. There were no children of the marriage and the deceased couple left no wills. Mr. Arana was survived by his mother, Bernardina Arana, defendant herein. Mrs. Arana was survived by her parents. Ted Mayr, appellant herein, as the public administrator of Ventura County, was appointed administrator of the estates of both Cesar and Ramona Arana.

On March 24, 1953, appellant Mayr notified the insurance company of Cesar Arana's death and demanded payment of the $8,000 due under the policy. Following this demand the insurance company filed an interpleader action as a result of which Mrs. Bernardina Arana filed a claim to the proceeds as final beneficiary under the policy.

The policy contained, among others, these provisions:

"Settlement Agreement

"The sum payable upon the death of the insured shall be applied for the benefit of the following beneficiaries in accordance with the following provisions.

Primary Beneficiary....................Ramona Myrtle Arana, wife of the insured.

Option Under Which The Sum Payable Is To Be Applied For Primary Beneficiary ....Option 1

Successor Beneficiary ....Children of the insured by said wife.

Provision For Successor Beneficiary If Last Surviving Primary Beneficiary Dies After The Insured................One sum.

Option Under Which The Sum Payable Is To Be Applied For Successor Beneficiary If No Primary Beneficiary Survives The Insured: ....Option 1 if each share is not less than $1,000; otherwise in one sum.

Final Beneficiary To Receive in One Sum.....................Bernardina Arana, mother of the insured.

Special Provisions:.....................None."

"Order Of Payment To Classes Of Beneficiaries. Any payments due will be made exclusively to the Primary Beneficiary, if living. If at any time there be no Primary Beneficiary living, any payments due will be made to the Successor Beneficiary, if living. If at any time there be no living Primary or Successor Beneficiary, the then present value of any guaranteed amounts unpaid will be paid in one sum to the Final Beneficiary, if any.

If at any time there is no existing beneficiary (Primary, Successor, or Final), the then present value of any guaranteed amounts unpaid will be paid in one sum to the executors or administrators of the last survivor of the insured and all beneficiaries.

(Page Two A)

Option 1—Interest. Retained by the company as a fund with payment of interest annually on the then balance of the fund at a rate not less than two per cent per annum, the amount so retained to be payable through withdrawal by the payee, unless otherwise provided, in sums of $100 or multiples thereof.

(Page Four)"

The trial court gave judgment in favor of respondent Arana, the mother of the insured, for the amount of the proceeds of the policy.

Questions: First: *Under the terms of the policy was the mother of the deceased, Cesar Arana, or the estate of his deceased wife, Ramona Arana, entitled to the proceeds of the insurance policy?*

We are of the opinion that the finding of the trial court that respondent Bernardina Arana, mother of the deceased, was entitled to the proceeds of the policy was correct. Appellant contends that the proceeds of the policy vested in decedent's wife immediately upon his death, so that upon her death they passed to her estate, and in support of such contention relies on the case of Rossetti v. Hill, 9 Cir., 161 F.2d 549.

In the cited case George A. Hill, Jr., the insured, died. Thirty-nine days thereafter his widow, Genevieve Borlini Hill, who was the direct beneficiary in the policy, died. The Hill children were named in the policy as contingent beneficiaries. The court of appeals in its opinion, 161 F.2d at page 550, said:

"But the widow, the direct beneficiary, was alive when insured died, and, therefore, by the terms of the policy the unqualified right to the insurance benefits vested in her at the first point of time occurring after insured's death. The reasoning in Chartrand v. Brace, 16 Colo. 19, 26 P. 152, 12 L.R.A. 209, 25 Am.St.Rep. 235, and in Kottman v. Minnesota Odd Fellows Mut. Ben. Soc., 66 Minn. 88, 68 N.W. 732, is sound, as we see it. All that remained for the widow to have the benefits actually in hand, or, in lieu thereof, the right to it by installments, was to send the proof of death of insured to the insurance company, which was done, and to make and to inform the company of her election as to how she would receive the money, which was never done.

"Neither the insurance company nor anyone else had the slightest claim upon the title to the money, but a burden was upon the company to hold and protect it. The widow died before she communicated her choice of how she would receive the benefits, and since she was entitled to the whole thereof, and the installment option was in lieu thereof, the total of all benefits were payable when the death prevented a choice being made."

We are of the opinion that Rossetti v. Hill is not applicable to the facts of the present case for the reason that the insurance policy here involved is different than that involved in the cited case. In this case the policy repeatedly states that upon the death of the primary beneficiaries, after the death of the insured, the successor or final beneficiaries take the unpaid proceeds.

The Rossetti case involved a common type of policy which simply named a "contingent" beneficiary as an alternate to take in case the "direct" beneficiary predeceased the insured. The court there held that since the "direct" beneficiary survived the insured the right of the "contingent" beneficiaries never came into being. There was no language in that policy to indicate that upon the death of the direct beneficiary the contingent beneficiaries were to take the unpaid proceeds.

In the case at bar we find that in four separate clauses the provision is specifically made for payment to the successor or final beneficiary *after the death of a primary beneficiary who survives the insured.* For example, at the bottom of page Two A (supra) of the policy under the caption "Order of Payment to Classes of Beneficiaries" the following clauses appear:

"If at any time there be no Primary Beneficiary living * * * the then present value of any guaranteed amounts unpaid will be paid to the Final Beneficiary."

"If at any time there is no existing beneficiary (Primary, Successor, or Final) the then present value of any guaranteed amounts unpaid will be paid in one sum to the executors or administrators of the last survivor of the insured and all beneficiaries."

Again on page 2 of the application form which is attached as a photostatic appendage to the policy, we find that the primary beneficiary is described as "Payee at death of Insured." the successor is described as "Substitute Payee if no Primary Payee living," and the statement is made that "If primary survives the insured the method for successor shall be one sum."

Nowhere does the policy state that the primary beneficiary must die before the insured in order for the successor or the final beneficiary to claim the proceeds. The language is to the contrary. For example, the Fifth heavy black line on page Two A of the policy reads:

"Provision for Successor Beneficiary if last surviving Primary Beneficiary dies *after* the insured." (Italics added.)

This clause would be meaningless if, as appellant contends, the policy vested absolutely on the death of the insured in the primary. Obviously there would be nothing to pass on to the successor or final beneficiary upon the death of the primary. The only way in which the clause can be given meaning is to assume that: (a) The insured dies first; (b) Then the primary dies before having received all the payments due under the policy; (c) There are proceeds left which pass to the successor or final beneficiary.

On page 2 of the application form it says, "If Primary survives the insured the method for Successor shall be one sum." Manifestly the primary does not obtain an absolute vested interest in the policy. This is impossible because the policy states explicitly that the successor or final beneficiary, as distinguished from the estate of the primary, is entitled to receive the balance of the policy upon the death of the primary. In addition, on page 2 of the policy entitled "Order of Payment to Classes of Beneficiaries," it reads in part as follows:

"If at any time there be no Primary beneficiary living * * * the then present value of any guaranteed amounts unpaid will be paid to the Final Beneficiary."

[1] The primary need not predecease the insured in order that the final beneficiary take the unpaid balance. On the contrary, the final takes whatever is left of the proceeds whenever the primary dies. In this case the primary, the wife, died an hour after her husband. No part of the proceeds had been paid to her. In fact, she never regained consciousness. Since there was no primary living and no successor beneficiaries (children), the insured's mother as the final beneficiary become entitled to the proceeds the moment the wife died.

Finally, the clause at the bottom of page Two A dealing with payment where no beneficiaries are living, and stating that in such case the proceeds will be paid to the estate of the last survivor of the insured and all beneficiaries is conclusive. Obviously, if the proceeds would go to the estate of the mother, as the last beneficiary to die, rather than to the estate of the primary, it does not make sense to deny to her the proceeds while she is living.

We believe that the holdings in Northwestern Mut. Life Ins. Co. of Milwaukee, Wis., v. Fink, 6 Cir., 118 F.2d 761, and Peoples National Bank v. Northwestern Mut. Life Ins. Co., Ky., 237 S.W.2d 870, are sound and determinative and support the construction of the life insurance policy as written. In the Fink case the court held under facts similar to those at hand that the estate of a primary beneficiary who survived the insured but died before drawing down the proceeds was not entitled thereto as against the successor beneficiary.

In the Peoples National Bank case, after reviewing the decisions on the subject, the court observed that as a general rule if an insurance contract does not contain a provision to the contrary, the estate of a primary beneficiary who survived the insured but died before receiving the proceeds, took as against a contingent beneficiary. The court then discussed the Fink and Rossetti cases, distinguished them, and concluded that in the case under consideration, the successor beneficiary was entitled to the proceeds rather than the estate of the primary, the court saying, 237 S.W.2d at page 873:

"In the Fink case the court said that to hold the direct beneficiary to have acquired a vested interest would require the addition of the words 'before the death of the insured' to the endorsement and that this would constitute an unauthorized material alteration. It is sufficient to say that in our opinion the insured, by his endorsement as to settlement, manifested clearly an intent that the contingent beneficiary succeed to all the interest in the proceeds of the policy undisposed of by (the Primary) during her lifetime."

This language is pertinent to the present policy. Only by rewriting all the provisions dealing with the rights of beneficiaries and inserting in each the words "before the death of the insured" could appellant's position (that is, that the final takes only where the primary dies before the insured) be upheld.

[2, 3] Second: *In view of the fact that the premiums on the insurance policy were paid with community funds did the estate of decedent's wife have a community interest in the proceeds of the insurance policy?*

This question must be answered in the negative for two reasons:

(1) While it is true that under the California decisions the husband cannot make a gift of community property without his wife's consent, it is likewise settled that unless the wife desires to void the gift and takes action to set it aside the gift is valid. (Blethen v. Pacific Mut. Life Ins. Co., 198 Cal. 91, 101 [7], 243 P. 431; Pomper v. Behnke, 97 Cal.App. 628, 638 [12, 13], 276 P. 122.)

In the instant case the foregoing rule is applicable since the wife, knowing the terms of the policy, never at any time took any steps to assert her community rights thereunder. On the contrary, the record discloses that the agent who sold the policy testified that Mrs. Ramona Arana stated at the time the policy was issued that she felt the proceeds, if she were not living, should go to the decedent's mother. Since the wife took no steps to invalidate the gift, assuming it to be such, prior to her death, it became valid upon her death. (Italian American Bank v. Canepa, 52 Cal. App. 619, 621 [1], 199 P. 55.)

(2) There was not a gift of the proceeds of the policy to respondent since the decedent could have given one half of the proceeds to his mother without his wife's consent, but in consideration of the wife's consenting to the policy whereby she became the primary beneficiary of the entire amount named in the policy she released her community interest, in the event of her death prior to her mother-in-law's, to respondent. (Cf. Trimble v. Trimble, 219 Cal. 340, 343 [4], 26 P.2d 477.)

In view of our conclusions it is unnecessary to discuss other questions argued in the brief.

Affirmed.

FOX, J., concurs.

133 Cal.App.2d 418

John E. DUERKSEN and Helen Duerksen, Plaintiffs-Appellants,
v.
G. L. KLASSEN and Bertha B. Klassen, Defendants-Respondents.
Civ. 4956.

District Court of Appeal, Fourth District, California.
June 3, 1955.

Action by landlords against tenants for year's rent. The Superior Court, Kern County, Robert B. Lambert, J., entered judgment for tenants and landlords appealed. The District Court of Appeal, Griffin, J., held that evidence sustained findings that landlords took possession of property for themselves and considered the tenants' lease option terminated, and that tenants acquiesed in this termination, and surrendered the premises.

Affirmed.

Landlord and Tenant 🔑112½

In action by landlords against tenants for second year's rent on unimproved agricultural land on which tenants had exercised a two-year option to renew lease the year previously, evidence sustained findings that landlords took possession of property for themselves and considered lease terminated and that tenants acquiesced in this termination and surrendered the premises.

Woodruff & Williams, Bakersfield, for appellants.

Kendall & Howell, Bakersfield, for respondents.

GRIFFIN, Justice.

In 1949, plaintiffs, appellants herein, the lessors, leased, in writing, 160 acres of undeveloped farm land (on which there were no improvements), to defendants and respondents, the lessees, for a period of three years commencing January 1, 1949 and ending December 31, 1951, at $4,000 per year. The lease provided that lessees may have the option to renew the lease for two additional years commencing January 1, 1952, and ending December 31, 1953. Lessees entered into possession and paid the rental for the three-year term and on January 30, 1952, gave lessors written notice of the exercise of the option to renew, and paid $4,000 rental for the first year of the renewal period. The installment of rent due on February 1, 1953, for the second year of the renewal period, was not paid and lessors brought this action for said sum of $4,000.

Defendants' answer admits the due execution of the lease and that the payments indicated were made, but claims that no sum was then due or unpaid; that the lease provided lessee must level the land and that lessors would pay lessee out of the second year's rent, the cost of the leveling up to the sum of $1,000; that in addition, it was agreed therein that there was a legal action pending in regard to leveling costs for the year 1948, totaling $7,700; that in the event lessors were successful in reducing that sum in said suit, any reduction accomplished would be applied by lessors to the payment of the cost to lessee in their leveling of the land which exceeded the aforesaid sum of $1,000.

It is claimed in the answer that defendants expended $4,303.45 as leveling costs; that plaintiffs failed to account to defendants for any reduction, and that plaintiffs did receive such reduction in the lawsuit and accordingly defendants were entitled to a rent credit of $3,303.45. No counterclaim or cross-complaint was filed by defendants. As a special defense defendants claim that there was a failure of water supply and plaintiffs orally agreed that the renewal of the lease should be only for one year; that defendants advised plaintiffs they would not occupy the land for the year 1953, at the rental provided in the lease under those circumstances, and plaintiffs then notified defendants in writing that said written lease was breached and terminated and plaintiffs thereupon attempted to secure other lessees for said premises but no such lease was consummated.

The court found generally in favor of defendants; that defendants did not pay the installment rent of $4,000 due under the terms of the written lease on February 1, 1953, but found it was not true that such sum was due and owing plaintiffs because plaintiffs and defendants mutually terminated said lease on that day. It then found that the issue as to whether defendants were entitled to any offsets on account of land leveling was not determined in that action because the court found the lease was mutually terminated. Judgment was entered for defendants accordingly.

The sole contention on this appeal is whether the evidence produced was sufficient to support the decision that the parties mutually terminated their lease on February 1, 1953. The evidence in the record pertaining to this subject matter is rather sketchy. Most of the testimony related to the claim for the cost of leveling the land. Defendants paid the $4,000 yearly rental, went on the land, leveled a great portion of it, and grew crops thereon for the three-year term prescribed. Apparently defendants, with full knowledge of plaintiffs, let the premises to one Webb, who farmed it during the year 1951, and Webb paid the $4,000 yearly rental which was turned over to plaintiffs by defendants.

It appears that on December 14, 1951, plaintiffs' attorney sent a letter to defendants notifying them that defendants were in violation of the terms of their lease in two ways, i. e. (1) that the leveling work agreed to be performed was not sufficiently performed to comply with the agreement; (2) that lessees allowed noxious weeds to infest the premises in violation of the lease. Accordingly, lessors "do hereby elect to terminate said lease as of December 31, 1951, the expiration date of said lease * * *.", and "inform you that you have forfeited all rights to the option" and you are "requested to remove from said premises * * * before December 31, 1951."

The record shows that in the latter part of January, or early part of February, 1952, Duerksen, Klassen and Webb met at a cotton gin company which financed many of the farmers, and there was discussed between them the possibility of Webb taking over the acreage under direct lease from plaintiffs and accordingly defendants were not to renew their lease with plaintiffs. Webb testified it was there agreed that the place would go back to plaintiffs and Webb would take over on a ¼ crop rent basis if he could get financed to put in a well; that the gin company would not finance it and that it was finally agreed that defendants would pay the $4,000 for that year and Webb would be put on the property at a ¼ crop rental to Klassen, and for the next year Webb was to make his own deal with Duerksen. At that time defendants contended they had leveled the property in accordance with their agreement with plaintiffs but that the water supply was such that they were compelled to use water from their adjoining property and wells to irrigate this acreage. It appears that subsequent to this occasion defendants sold this adjoining property and no longer were able to obtain water from it, and accordingly it would be of no value to them without water; that this matter was discussed with plaintiffs by Webb after he had finished the 1952 crop, and Webb offered to put up $4,000 on account of the pumping plant and pay a ¼ crop rent for the lease on the property for 1953; that plaintiffs insisted on $10,000 to finance the deal but he could not finance it. There is evidence that Webb and plaintiff Duerksen went to a pump company in January, 1953, and secured an estimate of costs for the necessary drilling of the well and installation of a pump, at $10,000.

The record shows that on February 20, 1952, plaintiffs' attorney sent a letter to defendants stating:

> "After our many conversations and discussions in regard to the termination or renewal of option period of the lease * * * Duerksen * * * will refrain from taking action on the failure on your part to perform all the terms and conditions of said lease at least for the time being and will consent to your continued tenancy on said premises under the option provisions of said lease without waiver of any prior defaults * * *."

On January 30, 1952, defendants paid the $4,000 to exercise the option for the rest of the period and sent a check with a letter to plaintiffs indicating defendants' intention to renew the lease, but claimed that defendants had not received an accounting from plaintiffs as to money received as a result of the lawsuit over the leveling costs. Webb remained in possession of the land and farmed it. On February 2, 1953, plaintiffs sent defendants (who then resided in Los Angeles County), a telegram reading: "Lease Payment Past Due Lease Breached Unless Paid Today". It appears that Webb moved off the property about this time and no further payments were made by defendants on the lease. In the latter part of February, 1953, defendants received a telephone call from plaintiffs in which conversation plaintiff Duerksen expressed his disappointment because defendants had not taken over the property for that year and defendants told plaintiffs they did not see why they should be disappointed because plaintiffs had been wanting the place back all of this time and since they had their understanding at the gin that plaintiffs were going to lease the land to someone else because of the water problem and because of the telegram they sent they should not be disappointed because Webbs were moving off the property. Nothing further was heard from plaintiffs after this conversation. On March 10, 1953, demand was made upon defendants for the $4,000 claimed rent due on February 1, 1953.

The evidence shows that immediately after February 1, 1953, plaintiffs endeavored to secure other lessees for the premises upon the basis of $50 per acre if lessees furnished the water, and $60 per acre if lessors drilled a well and furnished it. A similar demand was made of Webb if he would continue to stay in possession of the property and desired to secure a lease. Similar propositions were submitted to other prospective lessees, without success. There was evidence that about this time Duerksen went on the property and burned the weeds; that sheep were pastured on the premises, and several hives of bees and some big equipment were kept there. He denied knowledge of any arrangements about the sheep grazing on the property and the bees being placed there. Defendants claim they did not have possession of the property or authorize any of this activity or exercise any control over it after Webb moved onto it.

It is defendants' position that in view of the previous arrangements and conversations with plaintiffs, the telegram sent by plaintiffs to them on February 1, 1953, regardless of its technical wording, amounted to a notice that the lease, as far as defendants were concerned, was terminated and accordingly plaintiffs took possession of the property but were unable to re-lease it due to the fact of the great increase in rental demanded and the requirement that the tenant drill a well on the premises; that defendants, in accordance with the notice to pay rent or quit the premises, and the previous oral agreements, surrendered possession and plaintiffs took over such possession; that there was no indication in the notice that plaintiffs were taking possession and attempting to lease the property for defendants' benefit, and accordingly a mutual termination of defendants' lease resulted. Apparently this was the construction placed upon the transaction by the trial court. Plaintiffs cite Black's Law Dictionary, Third Edition, in defining the word "breached", as used in the telegram, as the "breaking or violating of a law, right or duty, either by commission or omission". Defendants' answer to this is that these farmers were probably not possessed of Black's Law Dictionary at the time and accordingly used language which was known to them, and that defendants believed that they were told to pay up or quit the premises.

In Kulawitz v. Pacific Woodenware & Paper Co., 25 Cal.2d 664, 155 P.2d 24; it was held (quoting from the syllabus) that:

> "Upon surrender of possession by a lessee before the expiration of the lease term, the lessor has three remedies: (1) To consider the lease as still in existence and sue for the unpaid rent as it becomes due; (2) to treat the lease as terminated and retake possession for his own account; or (3) to retake possession for the lessee's account and relet the premises, holding the lessee for the difference between the rentals and what the lessor is able in good faith to procure by reletting."

Although the evidence here presented might well have supported a contrary conclusion it does indicate that defendants made payments of all rents due until they could no longer obtain a water supply from their property; that plaintiffs knew that the only water supply was from such source when the lease was executed and that the land had no such rental value without a supply of water; that this condition was discussed with plaintiffs before defendants were willing to continue under the lease of the property for a period longer than one year; that in fact plaintiffs had given defendants notice that the lease had been violated for failure to properly care for the property and accordingly the lease was "terminated" and that a renewal of the lease would not be permitted.

There is some evidence that plaintiffs let the Webbs have possession of the property for the one year, conditioned that defendants pay the amount due for that year and that some arrangements would be worked out with the Webbs or other persons whereby water could be produced on the property, and defendants would then be notified of that fact. Apparently defendants had no further notice from plaintiffs of the arrangements made, and accordingly considered the telegram a notice to pay the rent or quit the premises, and they refused to pay and Webb surrendered them to plaintiffs. The lease made no provision for the retaking of the property by the lessors and leasing it for the benefit of the lessees.

While the evidence is in conflict as to whether plaintiffs took possession thereafter in their own behalf or in behalf of defendants, the trial court was justified in believing that plaintiffs did take possession of the property for themselves and considered defendants' lease option terminated and that defendants acquiesced in this termination and surrendered the premises. Downing v. Cutting Packing Co., 183 Cal. 91, 190 P. 455; Dorcich v. Time Oil Co., 103 Cal.App.2d 677, 230 P.2d 10; De La Motte v. Rucker, 55 Cal.App.2d 226, 229, 130 P.2d 444.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

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133 Cal.App.2d 427

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Bernard FARRELL, Defendant and Appellant.

Cr. 3062.

District Court of Appeal, First District, Division 1, California.

June 6, 1955.

Prosecution for possession of heroin. Defendant was convicted in Superior Court, City and County of San Francisco, Twain Michelsen, J., and appealed. The District Court of Appeal, Fred B. Wood, J., held that evidence, including defendant's false statement to officers concerning the location of his automobile which they wished to search, was sufficient to corroborate the testimony of an accomplice who was seen leaving the automobile and throwing away heroin.

Affirmed.

1. Criminal Law 🔑511(7)

In prosecution for possession of heroin, evidence, including defendant's false statement to officers concerning location of his automobile which they wished to search, was sufficient to corroborate testimony of accomplice who was seen leaving the automobile and throwing away heroin. Health and Safety Code, § 11500.

2. Criminal Law 🔑511(2)

Statutes relating to corroboration of testimony of accomplice requires only that evidence tend to connect a defendant with commission of the crime in such way as reasonably may satisfy a jury that accomplice is telling the truth, and it is not necessary that accomplice be corroborated as to every fact to which he testifies.

3. Criminal Law 🔑511(1)

Evidence required to corroborate testimony of accomplice need not by itself establish that crime was committed or show all elements thereof, but it must relate to some act or fact which is an element of the offense and, though it must create more than a suspicion, it may be sufficient even though slight and entitled to but little consideration when standing by itself.

4. Criminal Law 🔑511(7)

False and contradictory statements of a defendant in relation to the charge are themselves evidence which may serve to corroborate testimony of an accomplice.

5. Witnesses 🔑277(4)

In prosecution for possession of heroin, wherein defendant had testified on direct examination that he had used dolophine, that he had never had bindle of heroin in his possession and had never used heroin in his life, question on cross-examination as to whether defendant knew that dolophine was sometimes used as substitute drug by heroin addicts was within proper scope of cross-examination. Pen.

Code, § 1323; Health and Safety Code, § 11500.

6. Witnesses ⚷277(4)

A defendant may be cross-examined as to all matters which were covered by his direct examination. Pen.Code, § 1323.

7. Criminal Law ⚷1043(1)

Where defendant in prosecution for possession of heroin did not at trial object to question on ground that it was beyond proper scope of cross-examination, he thereby waived the objection and could not assert it on appeal. Pen.Code, § 1323; Health and Safety Code, § 11500.

8. Witnesses ⚷277(4)

In prosecution for possession of heroin, wherein defendant had testified on direct examination that he had never possessed nor used heroin and that he had never seen a bindle except in magazine pictures, question whether on certain occasion he had swallowed a bindle and whether he had placed in his mouth a paper of general size and description of bindle which was in evidence were within proper scope of cross-examination. Pen.Code, § 1323; Health and Safety Code, § 11500.

9. Criminal Law ⚷1036(2)

In prosecution for possession of heroin, defendant waived objection to questions as not within proper scope of cross-examination by failing to make objection at time questions were asked. Pen.Code, § 1323; Health and Safety Code, § 11500.

◆

Sol A. Abrams, George E. Hammer, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Arlo E. Smith, Deputy Atty. Gen., for respondent.

FRED B. WOOD, Justice.

Convicted of a violation of section 11500 of the Health and Safety Code, possession of heroin, defendant has appealed from the judgment and from the order denying a new trial. He claims (1) lack of corroboration of the testimony of an accomplice and (2) the allowance of improper questions upon the cross-examination of the defendant.

(1) *Was there insufficient corroboration of the testimony of Kay Lucia, an accomplice?*

Kay Lucia testified that on December 10, 1953, about noon, she saw defendant in a bar near Leavenworth and Eddy Streets, San Francisco; that he said he didn't have a room to use, was locked out of his room, and asked if he could use her room to take a "fix," which she explained as meaning an injection of a narcotic. She told him he could do so. The two of them then left in his car; stopped at Van Ness and Eddy where he got out of the car. He returned to the car in two or three minutes, and drove to an alley near defendant's hotel and parked the car. He handed her a paper of heroin which was intended for both of them.[1] He then left the car to get his "outfit" (needle and syringe) for taking a "fix." He told her that his "outfit" was outside his room. She waited some 20 to 30 minutes for his return when she saw a police car driving toward her. She got out of the car and as an officer walked toward her, she flipped the paper of heroin on the ground.

One of the arresting officers testified that he and another police officer went to defendant's hotel on Larkin Street near Eddy and waited about two hours for him. They searched him and his baggage, but found nothing. They asked him to take them to his car so that they could search it; they told him that if they found no evidence of crime in his car, they would let him go. Defendant told them that he had parked his car at Eddy and Leavenworth, but when the three of them reached that location, the car was not there. Defendant pointed to an opening at the curb and said he had parked his car there, and then stated that possibly it had been stolen. The officers did not believe it had been stolen. Defendant then said that it might be in the neighborhood. After driving around the area for twenty minutes, they saw a car which answered the description of defendant's car parked on Willow Street. One of the officers got out of the police car and started walking toward the car. A woman (later identified as Kay Lucia) got out of the car and, while walking toward the officer, made a throwing motion in the direction of an alleyway. Following the direction of her motion, the officer found a small white bindle which Kay Lucia identified as the object she had thrown. The bindle contained heroin.

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[1] Upon cross-examination, she said he handed her the paper of heroin when he got back into the car at Van Ness and Eddy; that she had it in her possession thereafter until she threw it away.

Defendant testified that he met Kay Lucia in the bar that morning, also a person called "Steve"; that Kay asked him to drive her home and Steve asked to be driven to Van Ness and Eddy; that the three of them left in defendant's car; he dropped Steve at Van Ness and Eddy and drove to his own hotel to get his baggage before driving Kay Lucia home. He met the police officers at his hotel and went with them to find his car. He knew he had parked his car on Willow Street but he told the officers that it was parked at Eddy and Leavenworth. The officers found his car even though he did not tell them where it was actually parked. When the police car pulled into Willow Street, Kay Lucia was either seated in defendant's car or walking down the street; defendant saw her throw something, but he did not know what it was. Defendant had not given a bindle of heroin to Kay Lucia; he had never used heroin; he had never seen a bindle except in magazine pictures; he never had in his possession "what has been termed here as an outfit" (needle and syringe); in 1951 or 1952 he pleaded guilty to using dolophine, he used it for migraine headaches and sinus condition. Upon cross-examination he said he took the dolophine in tablet form orally but that several times he used the liquid form and injected it by needle.

[1] Defendant's admittedly false and misleading statements to the officers concerning the location of his car when they were in search of it to examine it and possibly to examine the occupant when found, coupled with his contradictory statements as to whether he ever had or used a needle and syringe and his not too plausible explanation of the automobile trip with Kay and Steve, were sufficient to connect him with the commission of the crime in such a way as reasonably might satisfy the jury that the accomplice was telling the truth, and thus furnished sufficient corroboration.

[2] "Section 1111 of the Penal Code requires only that the corroborative evidence tend 'to connect a defendant with the commission of the crime in such a way as reasonably may satisfy a jury that the accomplice is telling the truth. It is not necessary that the accomplice be corroborated as to every fact to which he testifies.' People v. Trujillo, 32 Cal.2d 105, 111, 194 P.2d 681, 684; People v. Henderson, 34 Cal.2d 340, 342–343, 209 P.2d 785." People v. Barclay, 40 Cal.2d 146, 156, 252 P.2d 321, 326.

"Some of the cases state that the evidence must be 'inculpatory,' but this is used merely as another way of stating that it must tend to connect the defendant with the crime. See People v. Shaw, 17 Cal.2d 778, 803–804, 112 P.2d 241; People v. Morton, 139 Cal. 719, 724, 73 P. 609; People v. Reingold, 87 Cal.App.2d 382, 392–393, 197 P.2d 175." People v. Gallardo, 41 Cal.2d 57, footnote on page 62, 257 P.2d 29, 32.

[3] "It has been held that the corroborative evidence need not by itself establish that the crime was committed or show all the elements thereof, but it must relate to some act or fact which is an element of the offense. See People v. Barclay, 40 Cal.2d 146, 156, 252 P.2d 321; People v. Yeager, 194 Cal. 452, 473, 229 P. 40; People v. Robbins, 171 Cal. 466, 469–471, 154 P. 317; People v. Josselyn, 39 Cal. 393, 400–401; People v. Lee, 81 Cal.App. 49, 53, 252 P. 763. It must create more than a suspicion, but it may be sufficient even though slight and entitled to but little consideration when standing by itself. * * * See People v. Wilson, 25 Cal.2d 341, 347, 153 P.2d 720; People v. Kempley, 205 Cal. 441, 455–456, 271 P. 478." People v. Gallardo, supra, 41 Cal.2d 57, 63, 257 P.2d 29, 33.

"Although it has been said that corroboration is not sufficient where the circumstances are consistent with the innocence of the accused, see, e. g., People v. Davis, 210 Cal. 540, 555, 293 P. 32; People v. Kempley, 205 Cal. 441, 461, 271 P. 478; People v. Robbins, 171 Cal. 466, 470, 154 P. 317, the more recent decisions have held that whether the corroborating evidence is as compatible with innocence as it is with guilt is a question of weight for the trier of fact, see People v. Henderson, 34 Cal.2d 340, 347, 209 P.2d 785; People v. Estes, 99 Cal.App.2d 745, 747, 222 P.2d 454; cf. People v. Newland, 15 Cal.2d 678, 681, 104 P. 2d 778." People v. Gallardo, supra, 41 Cal. 2d 57, footnote on page 63, 257 P.2d 29, 33.

[4] "False and contradictory statements of a defendant in relation to the charge are themselves corroborative evidence. (People v. Taylor, 1924, 70 Cal. App. 239, 244, 232 P. 998.)" People v. Santo, 43 Cal.2d 319, 327, 273 P.2d 249, 254. See also People v. McLean, 84 Cal. 480, 481, 24 P. 32; People v. Ward, 40 Cal. App.2d 143, 148–149, 104 P.2d 537; People v. White, 35 Cal.App.2d 61, 70, 94 P.2d 617; People v. Rice, 29 Cal.App.2d 614, 618, 85 P.2d 215.

[5, 6] (2) *One of the questions asked defendant upon cross-examination* was: "Did you know, or do you know that dolophine is sometimes used as a substitute drug by heroin addicts?" His counsel objected "to the form of the question in that it calls for an expert's opinion, which the witness is not qualified to do and also, that it is completely misleading to the ladies and gentlemen of the jury, because it is putting to effect, a question that is not involved in this case, whatsoever."

Upon direct examination he had testified that in 1951 or 1952 he pleaded guilty to using dolophine; that he had used dolophine for migraine headaches and for a sinus condition; that he had never had a bindle of heroin in his possession; had never used heroin in his life; had never had "what has been termed here as an outfit" in his possession.

That would seem to open the way for the challenged question, bringing it within the proper scope of cross-examination. A defendant may be cross-examined as to all matters which were covered by his direct examination. Pen.Code, § 1323; People v. Tyren, 179 Cal. 575, 580, 178 P. 132; People v. Gin Hauk Jue, 93 Cal.App.2d 72, 74, 208 P.2d 717; People v. Ochoa, 118 Cal.App.2d 566, 569, 258 P.2d 104.

[7] Moreover, defendant did not at the trial object on the ground that the question was beyond the scope of cross-examination. He thereby waived that objection. People v. Renek, 105 Cal.App.2d 277, 283, 233 P. 2d 43.

[8, 9] *Another question now challenged as not proper cross-examination* was whether or not on July 11, 1952, at a certain street intersection, when accosted by police, he swallowed a bindle. He answered, "No." Defendant's counsel then made an objection, the nature of which is not clear, one which he subsequently withdrew. A second question along the same line was objected to as having been asked and answered. It was reframed and he answered, without objection, that he did not on that date place a piece of paper in his mouth while driving an automobile when accosted by police officers. He was then asked if he recalled on that date or any other date placing in his mouth a paper of the general size and description of the bindle which was in evidence. His counsel objected that it was too general, that no foundation had been laid, that neither place nor time was stated. The prosecutor contended the question was proper as cross-examination, that impeachment was not his purpose. Upon the overruling of the objection, defendant answered: "No, I never did; at no time did I ever swallow any paper in any shape or form."

Defendant now contends that this series of questions was beyond the scope of cross-examination, but he waived that objection by failing to make it at the time. Besides, the questions were within the scope of cross-examination. Defendant had testified, on direct, that he never had possessed or used heroin and that he had never seen a bindle except in magazine pictures.

The judgment and the order denying a new trial are affirmed.

PETERS, P. J., and BRAY, J., concur.

133 Cal.App.2d 453

In the Matter of the ESTATE of Herschel B. McGEE, Deceased.

Beulah LAYNE, Petitioner and Appellant,

v.

Dorothy HALL, Contestant and Respondent.

Civ. 20932.

District Court of Appeal, Second District, Division 1, California.

June 7, 1955.

Hearing Denied Aug. 3, 1955.

Proceeding to probate a will contested on grounds of unsoundness of mind, lack of execution and undue influence. From a judgment of the Superior Court, Los Angeles County, Eugene P. Fay, J., denying probate, the proponent appealed. The District Court of Appeal, Doran, J., held that substantial evidence sustained finding of jury that will, although duly executed, was the result of undue influence on testator.

Judgment affirmed.

1. Wills ⊂⊃166(1)

In proceeding to probate a will, evidence was sufficient to sustain finding of jury that the will, although duly executed, was the result of undue influence on testator.

2. Wills ⊂⊃386

In proceeding to probate a will, verdict of jury, supported by substantial evidence, could not be disturbed by reviewing court.

3. Wills ⊂⊃384

If complaint, filed to contest probate of will on ground of undue influence, omitted essential allegation of confidential relationship between proponent of will and testator, but parties treated such complaint as sufficient during trial and allowed issue to be tried as though properly presented, objection to such defect could not be made for the first time on appeal.

4. Wills ⊂⊃332

In proceeding to probate a will that left all of testator's property to proponents who were not relatives of testator to exclusion of testator's daughter, evidence warranted instruction as to confidential relationship between proponents and testator.

◆

Barry Sullivan, Harry V. Leppek, Los Angeles, for appellant.

Forster & Gemmill, Scott McCormac, Los Angeles, for respondent.

DORAN, Justice.

"This is an appeal by proponent, Beulah Layne, from a judgment, denying probate of a Will. As recited in appellant's opening brief.

"Herschel B. McGee died January 18, 1954. By a Will dated September 16, 1953, he left all of his property to Beulah Layne and Lewis Layne. He named Beulah Layne Executrix. She presented the Will for probate. Dorothy Hall, his daughter, whom he had not seen from the time she was about one year of age, until she was about thirty-five years of age, contested the probate on the following grounds:

"1. Unsoundness of mind;

"2. Lack of execution;

"3. Undue influence.

"The latter two issues were submitted to the jury. The jury found that the Will was duly executed. The jury found that the Will offered for probate was the result of undue influence exercised from the testator, Herschel B. McGee.

"Judgment denying probate was thereupon entered.

"Appellants contend the evidence was insufficient to support the jury's findings of undue influence and that the Court committed prejudicial error in the giving and refusal of certain instructions."

As recited in respondent's brief,

"Beulah Layne and Lewis Layne, her husband, are not related to the decedent. Dorothy Hall is the decedent's daughter and only lineal descendant. Dorothy Hall was thirty-eight years of age at the time of the trial. Her mother and the decedent were divorced when she was a very young child. Dorothy Hall did not see her father after the divorce nor did she know his whereabouts until in 1937 when Dorothy Hall was about twenty-one years of age, she learned her father's address in Los Angeles and wrote to him. Thereafter Dorothy Hall and her father corresponded.

"In 1938, the decedent wrote Dorothy Hall a letter, dated September 26, 1938, which, together with the envelope, was introduced into evidence as Contestant's Exhibit No. 3 and is a part of the record on this appeal. A portion of the letter is as follows:

"'I have no will made out, but if anything should happen to me, I want you to have what little I have. It isn't much, but it will help some. With love and best wishes to you and family.

"'Love,
Daddy.'

"In the summer of 1947 Dorothy Hall, together with her husband and children, came to Los Angeles to attend a religious convention and while here, visited the decedent. The first day in Los Angeles, Dorothy Hall and her family called upon the decedent and, although he did not recognize her at sight, when she told him who she was, there was a family reunion typical of that to be expected of a father and daughter long separated. The decedent posed for pictures with Dorothy Hall's husband and the decedent's grandchildren while they were here on this visit and two such pictures are in evidence and part of the record on this appeal.

* * * * * *

"The decedent sent Christmas presents to his grandchildren both before and after the 1947 visit and Dorothy Hall sent him Christmas presents and Father's Day gifts.

"On or about August 29, 1953, the decedent suffered a severe heart attack and was taken to White Memorial Hospital where he remained for a period of twenty days. While in the hospital the decedent signed two powers of attorney in favor of Beulah Layne during the first week of September, 1953, and a third power of attorney on or about September 15, 1953, the powers of attorney being prepared by Harry V. Leppek. Said latter power of attorney gave Beulah Layne authority to handle the money and property of the decedent.

"The alleged will bearing date of September 16, 1953, was executed while the decedent was still in the hospital. This will was prepared by Beulah Layne's attorney in this action, Harry V. Leppek. While decedent was in the hospital, Beulah Layne discussed a will with him and when she called Harry V. Leppek and in response to that call Harry V. Leppek went to the hospital and thereafter drew the will for the decedent. Beulah Layne was present at the hospital and at the bedside of the decedent when the alleged will of September 16, 1953, was executed. Her attorney in this action, Harry V. Leppek, had possession of the alleged will from the time of its execution until it was filed for probate. Beulah Layne admitted discussing a will with the decedent on several occasions.

"Dorothy Hall was not notified of her father's illness of September, 1953. Beulah Layne told Mrs. Sherman, Dorothy Hall's aunt, that she, Beulah Layne, would notify Dorothy Hall of the decedent's illness but she, in fact, did not. When confronted with this, Beulah Layne first told Dorothy Hall that she did not notify her because she did not know her address and then later told her that her father requested her not to.

"After the decedent was discharged from the hospital, he went to live at the Layne home and paid Beulah Layne $50.00 per week for his care. Around Christmas of 1953 the decedent moved out of the Layne home. The decedent told Anna Luck that he paid the Laynes $50.00 a week to take care of him and that they had him sign checks every other day or so and that he didn't have that kind of money.

"During the period after the decedent's discharge from the hospital in September, 1953, up until the time of his death the decedent had many conversations with Lee

McGee who roomed in the same building as decedent and who is not related to the decedent in any way although having the same last name. The decedent told Lee McGee that he, the decedent, had not heard from his daughter and that he could not understand why not. (Dorothy Hall wrote letters to her father during this period and in November of 1953, which was at the time the decedent was living at the Layne home, wrote her father about her daughter's wedding.) The decedent further stated to Lee McGee that he had dictated letters to Beulah Layne to his daughter, Dorothy Hall. Dorothy Hall testified that she did not receive these letters and although Beulah Layne took the stand she did not deny they were dictated to her. All parties testified that the decedent was paralyzed in his left arm as a result of the illness and that he was left-handed.

"In January, 1954, Lee McGee had another conversation with the decedent, and in that conversation decedent told Lee McGee that he was going to the hospital for a checkup and when he got back he was going to get a lawyer and make a will. The decedent further said that Beulah Layne had been trying to get him to make a will. The decedent further said that he had never made a will but that he was going to get his own lawyer up to his room and wanted Lee McGee to be present. The decedent further told Lee McGee that he had three bank accounts of about $15,000.00 and that he wanted his daughter, Dorothy Hall, to have one-half of it, or $7,500.00, and that he wanted $1,000.00 to go to Mrs. Vera Arnold, $500.00 to Beulah Layne and the balance to his brothers and sisters.

"Beulah Layne testified that she didn't see a copy of the alleged will and didn't know its contents until after decedent's death; whereas, casual friends testified they knew of the contents."

The record supports the foregoing summary of the facts.

[1, 2] That there was substantial evidence to support the verdict of the jury there is no question and the reviewing court is without power to disturb the verdict in such circumstances. In re Estate of Pohlmann, 89 Cal.App.2d 563, 201 P.2d 446.

[3, 4] Appellant's argument that the complaint contained no allegation of confidential relationship is without merit. To make such an objection for the first time on appeal is too late. "Even where a complaint entirely omits an essential allegation, if the parties have treated it as sufficient throughout the trial and have permitted the issue to be tried as though properly presented, a defendant cannot for the first time on appeal urge that the complaint, which could have been cured below if the objection had there been made, is defective." 3 Cal.Jur.2d, p. 620. And the amendment to the complaint to conform to the proof was timely made. Lee v. Murphy, 119 Cal. 364, 51 P. 549, 955.

The instructions as to the law relating to confidential relationship were correct and the findings, as well, are supported by the evidence and the law.

There are no prejudicial errors.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

133 Cal.App.2d 481

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Robert Charles BAGLEY and Don Ray Baucom, Defendants,

Don Ray Baucom, Defendant and Appellant.

Cr. 5352.

District Court of Appeal, Second District, Division 2, California.

June 8, 1955.

Prosecution for possession of heroin. The Superior Court, Los Angeles County, Thomas L. Ambrose, J., entered judgment of conviction and denied defendant's motion for new trial, and defendant appealed. The District Court of Appeal, Fox, J., held that findings of jury that defendant had knowledge of and joint dominion and control of heroin found by officers in apartment wherein defendant was arrested was sustained by the evidence.

Affirmed

1. Criminal Law ⇐1144(13)

When contention is made on appeal that evidence is insufficient to sustain conviction, evidence will be viewed in light most favorable to successful party in trial court.

2. Poisons ⇐9

In prosecution for possession of heroin, evidence supported implied findings of jury that defendant had knowledge of and joint dominion and control of heroin found by officers in apartment wherein defendant was arrested and was therefore guilty of possession. Health and Safety Code, § 11500.

3. Criminal Law ⇐1173(2)

In prosecution for possession of heroin, wherein jury was instructed on presumption of innocence, reasonable doubt, and burden of proof, court's refusal to instruct on subject of alibi was not so prejudicial to defendant as to necessitate reversal. Health and Safety Code, § 11500.

John H. Marshall, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

FOX, Justice.

Defendant Baucom was convicted of possession of heroin, in violation of section 11500 of the Health and Safety Code. He appeals from the judgment of conviction and the order denying his motion for a new trial.

In the afternoon of August 10, 1954, Deputy Sheriffs Stahl and Talbot were admitted to apartment No. 107 at 187 South Alvarado, in Los Angeles, by defendant Bagley. On searching the premises the officers found on the edge of the bathtub an eye dropper, two hypodermic needles and a prophylactic containing approximately 3 grams (45 grains) of a brownish white powder which, upon analysis, proved to be heroin. Such paraphernalia is ordinarily used in getting an injection of heroin. Also, they found boxes containing packages of cigarette papers, loose rubber bands, small pieces of paper for making bindles, empty 5-grain gelatin capsules and a prophylactic. Such equipment is used by persons trafficking in narcotics. The officers found approximately $1,225 in the apartment and on defendant Bagley's person.

Soon thereafter appellant entered the apartment. He was searched for narcotics but none was found. When asked whether he had rented the apartment he stated that he had rented it under the name of Don Cartier. On the witness stand appellant testified that he rented the apartment on August 1st and explained the transaction as follows:

"I rented the apartment for Robert Bagley, who is my friend of long standing and I didn't want to give him the money to rent the apartment because I was afraid he would never rent it. I wanted a place for him to live so I rented the apartment for him and put it under another name because I didn't want it in my name, because I wouldn't be living there in the first place and I didn't want to be liable for the next month's rent."

At various times during the interview with the officers both appellant and Bagley said they had been living there together. The officers found some men's clothing in the apartment. Appellant stated that part of the clothes were his and Bagley acknowledged that some of them belonged to him.

When appellant was first asked whether he knew there were any narcotics in the apartment he remained silent. Later he denied such knowledge and denied that the narcotics found in the bathroom were his. At another time appellant stated he received no money from Bagley, that he merely "delivered" for Bagley, and that he was at liberty to use any amount of heroin he wished.

The officers examined appellant's person. Below the elbow on his left arm, on the inside, they found "numerous scabs or injection marks." One of the officers who was experienced in this field gave the opinion, from the way the scabs appeared, that four or five of them were the result of injections "within the last ten days." The officer also noticed the pupils of appellant's eyes were dilated and that he acted as if he were sleepy. From these circumstances the officer was of the opinion that appellant was under the influence of an opiate. Heroin is, of course, a derivative of opium. Appellant stated to officer Talbot that he used from one to two grams of the "stuff" per day.

Appellant's story was that he and his wife had been living with her mother in Inglewood; that about the first of August he had an argument with his wife and moved out, taking some of his clothes; and that he moved in with Bagley for a couple of days; that he was ill; that he called up his wife and arranged to go back to his mother-in-law's home where he stayed until the day of his arrest; and that he came back to the apartment on that occasion for the purpose of getting his clothes. His mother-in-law corroborated his testimony relative to the argument with his wife and his leaving, his illness and return to her home after an absence of a couple of days. She further testified that he remained there most of the time between the 4th and 10th of August. On cross-examination appellant testified that he paid $50 rent for the apartment. He explained why he did not rent the apartment in Bagley's name as follows: "Q. Why didn't you rent the apartment in Bagley's name? A. Well, Bagley didn't want an apartment under his name because he was on parole and he had an address with the Parole Department and he says, 'Put it in your name or some other name. I don't want it in mine.' Q. So you didn't rent it in Bagley's name because he told you he didn't want it in his name? A. That is right."

Appellant was informed by his wife, four or five days prior to August 1st, that officers from the Sheriff's Narcotic Detail had inquired as to his whereabouts. He did not, however, call the officers to find out what they wanted.

Appellant testified that none of the money found in the apartment belonged to him. It was Bagley's so far as he knew but he did not know how Bagley got it. At the trial appellant denied having any knowledge that heroin was in the apartment. He also denied telling the officers that he had either used or was free to use the narcotics found there or that he delivered any narcotics for Bagley. He admitted, however, two prior felony convictions.

Bagley admitted he was a user and had a prior conviction of possession of marijuana. He claimed the ownership of the heroin in the apartment.

[1, 2] Appellant's first contention is that "the evidence is insufficient to sustain the conviction." When such an attack is made we must view the evidence in the light most favorable to the successful party in the trial court. People v. Obersmith, 129 Cal.App.2d 97, 276 P.2d 19. When so viewed, it is clear that the evidence, together with the reasonable inferences therefrom, amply supports the implied finding of the jury that appellant had knowledge of and "joint dominion and control of" the heroin found by the officers in the apartment and was therefore guilty of pos-

session. People v. Lama, 129 Cal.App.2d 391, 276 P.2d 816; People v. Cuevas, 131 Cal.App.2d 393, 280 P.2d 831.

Appellant relies on People v. Antista, 129 Cal.App.2d 47, 276 P.2d 177. It is not, however, here controlling. In that case officers went to the appellant's apartment and found the codefendant and another person there. Marijuana was found in the apartment prior to the appellant's arrival. The appellant testified that he had been away from the apartment for a number of hours, and he denied all knowledge of the presence of the marijuana. He testified that he was a nonsmoker due to an arthritic condition. There was no evidence that the appellant had had any previous connection with marijuana or narcotics. The Appellate Court pointed out that in all the cases which had been examined in which a conviction was upheld, there was some incriminating statement or circumstance in addition to the presence of the narcotic indicative of knowledge by the defendant of its presence and of his control of it.

In the instant case there are a number of incriminating circumstances. Appellant rented the apartment under an assumed name and gave an explanation that was less than plausible. When first asked whether he knew there were narcotics in the apartment he remained silent; the appearance of the inside of his left forearm indicated he was a user and that several injections had been made within the last ten days, which was after he had rented the apartment; he admitted to the officers that he was a user and was free to use such amounts of the narcotic as he wished; his sleepiness and the dilation of the pupils of his eyes caused an officer experienced in the effect of opiates to conclude that he was under the influence of a narcotic. The presence of empty gelatin capsules, and other related paraphernalia, together with the rather considerable amount of money that was found on the person of Bagley and in the apartment, particularly in view of his recent impecuniosity, immediately give rise to an inference that narcotics were being peddled from these premises. Thus appellant's statement to the officers that he delivered for Bagley takes on added significance. Finally, appellant's failure to contact the officers who were inquiring as to his whereabouts gives rise to an inference that he had a guilty conscience. These incriminating circumstances clearly distinguish this case from the Antista case.

[3] Appellant vainly argues that the court committed prejudicial error in refusing to instruct the jury on the subject of alibi. The jury was instructed on the presumption of innocence, reasonable doubt, and burden of proof; also, they were told that if the evidence is susceptible of two constructions, one pointing to guilt and one to innocence, each of which appears reasonable, the jury must adopt that which points to innocence; and that the jury cannot find defendant guilty unless the proved circumstances are consistent with the hypothesis of guilt and irreconcilable with any other rational conclusion. The testimony and the reasonable inferences therefrom definitely established appellant's connection with the apartment and the heroin found therein. It is implicit in the jury's verdict that they believed such evidence and did not believe the alibi story of appellant and his witnesses. As this court observed on this precise point in People v. Jackson, 125 Cal.App.2d 776, 780, 271 P.2d 196, 199, "To have given an instruction on that subject would not have added any credence to their story and a different verdict would not have resulted." Hence, there was no prejudice in the court's failure to give an instruction on the subject of alibi, particularly in view of the instructions actually given. People v. Haywood, 109 Cal.App.2d 867, 872, 241 P.2d 665.

The judgment and order denying motion for a new trial are affirmed.

MOORE, P. J., and McCOMB, J., concur.

133 Cal.App.2d 4

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Clarence L. THOMPSON, Norman Smith and Clarence Williams, Defendants and Appellants.

Cr. 3076.

District Court of Appeal, First District, Division 2, California.

May 16, 1955.

Hearings Denied June 8 and June 15, 1955.

Defendants were convicted of (1) kidnapping for purpose of committing robbery, (2) robbery, (3) burglary, connected together in their commission. The Superior Court, County of Alameda, Donald K. Quayle, J., denied motion for new trial and entered judgment and defendants appealed on separate briefs. The District Court of Appeal, Nourse, P. J., held that evidence established that confessions of defendants were admissible.

Judgments and orders affirmed.

1. Constitutional Law 🔑250, 258
Kidnapping 🔑1

Statutes, which provide for crime of kidnapping for purpose of committing robbery, are not unconstitutional as violative of the due process and equal protection clauses on ground that they make it possible to prosecute an accused for kidnapping for purpose of robbery or on the same facts to prosecute for robbery only, since such statutes require that in prosecution for kidnapping for purpose of committing robbery, the victim must be kidnapped or carried away. Pen.Code, §§ 207, 209; U.S.C.A. Const. Amend. 14; West's Ann.Const. art. 1, § 13.

2. Criminal Law 🔑1028

On appeal from conviction for kidnapping for purpose of committing robbery, contentions as to attempts at extortion by threats of prosecution for kidnapping instead of robbery, which were not based on any evidence at trial, could not be considered on appeal. Pen.Code, § 209.

3. Criminal Law 🔑517(1)

An oral confession can be proved by parol evidence of any person who heard and understood it when it was made by defendant.

4. Criminal Law 🔑1169(12)

In prosecution for (1) kidnapping for purpose of committing robbery, (2) robbery and (3) burglary, connected together in their commission, admission in evidence of unsigned statement of one defendant, if error, was not prejudicial after unobjected reading of statement to jury by inspector who took statement from defendant.

5. Criminal Law 🔑741(3)

In prosecution for (1) kidnapping for purpose of committing robbery, (2) robbery and (3) burglary, connected together in their commission, weight to be given to unsigned statement of one defendant and testimony of inspector who took the statement was for jury.

6. Criminal Law 🔑1116

On appeal from conviction for (1) kidnapping for purpose of committing robbery, (2) robbery and (3) burglary, District Court of Appeal could not consider alleged error in including in information the first count which related to kidnapping for purpose of committing robbery and which had been allegedly excluded by committing magistrate, since there was nothing in record with reference to defendant's appearance before magistrate.

7. Criminal Law 🔑1044

Where defendant did not move in trial court to set aside information on ground that it included the first count relating to kidnapping for purpose of committing robbery, which count had allegedly been excluded by committing magistrate, defendant was precluded from afterwards taking such objection. Pen.Code, § 995.

8. Criminal Law 🔑770(3), 1172(1)

In prosecution for (1) kidnapping for purpose of committing robbery, (2) robbery and (3) burglary, connected together in their commission, where three defendants had been jointly charged with such acts, trial court correctly instructed that each count as to each defendant should be judged separately on evidence relating thereto, and it was no reversible error not to repeat and summarize all instances of such restrictions in final instructions. Pen.Code, § 1127.

9. Criminal Law ⇨29

Multiple convictions are correct when separate and divisible acts have been proved as basis of each conviction, even though these acts were closely connected in time and were part of same criminal venture.

10. Criminal Law ⇨1177

Where victim had been taken at gun point and transported in his own car for purpose of committing robbery, and where his wallet was then taken, there were committed two acts, kidnapping and robbery, for which defendant could be punished, but even if transportation of victim and taking of victim at gun point were to be considered as one indivisible act, defendant was not prejudiced since sentences were made to run concurrently. Pen.Code, § 654.

11. Burglary ⇨41(2)
Kidnapping ⇨5
Robbery ⇨24(1)

In prosecution for (1) kidnapping for purpose of committing robbery, (2) robbery and (3) burglary, connected together in their commission, where prosecuting witness testified in detail to happening of crime and all its parts and elements, there was no lack of showing of the corpus delicti.

12. Criminal Law ⇨563

Proof of corpus delicti does not require showing of perpetration of crime by person or persons charged.

13. Criminal Law ⇨780(1)

In prosecution for (1) kidnapping for purpose of committing robbery, (2) robbery and (3) burglary, connected together in their commission, where three defendants had been jointly charged, trial court did not err in failing to give instructions that testimony of an accomplice ought to be viewed with distrust and as to manner in which such testimony must be corroborated, where defendant's codefendants at trial denied all participation in crime and did not incriminate the defendant, and where their extra judicial statements which implicated defendant were not admissible against him and were not to be considered against him. West's Ann.Code Civ.Proc. § 2061, subd. 4.

14. Criminal Law ⇨730(1)

In prosecution for (1) kidnapping for purpose of committing robbery, (2) robbery and (3) burglary, alleged prejudicial misconduct of district attorney in his closing argument did not constitute reversible error, where jury was duly admonished when defendant's objection to closing argument was sustained and where any other misconduct could have been cured by admonition.

15. Criminal Law ⇨1158(4)

In prosecution for (1) kidnapping for purpose of committing robbery, (2) robbery and (3) burglary, where question of free and voluntary nature of statements amounting to confession of one defendant had been resolved against the defendant, the determination could not be disturbed by the District Court of Appeal when evidence was sufficient to support it.

16. Criminal Law ⇨519(9)

The fact that accused was questioned over four days without counsel being present and that two conflicting statements were given by accused was not sufficient to vitiate his confession.

17. Criminal Law ⇨519(9)

In relation to its invalidating effect on a confession, psychological coercion by questioning is not considered equivalent of physical violence, which is always bad.

18. Criminal Law ⇨519(9)

Questioning serves a social purpose in solving crime, although it can become extortion of involuntary confessions by undue prolongation or deprivation of rest or relief.

19. Criminal Law ⇨519(8)

A confession is not rendered inadmissible merely by the fact that it was obtained during an undue delay between arrest and time when accused was brought before the court.

20. Criminal Law ⇨517(1)

The test for admissibility of a confession is trustworthiness.

21. Criminal Law ⚷523

Employment of an artifice by questioning officers that officers had more proof than they actually had of accused's participation in a crime, does not render the confession inadmissible, if the means employed are not calculated to procure an untrue statement.

22. Criminal Law ⚷519(1)

In prosecution for (1) kidnapping for purpose of committing robbery, (2) robbery and (3) burglary, confession of defendant was admissible even though statement in his confession showed that it was not voluntary in the sense that defendant wanted to make it or that defendant had special motives for making it.

◆

George Nye, Public Defender of Alameda County, Rudolf H. Michaels, Asst. Public Defender, Oakland, for appellant Williams.

Steward, Kennedy & Cannon, Joseph G. Kennedy, San Francisco, for appellant Smith.

Clarence L. Thompson, in pro. per., Represa, for appellant Thompson.

Edmund G. Brown, Atty. Gen. of the State of California, Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

The defendants, Clarence L. Thompson, Norman Smith and Clarence Williams were jointly charged with and found guilty by a jury of 1) kidnapping for the purpose of committing robbery, § 209, Penal Code, 2) robbery, 3) burglary, connected together in their commission; the defendant Thompson was charged with, and admitted, three prior felony convictions, defendant Smith two, and defendant Williams one. Their motions for new trial were denied and they were sentenced to San Quentin—the three sentences of each of them to run concurrent with each other but consecutive to any prior incompleted sentence. They appeal from the judgments and from the order denying their motions for a new trial.

When on December 11, 1953, at 7 p. m. James A. Brennan, the Controller of the Associated Metals Company, left the office of the company at 2730 Peralta Street, Oakland, after having locked up he found that one of his front tires was flat. The light was not good. A man with a gun in his hand ordered him to move over to the seat next to the driver's seat, got into the driver's seat, and told him that they were going for a little ride. When he turned to that man another person in the back seat, of whom he had not been aware, hit him on the side of the head and ordered him to look straight ahead. The first man drove the car approximately one and a half blocks to a darker area, took his wallet, searched him for weapons and demanded the key of the front door and the combination of the safe which Brennan gave him writing down the combination. The man gave the pistol to the one in the rear, told Brennan to do what he was told and went to the office of the company. Brennan did not see the man in the rear, but his speech was that of a colored person. He asked Brennan to pass back the money he had with him and Brennan did so. A man came to the car and the man in the back asked him how much he had got. The latter then ordered Brennan in the back seat and a third man appeared who tied Brennan's ankles and wrists with tape and put a piece across his mouth. The third man also had a colored accent. After the three left, Brennan freed himself by breaking the tape. He found his wallet in the car; nothing had been taken from it. It was found that from the safe a metal cash box with currency, checks and some copies of sales slips and a second metal box, containing employees earning records were missing. It was also found that the empty tire had no defect so that the air had probably been let out.

At a police line-up of negroes among whom were the defendants Brennan could not identify any of them by sight and his only identification was that the voice of one of the men, said to have been the defendant Thompson, sounded like the man who had been in the front of the car. He had "a sort of a hard penetrating type of voice". As to the third man Brennan testified that he was a very small man from whose appearance he would not be able to tell whether he was caucasian or negro. Mr. Brennan also testified that in his presence a police inspector told Williams that he must know Mr. Brennan, because Mr. Brennan knew him, which was not true. The defendants Thompson and Smith were together in a car with a third man, not Williams, when they were arrested. Smith was driving. The car was registered to Smith's girl friend. In the glove compartment two rolls of tape were found. At the home of the girl friend a pistol was found of the same kind as the one with which Brennan was threatened.

The verdicts against the three defendants are supported mainly by their confessions and other statements made to police inspectors when they were under arrest and by the accordance of the facts stated in these confessions with those of the crime stated above, to which Mr. Brennan testified. Each of the confessions implicates the other defendants, but the confession of each was duly received in evidence as against himself only and the jury was repeatedly so instructed. Both Thompson and Smith separately indicated to police officers the place where they had thrown away the boxes taken in the burglary. First Thompson showed a spot different from that shown by Smith, but the second time he brought them to the some spot as Smith. The boxes were not found there.

At the trial all three defendants denied all connection with the crime and the making or voluntary character of their alleged statements. They appeal on separate briefs and their grievances will be discussed separately.

Appeal of Thompson

[1, 2] This appeal is taken in propria persona. Appellant contends first that Sections 209 and 207 Penal Code are unconstitutional under Federal, U.S.C.A.Const. Amend. 14, and State, Const. art. 1, § 13, constitutions as violative of the due process and equal protection clauses because they make it possible to prosecute one person, like appellant, for kidnapping for the purpose of robbery, whereas another on the same facts would be prosecuted for robbery only, so that the threat of prosecution for kidnapping could be used as a means of extortion. The contention is wholly without merit. It might at most have had some factual basis in the text of Section 209 Penal Code prior to the 1952 amendment, when confining, holding or detaining a person to commit robbery was sufficient to subject him to the severe punishments of that section, even when there had been no confinement other than that necessarily incident to the commission of the robbery. See People v. Knowles, 35 Cal.2d 175, 217 P.2d 1, especially the dissenting opinions but the 1951 amendment requires for kidnapping to commit robbery that a person be kidnapped or carried away, an element of the crime present in this case where Mr. Brennan was carried away in his car for one and a half blocks, People v. Chessman, 38 Cal.2d 166, 192, 238 P.2d 1001, but not normally incident to a robbery. (Even the old text was not held unconstitutional in the Knowles case. The minority only criticized the construction of the section as applying to a confinement necessarily incident to the robbery.) Contentions as to attempts at extortion in the above manner in this and in another case which are not based on any evidence at the trial cannot be considered on this appeal.

[3–5] Appellant next contends that the verdicts against him were as a matter of law not supported by the evidence. He reaches this result mainly by eliminating as not legal evidence a statement written by Inspector Rodman and the testimony of said inspector that he took it when Thompson orally made it on February 1, 1954, but that Thompson after having read it refused to sign it. The statement contained among other things Thompson's participation in the crime as the man who sat in the back of Brennan's car, whereas defendant Smith played the principal part in the front seat and in the office, his assistance in transporting the two boxes taken, the taking of money and checks from them and the division of the money at his place, among himself, Smith and "Shorty" (Williams) he receiving $20. It further contained the statement that it was free and voluntary, without promises, force or threats, to which circumstances Inspector Rodman also testified. Thompson at the trial denied the making and the truth of all the statement. The written statement was received in evidence over unspecified objection of defendant, whose attorney had earlier expressly declared that he would let it go in without voir dire when it was read by Inspector Rodman to the jury as the statement given by Thompson. It obtained its evidentiary value from Inspector Rodman's testimony as to its taking and contents. Annotation, 23 A.L.R.2d 919, 924 et seq., § 5. An oral confession can be proved by parol evidence of any person who heard and understood it when it was made by the defendant. 8 Cal.Jur. 117; People v. Luis, 158 Cal. 185, 193, 110 P. 580. Even if the unsigned sheets of paper should not have been received in evidence, the error would not have been prejudicial after the unobjected reading of the statement contained in them to the jury by Inspector Rodman. The weight to be given to said evidence in connection with the evidence of Mr. Brennan was for the jury and we cannot say that it was insufficient as a matter of law.

[6, 7] Appellant claims error in including in the information the first count relating to kidnapping for the purpose of committing robbery although this count had allegedly been excluded by the committing Magistrate. As nothing with reference to the appearance of defendant before the Magistrate is in the record, we cannot consider the factual basis of the contention. But at any rate appellant did not move in the Superior Court to set aside the information on that ground in accordance with Section 995 Penal Code and hence the defendant is precluded from afterwards taking such objection, § 996 Penal Code; People v. Sierra, 117 Cal.App.2d 649, 652, 256 P.2d 577; People v. Reimringer, 116 Cal.App.2d 332, 337, 253 P.2d 756.

[8] It is contended that under Section 1127 Penal Code it was the duty of the court on its own motion to point out to the jury by instruction all the evidence they could consider against the defendant. The section does not contain such requirement. The jury was correctly instructed that each count as to each defendant should be judged separately on the evidence relating thereto. Whenever evidence had been admitted which was admissible as to one defendant only this had been clearly stated to the jury. It was no reversible error not to repeat and summarize all instances of such restriction in the final instructions.

[9, 10] Appellant urges that under Section 654 Penal Code he cannot be punished for both robbery and kidnapping for the purpose of robbery because these are two different ways in which the same act has been made punishable. However as said before, there are here two acts, the transportation of Brennan at gun point in his own car for the purpose of committing robbery in a darker place, which constitutes the kidnapping, and the taking of his wallet and key at gun point, which constitutes the robbery. Multiple convictions are correct when separate and divisible acts have been proved as the basis of each conviction, even though those acts were closely connected in time and were part of the same criminal venture. See People v. Knowles, supra, 35 Cal.2d at page 188, 217 P.2d 1. Kidnapping and robbery have under such circumstances been held separate offenses for each of which defendant can be punished. People v. Chessman, supra, 38 Cal.2d 166, 192, 238 P.2d 1001; People v. Bruno, 140 Cal.App. 460, 462, 35 P.2d 391; People v. Beltran, 94 Cal.App.2d 197, 203, 210 P.2d 238. People v. Knowles, supra, came to a different result because in that case there had been no separate act of transportation, which as Section 209 Penal Code then read, was not required for kidnapping for the purpose of robbery. Even if the transportation and the taking at gun point was in this case to be considered as one indivisible act, so that appellant could be punished for only one of these offenses appellant could not be prejudiced as the two sentences were made to run concurrently. People v. Ponce, 96 Cal.App.2d 327, 330, 215 P.2d 75; People v. McWilliams, 87 Cal.App.2d 550, 552-553, 197 P.2d 216.

[11, 12] Appellant Thompson complains of the overruling of many of his objections to the admission of evidence, especially the admission of statements which were not shown to have been freely and voluntarily made. The only specific part of this grievance which could have any relevancy relates to his statement to Inspector Rodman which has been treated herein before. His complaint of lack of showing of the corpus delicti is incomprehensible as at the beginning of the trial the witness Brennan testified in detail to the happening of the crime and all its parts and elements. Proof of the corpus delicti does not require showing of perpetration of the crime by the person or persons charged (14 Cal.Jur.2d 184).

[13] Error is predicated on the failure of the court to give instructions that the testimony of an accomplice ought to be viewed with distrust, § 2061, subd. 4, Code of Civil Procedure, and as to the manner in which such testimony must be corroborated. There was no occasion for such instruction because Thompson's codefendants at the trial denied all participation in the crime and did not incriminate him. Their extra judicial statements which implicated Thompson were not admitted against him and could not be considered against him even with distrust or after corroboration.

[14] Appellant claims prejudicial misconduct of the District Attorney in his closing argument. Only twice an objection was made during this argument, both times on the ground that facts were stated which were allegedly not in evidence. At one of these occasions the facts stated were found to be in evidence and this point is not brought out on appeal. In the other the jury was duly admonished. Otherwise there was no assignment of misconduct or request for an instruction to disregard. There is no contention that any of the misconduct now asserted was of such character that it could not have been cured by any admonition. Moreover we have found all misconduct urged completely unfounded and harmless or at any rate such that admonition could have sufficiently cured it. It is then no basis for reversal. People v. Simon, 107 Cal.App.2d 105, 125, 236 P.2d 855.

Appellant's contention that the court erred in denying his motion for a new trial is not supported by any specific argument not already rejected herein and does not require discussion.

Appeal of Smith

Defendant Smith's only grievance is the admission in evidence of his purported confession of February 2, 1954, which he contends was signed under the influence of psychological abuse. (It is conceded that there was no physical abuse.)

[15] After appellant was arrested on January 29, 1954, he was held in custody for investigation, without charge. He was several times questioned by Inspectors Deuel or Rodman or both; there is no contention that in any instance the questioning was unduly prolonged. On January 31, he gave a statement to Inspector Deuel who wrote it out and he signed it. He contended at the trial that he signed it without reading because he was promised that he would be released if he signed. This was denied by Inspector Deuel who also testified that the statement was shown and read to Smith before he signed it and that it was a correct narration of his statement. The statement does not contain any confession or admission of participation in the events of December 11, 1953. It states, however, that he, Smith, found a paper bag with a lot of checks of the Associated Metals Company on Market Street, that he took them to 3010 Adeline Street where he lived with his girl friend Isabella King. He intended to pass them with a false signature. He had not disposed of them and they might still be in a drawer if Isabel had not disposed of them. Thereafter, on February 1, he was ostensively released but immediately again questioned and rebooked. On February 2, after having been told about and shown the confessions of Thompson and Williams, he signed another statement. In this statement he described in detail his part in the events of December 11th and the participation of Thompson and

Shorty. He himself was the man who let out the air from a tire, threatened with a pistol, drove Brennan's car, asked for the combination of the safe and the keys. He went with Thompson, who had been in the back seat to the office, while Shorty watched Brennan. He went inside and took the two boxes. The three went to Thompson's house where they divided the money. The next day he and Thompson disposed of the boxes on the other side of Broadway tunnel, after having taken out the checks. At the trial Smith took the position that he had signed the confession because of threats that otherwise his friend Isabel would be involved because of the gun found in her place, and that his parol would be violated. He also complained of other forms of psychological abuse and of refusal, as unnecessary, of his requests for an attorney. It is conceded that all this was denied by the inspectors as witnesses so that in all these respects the evidence is conflicting. As this conflict was resolved by the court and by the jury against defendant, we cannot disturb their determination when the evidence of the witnesses for the People sufficiently supports it. People v. Burwell, 44 Cal.2d 16, 279 P.2d 744.

[16] It is however argued, that the questioning over four days without counsel being present and the fact that two conflicting statements were given is sufficient to vitiate the confession. This is not so.

[17–19] In relation to its invalidating effect on a confession psychological coercion by questioning is not considered the equivalent of physical violence, which is always bad. Questioning serves a social purpose in solving crime, although it can become extortion of involuntary confessions by undue prolongation or deprivation of rest or relief, not here involved. Stein v. People of State of New York, 346 U.S. 156, 184, 73 S.Ct. 1077, 97 L.Ed. 1522. "A confession is not rendered inadmissible merely by the fact that it was obtained during an undue delay between arrest and the time when accused was brought before the court * * * or that he was not represented by counsel". 22 C.J.S., Criminal Law, § 817, p. 1431; People v. Aguilar, 140 Cal.App. 87, 93, 35 P.2d 137, 142. Appellant's change of position does not indicate undue pressure but is readily explained by the confessions of his accomplices. Even his original statement indicated his connection with the crime by stating his possession of part of the loot, although it attempted to give it a more harmless explanation. The confession was not inadmissible as a matter of law.

Appeal of Williams

Like Smith, Williams contends that his alleged confession was obtained by improper means and was therefore inadmissible and that without that confession there was no evidence to connect him with the crime. After his arrest on February 1, 1954 Williams was questioned by Inspectors Deuel and Rodman in the presence of a police stenographer. The stenographer testified that he dictated the questions and answers identically into a recording machine. The police inspectors received a transcript of the record made a very short time thereafter and Inspector Rodman found the transcript to conform to what actually had been said. He read the transcript to the jury over objection. The transcript was not admitted in evidence. It is not contended on appeal that this is not a manner in which an oral confession can be proved; we found on the appeal of Thompson that it can validly be done.

The confession contained that defendant was taken along by the other two men, whom he did not know well, that they told him to sit in the back seat so that the man in the front seat could not get away, that when they came back with the boxes the man was put in the back seat and he put tape on him and that they went to Thompson's house on Filbert Street where they divided the money of which he got $20. At the trial Williams contended that the inspectors had told him how to answer the questions and that he had done so after being abused and threatened with a death sentence or life imprisonment and with violence, and after having received promises of help if he complied. All these contentions were denied by the three police witnesses and it is conceded that the conflict was resolved by the verdict and that appellant cannot rely on this evidence on appeal. It is, however, contended that the statement itself shows circumstances which make it inadmissible. Appellant relies on the following final language of the statement:

> "Q. And this—statement that you've given is entirely free and voluntary? A. I mean, well, after you know that I was there and all the time that it happened—
>
> "Q. Well, you haven't been threatened in any manner, have you? A. Well, they told me that I was in it, that I was in it as deep as they were; I didn't even know that there was going to be any robbery committed.
>
> "Q. Well, when you say that they told you that you were in it as deep, you mean that was during the robbery, they told you that you were in as deep as they were? A. Yes, sir, yes.
>
> "Q. Well, no; I mean, Inspector Rodman or myself have not threatened or forced you to say anything that you didn't want to say? A. Well, you all told me you were going to put all charges on me—three charges on me.
>
> "Q. Well, we told you that you could be charged with robbery, burglary and kidnapping, didn't we? A. Yes, you told me that.
>
> "Q. Well, that is correct, and this statement has been given in a free and voluntary manner, without promises or rewards at any time? A. Well, oh, you say that they were going to throw—
>
> "Q. Well, you haven't, in any way, been threatened, we've just asked you to tell the absolute truth, isn't that correct? A. Yes, that's right."

[20–22] The above conversation does not prove circumstances which necessarily vitiate the confession. It shows that the confession was not voluntary in the sense that Williams wanted to make it or that it was "completely spontaneous, like a confession to a priest, a lawyer, or a psychiatrist. But in this sense no criminal confession is voluntary". That the defendant had special motives for making it does not prevent the confession from being voluntary in the sense decisive of admissibility. Stein v. People of State of New York, supra, 346 U.S. 156, 186, 73 S.Ct. 1077, 97 L.Ed. 1522. Both in that case and in People v. Burwell, supra, 44 Cal.2d 16, 279 P.2d 744, it has recently been held that the test for admissibility is trustworthiness. The fact that appellant felt free to discuss his motives with the officers and did not feel constrained to just answer their questions as to voluntariness in the affirmative increases for us its trustworthiness, the more so because appellant in so doing, unintentionally confirmed his involvement in the crime. The truthful statement that there would be three charges against defendant may have been a reason for defendant to try to make a better impression by confessing, but it does not appear that this happened at the instance or advice of the officers. Even if the interrupted sentence should be completed as meaning that defendant was told that they were going to throw the book at him, which is only a matter of conjecture, then it again does not appear that it was said to extort a confession or that any leniency was promised in case defendant confessed. At any rate we cannot say that such conjecture must prevail over the clear statement that defendant was not in any manner threatened and only asked to tell the absolute truth. It may be that the police officers pretended to have more proof of Williams' participation than they actually had, but the employment of such an artifice to obtain a confession does not render it inadmissible, if the means employed are not calculated to procure an untrue statement. 22 C.J.S., Criminal Law, § 827, p. 1450; People v. Connelly, 195 Cal. 584, 597, 234 P. 374. Here there is no indication that the attitude of the officers was calculated to procure or did procure any untrue statement.

Judgments and orders affirmed.

KAUFMAN, J., and DRAPER, J. pro tem., concur.

The PEOPLE of the State of California Plaintiff and Respondent,

v.

Leslie Robert NUNN, Defendant and Appellant.

Cr. 5282.

District Court of Appeal, Second District, Division 1, California.

May 31, 1955.

Rehearing Denied June 13, 1955.

Hearing Granted June 29, 1955. *

Defendant was prosecuted for prescribing narcotics for a person not under his treatment for a pathology and for prescribing a narcotic for a person who represented himself to be an addict. From a judgment of conviction in the Superior Court of Los Angeles County, Mildred L. Lillie, J., and from an order denying motion for a new trial, the defendant appealed. The District Court of Appeal, Drapeau, J., held that the defense of entrapment was not established by the evidence that there were no reversible trial errors and that the statute is not unconstitutional as vague, indefinite and uncertain.

Affirmed.

1. Courts 🔑91(1)

The District Court of Appeal as an intermediate Court is required to follow the decisions of the Supreme Court.

2. Criminal Law 🔑37

Entrapment as a matter of law is not established, where there is any substantial evidence in the record from which it may be inferred that the criminal intent to commit the particular offense originated in the mind of accused.

3. Poisons 🔑4

In determining whether a doctor's prescription of narcotics is lawfully made, lack of any real examination of the alleged patient, fees charged, lack of instructions to the patient as to treatment or use of the drug and the temporary character of the remedy, without any consideration of permanent cure are pertinent circumstances to be considered. Health and Safety Code, §§ 11163, 11164.

4. Criminal Law 🔑569

In prosecution of physician for narcotics violation, where defendant gave state narcotic's inspector prescriptions for dilaudid and was paid $150 in cash for four prescriptions and defendant did not make any physical examination of the alleged patient, and spent little time with him and prescribed an inordinate amount of the drug, evidence did not sustain defense of entrapment. Health and Safety Code, §§ 11163, 11164.

5. Criminal Law 🔑683(1)

In prosecution of physician for a narcotics violation, admitting testimony of a narcotics inspector of his opinion as to causes generally of narcotics addictions in rebuttal of defendant's testimony that he believed it possible that the majority of narcotics addictions were caused by prescriptions for the relief of pain was not error. Health and Safety Code, §§ 11163, 11164.

6. Poisons 🔑9

In prosecution of physician for narcotics violation, where defendant gave prescriptions for drug to narcotics inspector, refusal of instructions respecting use of a false name or false address with respect to dispensing of narcotics and the obtaining of narcotics by fraud, deceit, misrepresentations or concealment of a material fact was not error. Health and Safety Code, §§ 11170, 11170.5.

7. Criminal Law 🔑814(16)

In prosecution of a physician for narcotics violation, instruction as to confessions was properly refused, where defendant insisted that in giving the drug to an inspector he was prescribing in good faith for an ailment of his patient. Health and Safety Code, §§ 11163, 11164.

8. Criminal Law 🔑829(1)

Refusal of an instruction that if act is committed or an omission made under ignorance or mistake of fact which disproves any criminal intent, there is no crime was not error where it was adequately covered by other instructions given.

9. Statutes 🔑47

The statute respecting prescriptions of narcotics for person not under treatment for a pathology is not unconstitutional as vague, uncertain, and indefinite because of the words "except in the regular practice of his profession" are used. Health and Safety Code, § 11163.

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* Opinion vacated 296 P.2d 813.

◆

Morris Lavine, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice.

Defendant, Leslie Robert Nunn, is an osteopathic physician, licensed to practice in the State of California. He was convicted by a jury of four counts of prescribing narcotics for a person not under his treatment for a pathology, in violation of Section 11163 of the Health and Safety Code. He was also convicted of a fifth count, for prescribing a narcotic for a person "who represented himself to be an addict," in violation of Section 11164 of the same code. He admitted a prior conviction of a felony, for which he served a term in a California penitentiary. He appeals from the judgment of the Superior Court, committing him to state's prison for the term prescribed by law, and from the court's order denying his motion for a new trial.

Concededly the doctor gave prescriptions for dilaudid on four different occasions to a narcotics inspector of the State of California. Dilaudid is a derivative of morphine, with much the same effects, but less likely to form a habit.

The doctor testified that he wrote out the prescriptions and gave them to the inspector in the conscientious belief that the medication was to relieve his patient's pain, caused by migraine headache. But the jury found against this defense, and unless there is some prejudicial error at law in the case the judgment will have to stand.

Defendant assigns as error the following:

1. That he was entrapped by law officers of the State of California.

2. That the evidence was insufficient to sustain the verdicts, and that the verdicts are contrary to the law and the evidence.

3. That the court erred in the admission of testimony.

4. That the code sections here applicable are unconstitutional.

5. That the court erred in instructions given and refused.

The defense of entrapment presents the most serious question. That and the sufficiency of the evidence will be commented upon together.

The transactions here in question were between the two men, the state narcotics inspector and the doctor. So it becomes important to state pertinent portions of the testimony of the inspector, as follows:

The doctor gave the inspector prescriptions for dilaudid twice at the doctor's office in Santa Monica, and twice at the doctor's home in the Malibu hills. For these prescriptions the inspector paid the doctor $150 in cash.

On his first visit, February 3, 1954, the inspector met the doctor in his outer office. He said: "I am Dillon." The doctor asked him: "Are you the one Walter sent?" and he said "Yes."

None of these statements by the narcotics officer was true. His name was not Dillon, and nobody by the name of Walter had sent him to the doctor. He had been instructed by his superior officers in the state narcotics division to use the fictitious name.

And the law forbids any person to "obtain or attempt to obtain narcotics * * * (a) by fraud, deceit, misrepresentation, or subterfuge; or (b) by the concealment of a material fact." Section 11170, Health and Safety Code, or the giving of a false name or address in connection with the prescribing of a narcotic. Section 11170.5, Health and Safety Code.

Returning now to the inspector's testimony.

The two men then went into the doctor's private office. There the doctor "asked me my first name, and I said it was Joe."

Then the doctor handed the inspector a "diagnosis card," which the inspector signed, "Joe Dillon." The card is in evidence. It authorizes the doctor to treat

"Mr. Dillon." On it appear the words written in by the doctor: "1. Migraine headache; 2. Narcotics addiction." The inspector testified that that writing was not on the card when it was handed to him to sign.

The inspector also testified that he did not tell the doctor that he was suffering from migraine headache. He also denied the testimony of the doctor, a patient in the doctor's office, and the doctor's wife that he held his hand to his head and feigned great pain.

The inspector further testified that when he signed the card the doctor asked him what he was using, and he said "I am using H." Then the doctor said, "I cannot write a prescription for heroin, but I can write for some legitimate drug like morphine or dilaudid." The inspector said that would be all right. Whereupon the doctor wrote and signed a prescription calling for 60 tablets of 1/16 grain dilaudid.

On the second occasion, February 10th, the inspector telephoned the doctor from Ridgecrest, a town out in the Mojave desert, and asked him if he could call the next day instead of the 10th, when they had an appointment. The doctor told the inspector that that was his day off, but that the inspector could come to the doctor's home in Malibu. So the inspector saw the doctor at his home on February 11th. There the doctor wrote out and gave him another prescription for dilaudid.

On the third occasion the inspector again saw the doctor at his home, and again was given a prescription for dilaudid.

On the fourth and final occasion the inspector saw the doctor at his office, pursuant to a telephone call made by the inspector from a pay station. On this occasion the doctor again wrote out a prescription for dilaudid and gave it to the inspector. When the doctor was called into another room to see another patient, the inspector left the money for that prescription on the doctor's desk, and walked out.

These occasions were each about a week apart. Shortly after the last one the doctor was arrested.

Defendant argues that the conduct of the narcotics offices in securing the evidence which resulted in his conviction was fraudulent, deceptive, and in violation of the very law they are employed to enforce. The danger inherent in such police methods is well stated by Mr. Justice Traynor, speaking for our Supreme Court, in the landmark case of People v. Cahan, 44 Cal.2d 434, at page 446, 282 P.2d 905, at page 912:

"Moreover, any process of law that sanctions the imposition of penalties upon an individual through the use of the fruits of official lawlessness tends to the destruction of the whole system of restraints on the exercise of the public force that are inherent in the 'concept of ordered liberty.' See, Allen, The Wolf Case, 45 Ill.L.Rev. 1, 20. 'Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.' Brandeis, J., dissenting in Olmstead v. United States, 277 U.S. 438, 485, 48 S.Ct. 564, 575, 72 L.Ed. 944 [66 A.L.R. 376]; see also, State v. Owens, 302 Mo. 348, 377, 259 S.W. 100, 32 A.L.R. 383; Atz v. Andrews, 84 Fla. 43, 94 So. 329, 332; Youman v. Commonwealth, 189 Ky. 152, 224 S.W. 860, 866, 13 A.L.R. 1303; State v. Arregui, 44 Idaho 43, 254 P. 788, 792, 52 A.L.R. 463; State v. Gooder, 57 S.D. 619, 234 N.W. 610, 613."

[1] However, this Court is of the opinion that as an intermediate Court it is required to follow at least two recent deci-

sions of our Supreme Court, and affirm the judgment in this case.

[2] The law laid down in those cases is that "Entrapment as a matter of law is not established where there is any substantial evidence in the record from which it may be inferred that the criminal intent to commit the particular offense originated in the mind of the accused." Also " 'Where an accused has a pre-existing criminal intent, the fact that when solicited by a decoy he committed a crime raises no inference of unlawful entrapment.' " And "Where the record shows a conflict in the evidence, the judgment will not be reversed." People v. Terry, 44 Cal.2d 371, 282 P.2d 19, 20; People v. Braddock, 41 Cal.2d 794, 264 P.2d 521, 525.

In this case the jury could have inferred defendant's criminal intent from all the circumstances in evidence. He charged $150 for writing the four prescriptions. He did not make any physical examination of his fictitious patient. He spent little time upon his patient, no more than to make brief inquiry and to write the prescriptions. He prescribed an inordinate quantity of the drug—60 tablets the first time, 85 the second and third times, and 80 the last time.

[3, 4] It was said in Davis v. State Board of Medical Examiners, 108 Cal.App.2d 346, 239 P.2d 78, that the following circumstances are pertinent in determining whether a doctor's prescription of narcotics was lawfully made: The lack of any real examination of the alleged patient, the fees charged, the lack of instructions to the patient as to treatment, or the use of the drug, and the temporary character of the remedy, without any consideration of permanent cure.

Turning now to defendant's contentions as to the evidence and the instructions.

[5] He contends that it was error to admit in evidence testimony of a narcotics inspector of his opinion as to the causes generally of narcotics addictions. This was in rebuttal of the doctor's testimony that he believed it was quite possible that the majority of narcotics addictions are caused by prescriptions for the relief of pain.

No error appears in the admission of this evidence, or in the qualifications of the witness as an expert.

[6] Defendant contends that the conduct of the narcotics inspector who obtained the evidence against him required the giving of two proposed instructions, which were refused:

1. "You are further instructed that Section 11170.5 of the Health and Safety Code of the State of California provides that no person shall, in connection with the prescribing, furnishing, administering, or dispensing of a narcotic, give a false name or false address."

2. "Section 11170 of the Health and Safety Code of the State of California provides: 1. No person shall obtain or attempt to obtain narcotics or procure or attempt to procure the administration of or prescription for narcotics, (a) by fraud, deceit, misrepresentation, or subterfuge; or (b) by the concealment of a material fact."

While there can be no doubt that the inspector in this case did the things denounced by the law, a similar contention was made and determined adversely to defendant in People v. Braddock, supra. See the dissenting opinion in that case. 41 Cal.2d 794, 803, 264 P.2d 521, 526.

[7] Defendant also contends that the jury should have been instructed as to confessions. However, the record does not show that defendant ever made any confession. He talked with the arresting narcotics inspectors shortly after he was taken into custody. Then, as now, he insisted that he was prescribing in good faith for an ailment of his patient.

[8] Defendant also complains that it was error to refuse his proposed instruction to the effect that an act committed or an omission made under ignorance or mistake of fact which disproves any criminal intent is not a crime. This subject was adequately covered by other instructions given.

Defendant argues several other errors in the refusal of instructions. Without repeating each one, it may be said that the instructions read as a whole fully and fairly advised the jury as to the law upon all the issues in the case. There was no error in the giving or refusal of any of them.

[9] Finally, with reference to defendant's contention that the law under which he was convicted is unconstitutional. He argues that this is so because in the code sections the words "except in the regular practice of his profession" are used. And that this language is too vague, uncertain and indefinite to form the basis of a criminal prosecution.

Tried by the standards laid down in Lorenson v. Superior Court, 35 Cal.2d 49, 216 P.2d 859, this language is sufficiently certain to comply with constitutional requirements.

The judgment and the order denying defendant's motion for a new trial are, and each of them is, affirmed.

WHITE, P. J., and DORAN, J., concur.

In re ESTATE and GUARDIANSHIP of De Witt Clinton COOKINGHAM, Incompetent.

Ella Marie ORMSBY, Petitioner and Appellant,

v.

De Witt Clinton COOKINGHAM, Contestant and Respondent.

Civ. 20677.

District Court of Appeal, Second District, Division 3, California.

May 26, 1955.

Rehearing Denied June 16, 1955.

Hearing Granted July 20, 1955.*

Proceeding on settling of final account of guardian and on petition for guardian's fees and attorney's expenses. The Superior Court, Los Angeles County, John G. Clark, J., disallowed two items of expense. Guardian appealed. The District Court of Appeal, Ashburn, J. pro tem., held that trial court erred in refusing to hear any evidence bearing upon propriety of guardian's employment of attorney and psychiatrist in guardian's unsuccessful opposition to ward's petition for restoration to capacity.

Order reversed.

1. Trial 🔑45(1)

In proceeding on guardian's petition for guardian's and attorney's fees, although guardian's offer of proof as to attorney and psychiatrist's fees incurred by guardian in opposition to ward's petition for restoration to capacity was insufficient, court's previously announced conclusions that guardian should have obtained order of court authorizing employment of attorney and expert witness dispensed with necessity of offer. Probate Code, § 1472.

2. Trial 🔑45(1)

In proceeding on petition for guardian's fees and attorney's fees, offer of proof of guardian which did not specifially embrace matter of guardian having acted in good faith and upon substantial grounds in employing attorney and psychiatrist in opposition to ward's petition for restoration to capacity was insufficient. Probate Code, § 1472.

3. Mental Health 🔑179

It is the business of a guardian to conserve and advance the interest of the mentally incompetent in every way, and guardian occupies a position demanding of him the highest degree of diligence and good faith. Probate Code, § 1400.

4. Guardian and Ward 🔑28

Guardian is vested with genuine discretion with respect to the person and property of the ward where he has been appointed to act in a dual capacity, and guardian in fact is given the possession, care and management of the estate of his ward. Probate Code, § 1400.

5. Guardian and Ward 🔑2, 35, 37

It is the guardian and not the court who is made responsible for the proper administration of the trust, and although in the performance of his duties he is in certain respects under the control and su-

* Opinion vacated 289 P.2d 16.

pervision of the court appointing him, this right of supervision does not carry the power to interfere in any such manner with the custody and general management of the property of the ward except for conduct authorizing suspension or removal. Probate Code, § 1400.

6. Guardian and Ward 🔑2, 28

A trustee or a guardian is entitled to the presumption that he or she has acted in good faith and the court will control the exercise of the guardian's discretion only in case of abuse of the same, and the court will not substitute its judgment for that of the guardian as to what is for the best interests of the ward unless unusual circumstances are shown. Probate Code, § 1400.

7. Mental Health 🔑168

A guardian cannot file or oppose a proceeding for restoration to capacity of ward without reasonable grounds therefor, and he has the right to seek expert advice to be able to exercise an honest and informed judgment and act or refrain from acting accordingly. Probate Code, §§ 1470–1472.

8. Mental Health 🔑168

The mere fact that a ward has been released from detention does not determine whether ward should be restored to capacity, for the question is not of sanity but whether the ward is able unassisted properly to manage and take care of himself or his property, and is not likely to be deceived or imposed upon by artful or designing persons. Probate Code, § 1460.

9. Mental Health 🔑168

It will be a gross injustice to the ward for the guardian to institute or consent to proceedings for restoration of capacity of ward if he knows or is reliably informed of continuing incapacity of the ward to conduct his own affairs. Probate Code, §§ 1470–1472.

10. Mental Health 🔑169

Guardian can and must exercise an informed discretion in instituting or opposing proceedings for restoration of capacity of ward and when he acts in good faith and upon substantial grounds he is not required to proceed at his peril, forfeiting all rights to reimbursement for expenses in the event that court disagrees with him upon a difficult question of fact. Probate Code, §§ 1460, 1470–1472.

11. Mental Health 🔑169

Attorney's fees and expenses incurred by a guardian in good faith to restore his ward to capacity, when reasonably necessary, may be charged against the ward's estate, whether the proceedings are successful or not. Probate Code, §§ 1460, 1470–1472.

12. Mental Health 🔑169

Where the ward's mental condition is really in doubt and guardian acts in good faith in opposition to ward's petition for restoration, the guardian is entitled to reasonably necessary expenses thereby incurred. Probate Code, §§ 1460, 1470–1472.

13. Mental Health 🔑169

That guardian did not obtain court's approval before retaining attorney and psychiatrist in opposing ward's petition for restoration to capacity, did not preclude allowance of guardian's claim for attorney's fees and psychiatrist's fees. Probate Code, § 1472.

14. Mental Health 🔑169

In proceeding on guardian's petition for guardian fees and attorney's fees, court erred in refusing to hear any evidence bearing upon propriety of guardian's hiring of attorney and psychiatrist in opposing ward's petition for restoration to capacity. Probate Code, §§ 1460, 1470–1472.

Bailie, Turner, Lake & Sprague, Los Angeles, for appellant.

Carl O. Kowol, Montrose, for respondent.

ASHBURN, Justice pro tem.

Appeal from "Order Settling Seventh and Final Account of Guardian and Petition for Guardian's Fees and Attorneys' Fees." The order disallows two items of expense incurred by the guardian of an incompetent in unsuccessful opposition to the ward's petition for restoration to capacity. The items are an attorney fee of $625 and expense of a psychiatrist, $250.

De Witt Clinton Cookingham was committed to Patton State Hospital in 1942 and his daughter, Ella Marie Ormsby, was appointed guardian of his person and estate on April 28, 1944. He remained in Patton until November 1953 when he was temporarily released, being then 80 years of age. He had filed in October of that year a petition for restoration to capacity; this he did through attorney Kowol, as his guardian ad litem. Notice of hearing was served upon the guardian; she then consulted her attorneys and through them employed a psychiatrist, who apparently examined Mr. Cookingham and testified at the hearing. Counsel seem to agree that two experts testified in support of the petition, while the guardian's expert testified to the contrary, and that the court appointed and heard an expert of his own selection. The petition was granted and thus the guardianship ended. The only points raised on the guardian's appeal relate to the rejection of the attorney and psychiatrist fees and exclusion of evidence in relation thereto.

The hearing on the settlement of the account was quite informal. After some preliminary discussion and before offer of any evidence the court announced a ruling. It was then agreed, after considerable interchange of views between court and counsel, that the guardian's attorney should make an offer of proof to which petitioner's attorney would object so that the court could make a ruling thereon. There never was any room for doubt as to what the ruling would be, for the judge had repeatedly expressed the views (1) that a previous order of court authorizing the employment of attorneys and an expert witness was a necessary predicate for such an allowance, (2) that the court is the real guardian of an incompetent, (3) that a guardian who is notified of a hearing upon an incompetent's petition for restoration to capacity and who is authorized by statute to resist it, Prob.Code, § 1472, proceeds at his peril and unless successful in his opposition cannot be held to have acted for the benefit of the ward and hence cannot be allowed any expenditures made in that matter.

[1, 2] The offer which was finally made was patently insufficient but the previously announced conclusions of the court had dispensed with the necessity of any offer, Lawless v. Calaway, 24 Cal.2d 81, 91, 147 P.2d 604; In re Estate of Kearns, 36 Cal.2d 531, 537, 225 P.2d 218; Heimann v. City of Los Angeles, 30 Cal.2d 746, 757, 185 P.2d 597; if no offer was necessary, then a defective one could not obscure the fact that court and counsel knew that none of the pertinent evidence would be received. See People v. Amdur, 123 Cal.App.2d Supp. 951, 970, 267 P.2d 445; Morello v. Growers Grape Prod. Ass'n, 82 Cal.App.2d 365, 376, 186 P.2d 463; Phillips v. Powell, 210 Cal. 39, 42, 290 P. 441. The defect in the offer was that it did not specifically embrace the matter of the guardian having acted in good faith and upon substantial grounds. She was present in court. Counsel for both sides had stressed the importance of that issue; indeed respondent's brief on appeal does so. But the trial judge would have none of it, ruling that the result answered the question of whether the guardian had acted for the benefit of the ward.

The views orally expressed by the judge were carried into a "finding" IV, which reads: "That the incompetent through his guardian ad litem filed a petition for restoration to capacity and for termination of guardianship; that guardian secured no prior approval of the Probate Court authorizing her to employ a psychiatrist to examine said ward, or to employ attorneys to oppose said petition; that petitioner as guardian owed no duty to the ward, or to the Court, to investigate the competency of the ward, or to oppose or take any other action in connection with such proceedings for restoration to capacity and for termination of guardianship; that her acts of employing a psychiatrist and attorneys were unauthorized and not a justifiable charge against the guardianship estate." In most respects these conclusions are erroneous.

[3–5] The guardian's status is essentially that of trustee. Section 1400, Probate Code, says: "* * * The relation of guardian and ward is confidential, and is subject to the provisions of law relating to trusts. In the management and disposition of the person or property committed to him, a guardian may be regulated and controlled by the court." It is the business of a guardian to conserve and advance the interests of the incompetent in every way. Clark v. State Bar, 39 Cal.2d 161, 166, 246 P.2d 1, 3: "As guardian petitioner occupied a position demanding of him the highest degree of diligence and good faith. Probate Code § 1400; In re Guardianship of Carlon's Estate, 43 Cal.App.2d 204, 208, 110 P.2d 488." The guardian is vested with genuine discretion with respect to the person and the property of the ward where, as here, she has been appointed to act in the dual capacity. "In fact, by the express terms of the statute, the guardian is given the possession, care, and management of the estate of his ward. Civ.Code, §§ 236, 247, 249; Code Civ. Proc. §§ 1753, 1754, 1769, 1770. And the powers there given and the duties imposed are such as in their essential nature are wholly at variance with the existence of the right in the court to take the custody and management of the estate out of the hands of the guardian into its own. Under these provisions, as it was at the common law, it is the guardian, and not the court, who is made responsible for the proper administration of the trust. He it is to whose custody the property of the ward is intrusted, and to whom the law and the ward alike look for its safe return. In the performance of his duties he is, it is true, in certain respects under the control and supervision of the court appointing him; but this right of supervision does not, under our Code, nor did it at the common law, carry the power to interfere in any such manner with the custody and general management of the property of the ward, except, of course for conduct authorizing suspension or removal. * * * And it is primarily to his discretion, rather than that of the court, that this most important duty is committed,—a duty to be performed under the direction and control of the court, but, after all, a duty confided by the law to the guardian, who is made responsible for its faithful performance." De Greayer v. Superior Court, 117 Cal. 640, 644–645, 49 P. 983, 984. To same effect see Walters v. Superior Court, 129 Cal.App. 19, 21, 18 P.2d 343; In re Estates of Boyes, 151 Cal. 143, 154, 157, 90 P. 454.

[6] 25 Am.Jur., page 41, section 61: "A guardian acts, as has been shown, as an arm or officer of the court, from which it follows that the office or trust is administered under judicial control, and the guardian may be regulated and controlled in the management and disposition of the property and person of the ward. Ordinarily, however, the control exercised by the court is largely theoretical; in actual practice the court knows very little concerning the guardian's acts and is not usually informed except by reports which appear when requests are made to dispose of the ward's property by sale. The guardian is virtually a free agent so long as he is guilty of no acts detrimental to his ward; in handling the estate he exercises his own judgment, and in his control of the real property, except in so far as its title is concerned, he operates as freely as though the property were his own." A trustee (a guardian) is entitled to the presumption that he or she has acted in good faith, In re Estate of Ferrall, 41 Cal.2d 166, 167, 258 P.2d 1009, and the court will control the exercise of the trustee's discretion only in case of abuse of same. In re Estate of Marré, 18 Cal.2d 184, 190, 114 P.2d 586. "The court will not substitute its judgment for that of the guardian as to what is for the best interests of the infant unless unusual circumstances are shown." Latterman v. Guardian Life Ins. Co. of America, 280 N.Y. 102, 19 N.E.2d 978, 979.

[7–10] Section 1470, Probate Code, authorizes a guardian to institute a proceeding for restoration; section 1471 requires notice of hearing to be served upon the guardian if the proceeding is instituted by the incompetent or any other person in his behalf; and section 1472 declares that the guardian "may contest the right to the relief demanded." Inherent in commencing or opposing such a proceeding is the exercise of judgment or discretion by the guardian. He cannot file or oppose without reasonable grounds therefor. Action on his part often poses a delicate question which he as a layman is not competent to answer. He should and does have the right to consult those who know, see Clark

v. State Bar, supra, 39 Cal.2d 161, 173, 246 P.2d 1, and, possessed of expert advice, to exercise an honest and informed judgment and act or refrain from acting accordingly. The mere fact that a ward has been released from detention does not solve the problem for the guardian, In re Estate of Kay, 30 Cal.2d 215, 225, 181 P.2d 1, for the question is not one of sanity but whether the ward is able "unassisted, properly to manage and take care of himself or his property" and not "likely to be deceived or imposed upon by artful or designing persons." Prob.Code, § 1460; In re Des Granges' Estate and Guardianship, 102 Cal. App. 592, 596, 283 P. 103; In re Guardianship of Gordon, 56 Cal.App.2d 523, 527, 132 P.2d 824. It would be a gross injustice to the ward for the guardian to institute or consent to proceedings for restoration if he knows or is reliably informed of continuing incapacity of the ward to conduct his own affairs. It cannot be assumed that all judges will be able to detect the ultimate truth of present competency or incompetency if presented with evidence favoring only one side of the issue,—if the guardian sits idly by and leaves it to the court to ferret out the truth. It should be the law that the guardian can and must exercise an informed discretion in this matter and that, when he acts in good faith and upon substantial grounds, he is not required to proceed at his peril, forfeiting all right to reimbursement for expenses in the event the court disagrees with him upon a difficult question of fact, one which is actually a conclusion drawn from many facts. Though there is no decision in this state specifically in point the general current of authority elsewhere supports the view just expressed. This is true with respect to a guardian's instituting or opposing a restoration proceeding.

[11] As to the former, Kay v. Kay, 53 Ariz. 336, 89 P.2d 496, 498, 121 A.L.R. 1496, says: "Attorney's fees and expenses incurred in good faith to restore one to capacity, when reasonably necessary, may be charged against the ward's estate, whether the proceedings are successful or not." The case is annotated in 121 A.L.R. 1501. It is there said that the Kay case voices an established rule. Cases additional to those found in 121 A.L.R., and to the same effect, are: Penney v. Pritchard & McCall, 255 Ala. 13, 49 So.2d 782; Templeman v. Pierson, 334 Ill.App. 1, 78 N.E.2d 319, 322; In re Holder's Estate, 168 Kan. 657, 215 P.2d 166, 169; In re Schulte's Guardianship, 231 Iowa 237, 1 N.W.2d 193, 194; In re Weightman's Estate, 126 Pa.Super. 221, 190 A. 552, 554–555; Collins v. Marquette Trust Co., 187 Minn. 514, 246 N.W. 5, 6. See also, 44 C.J.S., Insane Persons, § 88b, p. 236; 28 Am.Jur. p. 690, § 53.

[12] Cases dealing with a guardian's unsuccessful opposition to restoration are few in number, but they turn also upon the questions of good faith and substantial grounds for opposition. It would be difficult to improve upon the exposition found in Palmer v. Palmer, 38 N.H. 418, 419: "The revocation of the guardianship in such cases is not to be made until the cause for which it is granted is removed. If this is a matter so obvious that no reasonable doubt can be entertained on the subject, it is the duty of the guardian to promote instead of resisting the revocation. But it is equally his duty, when the case is such as to admit of question, to present the facts fully to the judge. The interests of the ward, as well as sound reasons of public policy, require that the investigation should not be an *ex parte* one. The ward is not required or expected to produce evidence tending to show that the cause of guardianship is not removed. If the guardian should refrain from opposition for the reason that he apprehends the result may possibly show that the cause is removed, and he thereby be exposed to loss of the expenses incurred, the consequence will be that in many cases the revocation will be made upon unsatisfactory evidence, and when possibly the interests of the ward require that the guardianship should continue unrevoked. When the guardian, as in this case, proceeds in good faith, and in the exercise of a sound discretion, to try a doubtful question, the recovery of his reasonable expenses incurred in trying it

should not be made to depend upon the result."

American Nat. Bank v. Bradford, 28 Tenn.App. 239, 188 S.W.2d 971, 979, makes the same holding. It quotes the Palmer case and also says: "It is insisted that the guardian should be denied any compensation because it opposed the ward's efforts to be restored to her legal capacity and that its attorney, Mr. Stokes, likewise should be denied any fee. The argument is that a guardian as a fiduciary owes the duty of undivided loyalty to the ward, that opposing the ward's suit for restoration is a breach of that duty, and that such dereliction of duty disentitles the guardian and the attorney representing it to any compensation. It is true a guardian does owe his ward the duty of undivided loyalty. But that does not mean that a guardian of a mental incompetent must never oppose his application to be relieved of restraint and legal disability. In some cases it would be an act of intolerable oppression for the guardian to oppose such an application, as where it is clear the ward has recovered and is restored in mind; but in other cases the guardian's duty of loyalty would require him to oppose such an application, as where it is clear the ward is not recovered. 'It may well be that the most cruel and unfriendly thing that could be done to an incompetent would be to free him from all restraint, and the most beneficent and kindly thing to continue him subject to restraint.' In re Larner, 39 Misc. 377, 79 N.Y.S. 836, 838. Where the ward's mental condition is really in doubt and the guardian acts in good faith in opposing his petition for restoration, the guardian is entitled to the reasonable and necessary expenses thereby incurred." To the same effect is In re Larner, 39 Misc. 377, 79 N.Y.S. 836, 837.

While they do not decide the exact question presented at bar, In re Guardianship of Sherman, 42 Cal.App.2d 251, 108 P.2d 717 and Stone v. Conkle, 31 Cal.App.2d 348, 351, 88 P.2d 197, definitely point to the same conclusion as the above cited cases. Respondent relies upon McClenahan v. Howard, 50 Cal.App. 309, 195 P. 68. It contains language favorable to respondent's contention, but it does not involve any guardian or allowance to a guardian. It was an action brought by an alienist whom the court viewed as a mere volunteer. He had unsuccessfully tried to have a guardian appointed and the reviewing court held that the evidence sustained a finding that the services were not rendered at defendant's request or for her benefit. The case is not controlling here.

[13] There is no merit in the claim that failure of the guardian to obtain advance approval of the questioned expenditures precludes allowance. So held in In re Estate of Clanton, 171 Cal. 381, 386, 153 P. 459; In re Estates of Boyes, supra, 151 Cal. 143, 158, 90 P. 454; Clark v. State Bar, supra, 39 Cal.2d 161, 171, 246 P.2d 1; In re Estate of Schluter, 209 Cal. 286, 289, 286 P. 1008; In re Guardianship of Ewing, 42 Cal.App.2d 629, 630, 109 P.2d 748. The decision in In re Guardianship of Stallings, 85 Cal.App.2d 443, 447, 193 P.2d 114, is to the contrary, but we do not consider that it must prevail over the Supreme Court rulings above cited, none of which is cited in the Stallings opinion. The absence of prior approval of such expenditures as those involved in this appeal was held to be no bar to their allowance in these cases: In re Schulte's Guardianship, supra, 231 Iowa 237, 1 N.W.2d 193, 194; In re Holder's Estate, supra, 168 Kan. 657, 215 P.2d 166, 169; In re Weightman's Estate, supra, 126 Pa.Super. 221, 190 A. 552, 554; Collins v. Marquette Trust Co., supra, 187 Minn. 514, 246 N.W. 5, 6.

[14] We have not held or intimated that the court does not have a right and a duty to scrutinize the discretion exercised by the guardian and to disallow the disbursements if it appears the guardian did not act in good faith (for the benefit of the ward rather than her own financial advantage) or upon substantial grounds for so doing. The trouble with the proceeding under review is that the court refused to recognize any right in the guardian to exercise judgment in the premises and refused to hear any evidence

bearing upon the propriety of what the guardian did. That question will be before the court upon a retrial.

The order from which the appeal has been taken is reversed.

SHINN, P. J., and VALLEE, J., concur.

133 Cal.App.2d 154

Albert RAYMOND, Plaintiff and Appellant,

v.

INDEPENDENT GROWERS, Inc., a Nevada Corporation, Defendant,

Pacific Coast Fruit Distributors, Inc., a California Corporation, Defendant and Respondent.

Civ. 4951.

District Court of Appeal, Fourth District, California.

May 19, 1955.

Rehearing Denied June 16, 1955.

Hearing Denied July 13, 1955.

Action by fruit-owner against fruit distributor for accounting of proceeds of sale of owner's grapes by distributor and for recovery of money due. The Superior Court, Fresno County, Strother P. Walton, J., granted nonsuit, and fruit owner appealed. The District Court of Appeal, Griffin, J., held that distributor owed duty to account for proceeds to owner and nonsuit was not authorized.

Reversed.

1. Evidence ⇨591

Party calling adverse witness is not bound by witness' testimony, and testimony given by such witness may be rebutted by party calling him by other evidence. West's Ann.Code Civ.Proc. § 2055.

2. Factors ⇨32

Where distributor of fruit sold grower's crop, and under their agreement distributor was to deduct expenses, cost of distribution and pay remainder to grower, and distributor was only one who had record of transactions, distributor had duty to account to grower for proceeds. West's Ann.Agric.Code, §§ 1261–1269(1) (f), 1272, 1272.5, 1273(1) (b).

3. Factors ⇨42

In action by fruit owner against fruit distributor for accounting of proceeds received by distributor in sale of owner's fruit, whether owner accepted $21,000 check from distributor as waiver of disputed claims was matter of defense.

4. Trial ⇨139(1)

Court may grant a nonsuit only when, disregarding conflicting evidence and giving to plaintiff's evidence all value to which it is legally entitled, therein indulging in every legal inference that may be drawn from the evidence, the result is determined that there is no evidence of sufficient substantiality to support verdict in favor of plaintiff if such verdict was given.

5. Evidence ⇨53

Whenever, under given set of facts a presumption arises, such presumption is itself evidence.

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H. A. Savage, Fresno, for appellant.

Stammer, McKnight & Barnum, Fresno, for respondent.

GRIFFIN, Justice.

In a second amended complaint plaintiff alleged generally, in the first cause of action, that on December 4, 1952, plaintiff owned 13,211 packed boxes of Almeria grapes, and 18,346 of Emperor grapes, which were in storage; that they had been packed by defendant Independent Growers, Inc., and there had arisen a serious dispute between plaintiff and said Independent Growers, Inc. as to the amount due plaintiff from it, and accordingly on that day, an agreement was entered into between them and the defendant Pacific Coast Fruit Distributors, Inc. (hereinafter referred to as PCFD) for the immediate sale of the crops. Attached to the complaint as an exhibit is the written agreement which provides generally that PCFD immediately proceed to market, "on the present favorable market", the grapes in question to the end that the "maximum can be secured under market conditions", PCFD to deduct "ten cents per package for sale and collection of said grapes * * *"; that only F.O.B. sales shall be made by PCFD unless plaintiff specifically approves other types of sales; that if the market drops "below $1.75 for U. S. No. 1 f. o. b. shipping point", PCFD shall immediately notify plaintiff who shall determine whether they shall continue to sell on the current market or be given other instructions as to distribution of the remaining grapes. The same conditions apply to the Almeria grapes; that PCFD, from proceeds of sale, after deducting ten cents per package charge, shall apply the balance on account of the disputed obligation between plaintiff and the Independent Growers, Inc. up to the amount of $17,879.81, and thereafter place the balance in the hands of Produce Reporter Company for distribution up to $10,000, balance to be paid to plaintiff by PCFD, as received; that plaintiff Raymond and Independent Growers, Inc. will submit the question as to all differences between them, regarding what true balance is owing to either party, to arbitration with Produce Reporter Company, and each agreed to accept that company's award. Plaintiff then alleged that pursuant to this agreement he delivered to PCFD, as plaintiff's agent and for his account, the grapes indicated, and it proceeded to sell all of them for $68,168.65; that PCFD, after deducting all legitimate charges, had in excess of $30,000 on hand (the exact amount of which was unknown because all the items of proceeds of sale were only within the knowledge of PCFD); that plaintiff demanded that it pay Produce Reporter Company $10,000, as provided in the agreement; that PCFD pay to Independent Growers, Inc. $17,879.81, as therein provided, and that it make a full and complete accounting to plaintiff of the sale of said grapes; that PCFD refused and still refuses to do so and that it, as well as the Independent Growers, Inc. refused to carry out the provisions of the agreement, and have repudiated said arbitration agreement. It then alleges that PCFD received as proceeds of the sale $68,168.65, and after deducting allowable charges and credits, there remains in the hands of PCFD $35,032.06.

As to the second cause of action plaintiff realleges these charges and claims that PCFD has never given plaintiff a true or complete accounting, or any accounting at all of the money received by it for the sale of the grapes; that plaintiff does not have available to him the items of account, expenses, or proceeds of any sales, and that only PCFD has such information; that PCFD only acted as plaintiff's agent and broker in handling the grapes on consignment; that it has $35,032.06 on hand belonging to plaintiff, and that said sum was due and owing from it to plaintiff on April 1, 1953; that the exact amount cannot be determined without a full and complete accounting by it.

In a third cause of action plaintiff alleges generally that PCFD was employed in writing by plaintiff to sell the grapes, as plaintiff's agent and broker for the account of plaintiff; that it sold them for $68,168.55; that $33,136.59 was a proper charge against said sale and a balance of $35,032.06 belongs to plaintiff from such proceeds; that plaintiff, on many occasions, demanded payment of said sum but defendant PCFD refused to pay it.

The fourth cause of action is a common count of money had and received for said amount. The prayer is for judgment against PCFD for that amount and that the court order a full and complete accounting by it for all grapes sold for the account of plaintiff, and if from such account it be shown that plaintiff is entitled to recover any additional sum plaintiff have judgment against defendant accordingly.

By answer defendants admit plaintiff's ownership of the grapes in question; admit they were the subject matter of the contract; deny that PCFD received $68,168.55 from the sale of such grapes or any sum in excess of $41,049.99; and deny specifically and generally the other portions and paragraphs of the several causes of action. They admit, however, that on or about June 18, 1953, plaintiff "demanded" that PCFD pay the sum of $10,000 to the Produce Reporter Company, as provided by the contract, and that "said defendant refused and still refuses to do so". They also admit that PCFD has never given plaintiff any accounting of the monies received by said defendant from the sale of the grapes. As a separate and affirmative defense defendants allege that about December 15, 1952, plaintiff and defendants, for a good and valuable consideration, mutually agreed to and did abandon, rescind and set aside the written agreement referred to in the complaint.

It appears that prior to the filing of the second amended complaint, plaintiff, pursuant to request and demand, submitted a bill of particulars showing all items making up the balance claimed owing in the complaint. In this instrument, signed by plaintiff's attorney, it is stated that while one T. R. Sunshine, for and on behalf of both defendants, has given some detailed accounting of the sales of grapes made by each defendant, there has been no segregation as to who made the sales and that, in many instances, there have been charges for items for which there is no basis in the account, and a real accounting should be made as prayed for in the complaint; that as near as possible, from what calculations plaintiff has obtained from T. R. Sunshine, defendants received $90,460.13, and are entitled to credits for packaging at 70¢ per lug, totaling $33,792.50, plus commission of $3,155.70; that $42,256.78 has been paid to plaintiff, leaving a balance due plaintiff in the sum of $11,255.15.

The action went to trial upon these pleadings. In the opening statement counsel for plaintiff stated that plaintiff had not informed him of a $21,000 payment, and asked that the prayer of his complaint be reduced accordingly; that the Independent Growers, Inc. left a statement of accounting with plaintiff showing how the fruit had been sold in January, 1953, and that in that account it showed that "they had deducted 10 cents for all packages, and had made no allowance for fruit that was packed 'unclassified' "; that it was the Independent Growers, Inc. which made the accounting; that on receiving this account Sunshine was contacted and asked if he had put up the $10,000 with the Produce Reporter Company and Sunshine refused to carry out the arbitration agreement; that accordingly, since plaintiff was dealing only with PCFD, a ten-cent selling charge by Independent Growers, Inc. was not authorized and an accounting should be had to determine what amount was due and owing to plaintiff.

Counsel for plaintiff and defendants then agreed, in response to a question by the court, that "Any question on arbitration is out of it either by admission or conduct of the parties". Considerable argument ensued as to the effect of this concession, but it was finally agreed between the parties, as we construe the record, that defendants repudiated the arbitration portion of the agreement and plaintiff agreed to "call it off", but plaintiff would proceed to have defendants account for the fruit it received under the agreement, and so far as this case is concerned, plaintiff and defendants elected not to seek to have this matter referred to arbitration, either now or after the trial, and the court would be allowed to proceed upon the theory that "the arbitrator is out of this". Thereupon a motion was made by Independent Growers, Inc. to dismiss the action against it on the ground that no cause of action was stated. It was granted as to this defendant without objection. Several pages of argument ensued, in which plaintiff's and defendants' counsel stated what they expected to prove. The written agreement referred to in the complaint was received in evidence. Mr. Sunshine, president and general manager of PCFD, and a one-third or one-half owner of the stock in the Independent Growers, Inc., was called by plaintiff under section 2055 of the Code of Civil Procedure. He testified that he marketed the grapes pursuant to the agreement in evidence, for the account of plaintiff and the Independent Growers, Inc., and rendered a true and correct account and carried out the agreement except the portion pertaining to arbitration and paying the amount to Produce Reporter Company; that PCFD indirectly, through Independent Growers, Inc. but not directly, gave plaintiff an accounting; that he did not pay the $10,000 to the Produce Reporter Company under the arbitration agreement and did not pay Independent Growers, Inc. $17,879.81, because the arbitration agreement was rescinded by mutual consent on December 20, 1952, but he did pay them various sums of money at various times. He then related the particulars of a conversation with plaintiff in which plaintiff agreed to accept $21,000 as payment on account because he wanted to pay off a note of his for $20,000 at the bank and he stated that plaintiff said if he paid plaintiff that amount they would mutually agree to call off the impounding agreement in relation to the Produce Reporter Company. He then testified that according to his account PCFD received gross $77,262.60 for the grapes included in the contract and testified from an account prepared by him, showing dates of sale, number of lugs, selling price, gross receipts, deductions for packing, inspection and other expenses, and a recapitulation of all deductions made. This account was shown to counsel for plaintiff and the witness testified from it in response to questions propounded by plaintiff's counsel who was examining the report at the time. As to some of these sales it appears that the defendant received $2.10 per lug f. o. b. for one lot of 1260 lugs. The witness testified the Independent Growers, Inc., as agent for PCFD, paid directly to plaintiff $36,256.78, the full amount due and owing to plaintiff after making the deductions indicated.

Thereafter plaintiff offered in evidence inspection certificates of the grapes involved and certain Department of Agriculture reports covering a certain period for the claimed purpose of showing that the market prices of grapes, on the days indicated, were above $2.10 per lug f. o. b. Objections to the offer were sustained. These exhibits were marked for identification but were not brought to this court to examine and accordingly their contents are not otherwise known. Thereafter plaintiff's attorney propounded a question to the witness as to whether or not a certain produce handler in San Francisco had offered $2.25 and $2.15 per lug, including storage charges, for these grapes on a certain day. Objection was sustained to the question. Plaintiff made an offer of proof as to what the witness would testify. It appears that previously counsel for plaintiff asked the same or a similar question of the witness in this respect and it was answered to the effect that someone, maybe Mr. Raymond, told him that a certain outfit had offered to buy grapes in storage from plaintiff around December 20th, but he did not believe anything was said then about them offering $2.25 and $2.15 per lug; that he did not think anything was said about storage charges; and that he had already committed himself to sell 2210 lugs of these grapes at that time.

Thereupon plaintiff rested his case and the court granted defendants' motion for a nonsuit, apparently upon the ground that the record shows that plaintiff did in fact receive an accounting and accordingly an action for accounting will not lie and that plaintiff failed in his proof to show that PCFD owed him anything under the causes of action alleged in the complaint.

On appeal, plaintiff claims that the court erred in granting a nonsuit, in refusing to compel PCFD to account, in refusing to receive in evidence the documents indicated, and in refusing to permit plaintiff to offer evidence to prove PCFD did not receive the highest market price for the grapes at the time they were sold.

As we construe plaintiff's argument on this appeal, he contends that the pleadings admit the execution of the agreement; that PCFD never gave to plaintiff any accounting; that it was agreed that the arbitration portion of the agreement "was out"; that it was shown by plaintiff's evidence that PCFD received $77,262.60 for the sale of the grapes; that there was only paid to plaintiff $36,256.78, and that under the agreement, as amended, PCFD had no authority to pay out any money to any other person without plaintiff's consent, and therefore PCFD must account for the balance; that the burden of proving any offset or charges by PCFD rested upon PCFD; that since PCFD failed accordingly to account properly to plaintiff for such expenditures, there is due and owing to him a balance of $41,005.82.

In support of this contention Fox v. Hall, 164 Cal. 287, 128 P. 749; Whann v. Doell, 192 Cal. 680, 221 P. 899; and Kritzer v. Lancaster, 96 Cal.App.2d 1, 214 P.2d 407, are cited. In the latter case it is said 96 Cal.App. at pages 7 and 8, 214 P.2d at page 411:

> "The first count of the complaint was, in reality, a cause of action for an accounting. Under our system of pleading, a cause of action for accounting need only state facts showing the existence of the relationship which requires an accounting and the statement that some balance is due the plaintiff. * * * A pleader is not required to state facts which are peculiarly within the knowledge of his opponent. Here, the complaint alleged sufficiently the employment, the manner of compensation, the performance of services showing some compensation to be due, and the fact that the correct amount could not be ascertained without an accounting."

In Fox v. Hall, supra, it was said in 164 Cal. at page 290, 128 P. at page 750:

> "The facts alleged and proved showed the existence of a fiduciary relation sufficient to invoke the jurisdiction of a court of equity to compel an accounting, which, as the evidence shows, had been demanded of the defendant * * *. Upon such accounting, the burden would probably be upon the said defendant to establish any expenditures or credits upon which he might rely as offsets to the gross income shown to have been received by him."

In National Bank of New Zealand v. Finn, 81 Cal.App. 317, 331, 253 P. 757, 763, it was held that "The relation of principal and factor is of a fiduciary character and carries with it the elements of a trust, requiring the factor to scrupulously account to his principal. * * * A factor is both a bailee and a sales agent and is bound by his contract with his principal."

In Estate of McCabe, 87 Cal.App.2d 430, 197 P.2d 35, involving a confidential relationship of trustee and beneficiary, this court cited cases to the effect that trustees are under obligation to render to their beneficiaries a full account of all their dealings with the trust fund, and all presumptions will be against the trustee upon a settlement where there has been a refusal thus to account, and that the burden of proof was not on the beneficiary to point out the particulars in which the account was erroneous. See also Estate of McCabe, 98 Cal.App.2d 503, 220 P.2d 614. Sections 1261–1269, subd. (1) (f), 1272.5, 1273(1) (b), and 1272 of the Agricultural Code are cited as supporting this general statement of the rule, and as indicative of the duty of a trustee to account adequately to the principal under the circumstances here related.

Section 1272 provides: "The burden of proof shall be upon the commission merchant to prove the correctness of his accounting as to any transaction which may be questioned."

In the instant case the plaintiff established the fiduciary relationship; that the grapes were sold for $77,262.60; and that only $36,256.78 was returned to him. Under the agreement PCFD was only entitled to certain specified offsets and compensation for their sale. This was a sufficient prima facie showing by plaintiff of a right to accounting by PCFD for the balance. Under the authorities cited the duty rested upon PCFD to justify the retention or misapplication of any amount of the money not authorized by plaintiff. The question then arises: did the evidence of plaintiff conclusively show that PCFD met that burden before the nonsuit was granted in order to justify the judgment rendered? Notwithstanding the pleadings, the evidence does indicate that plaintiff did receive some form of accounting from Independent Growers, Inc. prior to the commencement of this action, but plaintiff contended then that it was not a full and complete report and accordingly "questioned" its efficiency and authenticity. The only other report indicated was that produced by PCFD while its president T. R. Sunshine was testifying as a witness under section 2055 of the Code of Civil Procedure. This accounting sheet was not received in evidence and accordingly is not before us for consideration, but certain testimony was elicited from the witness indicating its contents which, if true, would indicate that PCFD owed nothing to plaintiff under the disbursements made by PCFD. It is apparently plaintiff's claim that PCFD therein charged as an offset money PCFD paid to Independent Growers, Inc., which was the disputed indebtedness, without plaintiff's consent; that PCFD violated the agreement and sold portions of the grapes at a lesser amount than the "maximum that could be secured under market conditions", as provided in the contract; whether Independent Growers, Inc. was entitled to 10¢ per package selling charge; whether unclassified grapes were packed; and failure to credit plaintiff with cull grapes sent to the winery.

[1-3] The effect of the testimony of a witness called under section 2055 of the Code of Civil Procedure is that the party calling such adverse witness shall not be bound by his testimony, and the testimony given by such witness may be rebutted by the party calling him by other evidence. It is true that plaintiff's counsel failed to call plaintiff as a witness to rebut this testimony, but for the purpose of the nonsuit, plaintiff was not bound by his testimony that he made a full and accurate accounting of the proceeds of the sale and according to plaintiff's instructions. Accordingly, the duty of PCFD to account for those proceeds rested upon PCFD, particularly where it was alleged and shown that only PCFD had a record of the transactions and failed fully to account for the proceeds. Whether plaintiff accepted the $21,000 check as a waiver of all disputed claims was a matter of defense. A nonsuit was not authorized under the circumstances. Grantham v. Ordway, 40 Cal.App. 758, 761, 182 P. 73; Estate of Anderson, 185 Cal. 700, 704, 198 P. 407.

[4, 5] It is a well-known rule that a court may grant a nonsuit only when, disregarding the conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, therein indulging in every legal inference that may be drawn from the evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such verdict was given. It is likewise established law that whenever, under a given set of facts a presumption arises, such presumption is itself evidence. Grantham v. Ordway, supra; Brea v. McGlashan, 3 Cal.App.2d 454, 39 P.2d 877; 1 Cal.Jur.2d p. 429, sec. 91.

Judgment reversed.

BARNARD, P. J., and MUSSELL, J., concur.

In the Matter of the ESTATE of Harry A. SHERMAN, Deceased (two cases).

Jacob H. KARP, Petitioner and Respondent,

v.

HOPALONG CASSIDY, Inc., Contestant and Appellant,

Theodora Lois Sherman, Arlynne Sherman Wood, Ruth Britton Moon and Gordon B. Lockerbie, Contestants and Respondents.

Jacob H. KARP, Petitioner and Respondent, Hopalong Cassidy, Inc., Respondent,

v.

Theodora SHERMAN, Arlynne Sherman, Ruth Britton Moon and Gordon B. Lockerbie, Contestants and Appellants.

Civ. 20128, 20215.

District Court of Appeal, Second District, Division 2, California.

May 27, 1955.

Hearing Granted July 20, 1955.*

Proceeding in the matter of the estate of deceased testator. The Superior Court of Los Angeles County, Newcomb Condee, J., entered certain orders from which legatees and creditors of deceased testator appealed, and an order from which corporation appealed. The District Court of Appeal, McComb, J., held that where will authorized executor to do any and all things necessary in management and distribution of testator's estate as executor, in his discretion, shall deem advisable, executor had power to sell stock film footage belonging to estate of deceased testator.

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* Opinion vacated 297 P.2d 425.

Orders appealed from by legatees and creditors affirmed, and appeal of corporation dismissed.

1. Appeal and Error ⚷436

An appeal from an order does not deprive trial court of all jurisdiction over the cause pending such appeal, but only over so much as is affected by the appeal. West's Ann.Code Civ.Proc. § 946.

2. Appeal and Error ⚷442

An appeal does not deprive trial court of jurisdiction as to purely collateral, supplemental or independent matters pending the appeal. West's Ann.Code Civ.Proc. § 946.

3. Executors and Administrators ⚷358(3)

Where probate court on June 22 approved sale of stock film footage belonging to estate of deceased testator to corporation, and on August 10 probate court set aside order of sale because notice of hearing had not been properly served on legatees and creditors of deceased testator's estate, and on August 19 corporation filed notice of appeal from order of August 10, notice of appeal did not deprive probate court of jurisdiction to entertain petition on August 24 for approval of the sale. Probate Code, § 770; West's Ann. Code Civ.Proc. § 946.

4. Executors and Administrators ⚷336

Where executor's petition for approval of sale of property of estate of deceased testator contained sufficient factual allegations for approval of the sale pursuant to the provisions of either of three sections of the Probate Code, probate court was not without jurisdiction to enter order approving sale of property because executor's petition did not specifically request approval of sale under any particular section of the Probate Code. Probate Code, §§ 755, 757, 770.

5. Judgment ⚷248

In a contested matter, court may grant any relief embraced within allegations of petition, within jurisdiction of court, and consistent with evidence presented at hearing. West's Ann.Code Civ.Proc. § 580.

6. Executors and Administrators ⚷158

Where will authorized executor to do any and all things necessary in management and distribution of testator's estate as executor, in his discretion, shall deem advisable, executor had power to sell stock film footage belonging to estate of deceased testator.

7. Executors and Administrators ⚷339

Where sale of property belonging to estate of deceased testator was properly made pursuant to power of sale conferred on executor by will, it was unnecessary for probate court to make any specific findings, on petition for approval of sale, but only to comply with requirements of section of Probate Code dealing with sales under direction of will. Probate Code, § 757.

8. Executors and Administrators ⚷338

Where legatees and creditors of estate of deceased testator had notice of hearing on petition of executor for approval of sale of property of estate, were present, and were heard at the hearing, and were given adequate opportunity to present any bids which they might have desired to make to purchase the property of estate, but they did not do so, they thereby waived their objection to manner in which proceedings were handled, since they did not avail themselves of any opportunity to make such objections at time of hearing. Probate Code, § 757.

◆

Gang, Kopp & Tyre, Los Angeles, Hermione K. Brown and Milton A. Rudin, Los Angeles, of counsel, for Hopalong Cassidy, Inc.

Morris Lavine, Los Angeles, for Theodora Sherman and others.

H. P. Babson and John C. Goff, Los Angeles, for Jacob H. Karp.

McCOMB, Justice.

Two appeals have been consolidated from orders of the probate court concerning the sale of approximately 200,000 feet of stock film footage for a purchase price of $5,000. The first appeal, No. 20128, in which Hopalong Cassidy, Inc. is appellant (hereinafter designated as Hopalong), is taken from an order dated August 10, 1953, vacating an order of June 22, 1953, approving the sale of certain stock film footage by the estate of Harry A. Sherman, deceased, to Hopalong at a price of $5,000. In this appeal respondents are two legatees under decedent's will and two creditors of his estate. This group will be referred to as the "Sherman group."

The second appeal, No. 20215, is prosecuted by the Sherman group from orders dated August 24, 1953 and September 1, 1953, overruling their objections and approving the executor's sale of the stock film footage to Hopalong.

Facts: Harry A. Sherman died on September 25, 1952, leaving a will which read in part:

"Fifth: I hereby nominate my friends, Jacob H. Karp and Julian C. Sorin, or their survivor, or such as may qualify, to act as executor hereof, either and both to serve without bond.

"I authorize my executor to do any and all things necessary in the management and distribution of my estate as he, in his discretion, shall deem advisable."

Part of this estate consisted of 200,000 feet of stock film footage in which Paramount Pictures Corporation owned an interest. Decedent's estate was insolvent and the executor sought diligently to develop a market for the film footage mentioned above. After extended negotiations he received an offer from Hopalong of $5,000 for the film footage on condition that the offer be accepted and the property be delivered prior to July 15, 1953. Thereupon the executor filed a petition for the approval of sale for the film footage which petition was dated and verified on May 21, 1953, setting forth the terms and conditions of the sale to Hopalong.

On June 11, 1953, the probate court heard the petition for approval of the sale, granted it and signed an order on June 22, 1953, approving the sale to Hopalong for $5,000.

Thereafter the Sherman group filed a motion to set aside the order approving the sale upon the ground that although they had requested special notice of any proceedings in the estate none had been served upon them relative to the hearing on June 11, 1953.

On August 4, 1953,[1] the Sherman group's motion came on for hearing and the executor, while conceding that notice of the hearing on June 11, 1953, had not been properly served upon the Sherman group, presented a petition for the approval of the sale under the provisions of section 770[2] of the Probate Code, taking the position that the sale had actually been made, and that the executor was in fact dealing with a dissipating asset and requested the court to approve the sale. This the court refused to do and set aside the order of sale dated June 22, 1953, and reset the matter for hearing and bids on August 24, 1953.

The executor then filed a verified petition for instructions dated August 14, 1953, outlining in detail the problems which confronted the estate relative to the stock film footage and asking whether he should be instructed to sell the film footage or withdraw the product from the market. Objections were filed by the Sherman group to the petition filed under section 770, Probate Code, and to the petition for instructions.

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[1] The order was dated August 10, 1953.

[2] Section 770 of the Probate Code reads: "Perishable property and other personal property which will depreciate in value if not disposed of promptly, or which will incur loss or expense by being kept, and so much other personal property as may be necessary to provide the family allowance pending the receipt of other sufficient funds, may be sold without notice, and title shall pass without confirmation; but the executor, administrator or special administrator is responsible for the actual value of the property unless, after making a sworn return, and on a proper showing, the court shall approve the sale."

After hearing on August 24, 1953, the probate court overruled the Sherman group's objections, offered the property for sale, and no other bids being forthcoming, approved the sale of the film footage to Hopalong upon the terms and conditions set forth above.

August 19, 1953, Hopalong filed a notice of appeal from the order of August 10, 1953, vacating the order approving the sale of personal property to Hopalong.

On September 28, 1953, the Sherman group filed a notice of appeal from the order of August 24, 1953, overruling objections to the confirmation of the sale of the film footage and to the order of September 1, 1953, confirming the sale of the stock film footage to Hopalong.

These appeals have been consolidated for hearing in this court. We will first consider the Sherman group's appeal No. 20215, and then the Hopalong appeal No. 20128.

Sherman Group Appeal No. 20215

Questions: First: *Did the notice of appeal by Hopalong, No. 20128, filed August 19, 1953, deprive the probate court of jurisdiction to entertain the petition for approval of the sale on August 24, 1953, and make an order accordingly?*

No. Section 946 of the Code of Civil Procedure provides in part as follows: "Whenever an appeal is perfected, as provided in the preceding sections of this chapter, it stays all further proceedings in the court below *upon the judgment or order appealed from, or upon the matters embraced therein,* * * * but the court below may proceed upon any other matter embraced in the action and not affected by the order appealed from." (Italics added.)

[1, 2] An appeal from an order does not deprive the trial court of all jurisdiction over the cause pending such appeal but only over so much as is affected by the appeal. It does not deprive the trial court of jurisdiction as to purely collateral, supplemental or independent matters pending the appeal. (People v. Hall, 115 Cal. App.2d 144, 154 [6], 251 P.2d 979; Hennessy v. Superior Court, 194 Cal. 368, 372 [3], 228 P. 862; In re Estate of Waters, 181 Cal. 584, 585 [1], 185 P. 951.)

[3] It is clear that in the instant case the action taken by the trial court on August 24, 1953, was collateral and independent of the order of June 22, 1953. The appeal from the order of June 22nd pertained solely to whether the probate court's action in vacating its previous order was correct, while the appeal from the order of August 24th pertained solely to the authority of the probate court to approve the sale which had been made.

Counsel for the executor by an example aptly illustrates the untenability of the Sherman group's contention. They say:

"Let us assume a factual situation, similar to the situation which exists in the instant case, with reference to the early sale set aside by the Court and the subsequent appeal. Let us vary the subject matter and assume that the sale concerned a load of ice, or any other rapidly depreciating asset. For the Court to hold under the assumed circumstances that the executor lacked the power to sell the load of ice and the Court lacked the power to approve that sale, borders on the ridiculous. Certainly, the interests of the estate would demand that the executor act and salvage what he could for the estate, and the fact that a notice of appeal had been filed vacating a prior order of sale should affect neither the executor's power to sell nor the Court's power to approve that sale."

Second: *Was the probate court without jurisdiction to enter the order of August 24, 1953, approving the sale of the property for the reason that the executor's petition did not specifically request approval of the sale under any particular section of the Probate Code?*

[4] *No.* An examination of the executor's petition discloses that the petition itself contains sufficient factual allegations for the approval of the sale pursuant to the

provisions of either section 755, 757 or 770 of the Probate Code.

[5] In a contested matter the court may grant any relief embraced within the allegations of the petition and within the jurisdiction of the court consistent with the evidence presented at the hearing. (Section 580, Code of Civil Procedure; Jones v. Alexander, 101 Cal.App.2d 44, 45 [1], 224 P.2d 870.)

In the instant case the requirements of the foregoing rule have been met.

Third: *Did the will of decedent confer a power of sale upon the executor?*

[6] *Yes.* The fifth section of the will provided in part, "I authorize my executor to do *any and all things* necessary in the management and distribution of my estate *as he, in his discretion, shall deem advisable.*" (Italics added.)

"Any" is defined in Vol. I, Webster's New International Dictionary (1939) p. 121, in part as follows:

"1. One indifferently out of a number; one * * * indiscriminately of whatever kind; specif.: a. Indicating a person, thing, event, etc., as not a particular or determinate individual of the given category but whichever one chance may select; this, that, or the other; one or another; * * * 2. One or all * * * indiscriminately of whatever quantity; specif.: a. Indicating a positive but undetermined number or amount; one or more; not none; as, I do not find *any* nails; have you *any* money? b. Indicating the maximum or whole of a number, quantity, etc.; all; as, give him *any* papers you find; I need *any* help I can get. * * * 3. Of an amount, quantity, number, time, extent: a. Great, unmeasured, or unlimited; up to whatever measure may be desired or needed; the whole; as, Niagara can produce *any* quantity of water power; *any* time these twenty years."

"All" in the same authority at page 67, is defined in part: 1. The whole of;—used with a singular noun or pronoun, and referring to amount, quantity, extent, duration, quality, or degree; as, *all* the wheat; *all* the year; *all* this; specif., as much as, or the greatest, possible; complete; perfect; as, *all* happiness; with *all* speed; in *all* kindness. 2. The whole number or sum of;—used collectively, with a plural noun or pronoun expressing an aggregate, to mean, esp. in logic, that a statement is true of the sum of the individuals or cases considered; as, *all* the angles of a triangle are equal to two right angles. 3. Every number or individual component of; each one of; generically and distributively, meaning that a statement is true of every individual or case; as, all men are mortal. * * *"

Clearly the language used by the testator in the instant case meant exactly what it said: that the executor was authorized to do each and every thing necessary to the distribution of his estate as he [the executor], in his discretion should deem advisable.

One of the things that the executor deemed advisable was to sell the film footage to Hopalong for the price and upon the conditions agreed upon. This view is in accordance with the statements in Restatement of the Law of Trusts, Volume I (1935) page 501, section 190, which read in part: "The trustee can properly sell trust property if—b. *The language of the trust instrument.* The trustee can properly sell trust property if it appears from the language used in the trust instrument that a power of sale was intended to be conferred upon him, although it is not conferred in specific words. Thus, an authorization or direction to the trustee to 'invest and manage,' or to 'invest and reinvest,' or to 'dispose of' the trust property, may confer a power of sale both of real and personal property. In determining the meaning of a provision in the trust instrument resort can be had to the whole of the instrument and to the surrounding circumstances.

"If a trustee is authorized to sell trust property only for a particular purpose, he cannot properly sell except for that purpose. So also, if he is authorized to sell only under certain circumstances, he cannot properly sell except under those circumstances. Thus, if by the terms of the trust the trustee is authorized to sell trust property if such sale is necessary to raise money for the support of the beneficiary, he cannot properly sell unless it reasonably appears necessary to sell property for this purpose." (See also Carleton v. Goebler, 94 Tex. 93, 58 S.W. 829, 831; Scarborough v. Scarborough, 134 N.J.Eq. 201, 34 A.2d 791, 796.)

[7] In view of the fact that the sale was properly made pursuant to the power of sale conferred upon the executor by the will, it was unnecessary for the probate court to make any specific findings, but only to comply with the requirements of section 757 of the Probate Code, which it did. Said section reads as follows:

"When property is directed by the will to be sold, or authority is given in the will to sell property, the executor may sell the same either at public auction or private sale, and with or without notice, as he may determine; but he must make a return of sales and obtain confirmation thereof as in other cases. In either case no title passes unless the sale is confirmed by the court; but the necessity of the sale, or its advantage or benefit to the estate or to those interested therein, need not be shown. If directions are given in the will as to the mode of selling, or the particular property to be sold, such directions must be observed."

Cases relied on by the Sherman group, such as Billings v. Morrow, 7 Cal. 171; Quay v. Presidio R. Co., 82 Cal. 1, 22 P. 925; Wilcoxson v. Miller, 49 Cal. 193; Treat v. De Celis, 41 Cal. 202 and Grant v. Ede, 85 Cal. 418, 24 P. 890, are not here in point since such cases involved powers of attorney and agency contracts, and not powers conferred in a testamentary document. The rules of instruction and interpretation of wills are more liberal than those which are applicable in inter vivos powers of attorney. Hence the cited cases are not here controlling.

The rule which is here applicable is well stated in Cahill v. Russell, 140 N.Y. 402, 35 N.E. 664, where the court said: "It is evident that the testamentary plan which the testatrix had formulated in her own mind contemplated the grant of a power of sale to her executor. If the form adopted to express her intention is ambiguous or incomplete, the intent, nevertheless, should prevail. Formal words are not necessary to create a power, and * * 'However obscurely in a will the intention may be expressed, yet if it appears that a power of sale was intended, a sale will be supported.'" (See also Knight v. Gregory, 333 Ill. 643, 165 N.E. 208, 210 [3]; Illinois Christian Missionary Soc. v. American Christian M. Soc., 277 Ill. 193, 115 N.E. 118, 120 [1–3]; In re Miller's Will, Sur., 79 N.Y.S.2d 128, 129 [1–3]; In re Dzwoniarek's Estate, 143 Misc. 597, 258 N.Y.S. 53, 55 [4]; and In re Walker's Will, 258 Wis. 65, 45 N.W.2d 94, 95 [1], 823 A.L.R.2d 991; Whisman v. Roberts' Ex'r, 306 Ky. 433, 208 S.W.2d 305; Goeke v. Pierson, 141 N.J.Eq. 294, 57 A.2d 370, 371 [1].)

Fourth: *Were the Sherman group deprived of due process of law in that they did not have notice and an opportunity to be heard?*

[8] *No.* The record discloses without question the Sherman group had notice, were present and were heard at the hearing upon which the order of August 24, 1953, was predicated. No useful purpose would be served by giving details of the arguments presented by counsel for the Sherman group at the hearing. Suffice it to say that they were fully heard and given an adequate opportunity to present any bid which they might have desired to make to purchase the film. This they did not do. They thereby waived any objection to the manner in which the proceedings were handled, since they did not avail themselves of their opportunity to make such objections at the time of hearing. (See also In re Estate of Wilson, 116 Cal.App.2d 523, 526, 253 P.2d 1011.)

In view of the foregoing, it is evident that the probate court's orders of August 24, 1953 and September 1, 1953, were proper and free from error.

Hopalong Appeal No. 20128

In view of our decision in the Sherman Group No. 20215, the questions raised on the appeal of Hopalong, No. 20128, have become moot and therefore the appeal should be dismissed.

The orders of August 24, 1953 and September 1, 1953, are and each is affirmed.

The appeal of Hopalong from the order of August 10, 1953, is dismissed.

MOORE, P. J., and FOX, J., concur.

In the Matter of the ESTATE of Spencer H. CHARTERS, Deceased.

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, Petitioner, Appellant and Respondent,

v.

Irene Marie Charters YEAKEL, Contestant and Respondent,

Laura Hoerner, Legatee, Respondent and Appellant.

Civ. 20634.

District Court of Appeal, Second District, Division 2, California.

May 27, 1955.

Rehearing Denied June 16, 1955.

Hearing Granted July 20, 1955. *

Proceeding on petition by testamentary trustee for instructions as to disposition of accumulated trust income. The Superior Court, Los Angeles County, John Gee Clark, J., entered order of instructions and trustee appealed. The District Court of Appeal, McComb, J., held that Probate Court had jurisdiction to consider matter of sale of deceased's residence contrary to express terms of trust, notwithstanding fact that trustee had reported sale of such residence in its account as trustee and that court order had approved said account.

Affirmed.

1. Trusts 🔑271½

In proceeding by testamentary trustee for instructions as to disposition of accumulated trust income, probate court had jurisdiction to consider matter of sale of deceased's residence contrary to express terms of trust, notwithstanding fact that trustee had reported sale of such residence in its account as trustee and that court order had approved said account.

2. Trusts 🔑328

Minors have right to move to reopen account affecting their property rights at any time before final distribution. Probate Code, § 931.

3. Appeal and Error 🔑1008(3)

Appellate court is not bound by trial court's construction of will when it is based solely upon terms of instrument without aid of evidence, and appellate court must make final determination as to meaning of instrument in accordance with applicable principles of law.

4. Wills 🔑450, 470

Will must be read as a whole and all parts thereof are to be construed together and in relation to each other so as to form, if possible, a consistent whole.

5. Wills 🔑440

Court's inquiry in construing will is limited to ascertaining what testator meant by language which was used.

6. Wills 🔑684(6)

Will of decedent, properly construed, showed intent of testator that excess income of trust created by such will, if any, should not be accumulated but should be distributed to trust beneficiary.

◆

Henshey & Beeman, Hollywood, for appellant Security-First Nat. Bank.

Robertson, Harney & Behr; David Robertson; Ruth Michaelson, Los Angeles, for respondent Irene Marie Charters Yeakel.

Charles P. Lester, guardian ad litem, in pro. per.

McCOMB, Justice.

From an order giving a trustee instructions pursuant to a request therefor, the trustee appeals.

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* Opinion vacated 293 P.2d 778.

Chronology

i. Irene Maries Charters Yeakel, hereinafter referred to as Irene, is the only daughter of Irene Meyers Charters and Spencer H. Charters. She was born June 15, 1931.

ii. Irene's mother died January 2, 1942.

iii. January 25, 1943, Irene's father, Spencer H. Charters, died leaving a will dated February 12, 1942, reading in part as follows:

"Fifth: In the event my daughter, *Irene Marie Charters,* survives final distribution of my estate, I give, devise and bequeath the residue of my estate, real and personal, wherever situated, hereinafter termed the 'trust estate', to *Security-First National Bank of Los Angeles,* a national banking association, in trust, to hold, manage and distribute as hereinafter provided:

"(A) (1) Until my daughter, *Irene Marie Charters,* attains the age of Twenty-one (21) years, my Trustee shall distribute to her, or for her use and benefit, such sums or amounts in monthly installments as may be necessary for her proper support, maintenance and education, using therefor so much of the principal of the Trust Estate as may be necessary if the net income available for distribution is insufficient.

"(2) From and after the date upon which my daughter, *Irene Marie Charters,* shall attain the age of Twenty-one (21) years, my Trustee shall pay to my said daughter, during her lifetime or until the termination of the Trust Estate, such sum or amount monthly which, when added to the payments which she may receive from any insurance policies on my life, shall amount to a monthly income of *Two Hundred Dollars,* ($200.00). If the income available for distribution is not sufficient to make the aforesaid monthly payments my Trustee shall use such part of the principal as may be necessary to make such monthly payments.

"(3) My Trustee shall permit my daughter, *Irene Marie Charters,* and her guardian or such person as may be entrusted with her care, to use and occupy my residence at 1745 North Vista Street, Los Angeles, California, for so long a time as they may desire without payment of rent and without deduction from any of the payments herein provided. In connection with such use, my said daughter or her guardian or such person as may be entrusted with her care, shall, so long as she or they desire, have the use, without charge, of the household furniture and furnishings, silver, books, pictures, paintings, works of art, and bric-a-brac which may be located in said residence.

"(4) When and at such time as my daughter, *Irene Marie Charters,* shall cease to occupy my home at the above address the Trustee shall make such disposition of the personal property used in connection with said home as it may deem advisable.

"(5) Should any of my jewelry become a part of the Trust Estate the same shall be distributed to my daughter, *Irene Marie Charters,* at such time as, in the opinion of the Trustee, she is qualified to receive and care for the same.

"(6) In addition to the payments hereinabove provided for my daughter, *Irene Marie Charters,* my Trustee shall pay to her the sum of *Five Thousand Dollars* ($5,000.00) from the principal of the Trust Estate on the date upon which she attains the age of Thirty (30) years, and an additional sum of *Five Thousand Dollars* ($5,000.00) from the principal of the Trust Estate on the date upon which she attains the age of Thirty-five (35) years, and an additional sum of *Five Thousand Dollars* ($5,000.00) from the principal of the Trust Estate on the date upon which she attains the age of Forty (40) years of age."

iv. On or about the 5th of February, 1943, Security-First National Bank of Los Angeles was appointed Successor Guardian of the estate of Irene, in the matter of the Guardianship Estate of Irene Marie Charters, a minor, Los Angeles County Superior Court No. 215,784.

v. By the decree of distribution in the Estate of Spencer Charters, deceased, the Security-First National Bank of Los Angeles, was declared to be the trustee of the testamentary trust created under the will of said deceased. One of the assets in the estate so ordered to be distributed was the family residence of deceased, known as 1745 North Vista Street, Los Angeles. The material provisions of the will, relative to the creation of the trust, were incorporated in the decree of distribution.

vi. November 6, 1951, Irene married.

vii. On or about July 16, 1946, the trustee, without notice to the guardian of the estate, and without filing a petition with the court for authority to sell the family residence, sold the residential property of decedent for $23,615.75, which sum was then made a part of the principal of the trust.

viii. On June 24, 1947, in the trustee's third account current appears the following: "(a) The stucco bungalow carried herein at $11,000.00 was sold for the sum of $25,000.00. After paying the commission of the real estate broker and the expenses of sale, the transaction resulted in a profit of $12,615.75."

An order was made by the court settling and approving this account.

ix. By reason of the fact that Irene had married and was receiving only $45.48 per month, and that the residential property had been sold and the proceedings added to the principal, a considerable amount of income in cash had accumulated, and for the purpose of determining what to do with such sums, the trustee filed its petition for instructions, requesting that it be instructed as to the disposition of the accumulated and undisposed of income.

After hearing the trial court made, among others, the following findings:

"IV

"That on February 5, 1943 the Security-First National Bank of Los Angeles, a national banking association, was appointed guardian of the Estate of Irene Marie Charters (then a minor); that said guardian presented its inventory of the assets of said minor's estate; that the testamentary trust of Spencer H. Charters, deceased, under paragraph Fifth (A) (3) of the Last Will and Testament of Spencer H. Charters, gave the right to the use and occupancy of certain residence property located at 1745 North Vista Street, Los Angeles, California to Irene; that said right was in the nature of a Life Estate and that said right and/or estate was not listed in said inventory as an asset of said minor's estate.

"V

"That on or about the 16th of July, 1946 the Trustee of decedent's estate under said Last Will and Testament sold the real property at 1745 North Vista Street, Los Angeles, California. That said sale was made without notice to the guardian of said minor's estate, and said guardian did not file its petition with the Court for authority for it to sell said estate of the minor. That by reason of said sale, the Trustee obtained $25,000.00 which sum was then made a part of the corpus of said Trust and has since said date and does now make up a portion of the said Trust Estate."

Pursuant to the request for instructions an order reading in part as follows, dated April 30, 1954, was made:

"1. That petitioner, as Trustee, under the Last Will and Testament of Spencer H. Charters, deceased, and under the Decree of Distribution made in this cause on or about the 23rd day of May, 1944 be and it is hereby ordered to either purchase a home and residence with suitable furnishings for the occupancy of Irene Marie Charters Yeakel which shall be as nearly equal in value as reasonably possible to the home and furnishings located at 1745 Vista Street, Los Angeles, California, and which were sold by said trustee on or about the year 1946, or to provide Irene Marie Charters Yeakel with a sum sufficient to rent a furnished home of the value, approximate quality and desirability as the residence at 1745 Vista Street, Los Angeles, California which was previously occupied by Irene Marie Charters Yeakel, and sold by the Trustee as aforesaid.

"2. It is further ordered that Paragraph Fifth (A) (2) of the Last Will and Testament of Spencer H. Charters and Paragraph Fifth (A) (2) of the Decree of Distribution made in this cause be interpreted as a direction to the Trustee that Irene Marie Charters Yeakel should receive a minimum of $200.00 per month, including benefits from insurance policies received from sources outside the Trust Estate as well as income of the Trust Estate.

"3. It is further ordered that petitioner utilize any income remaining after it has provided the minimum of $200.00 per month including insurance payments received by Irene Charters Yeakel outside of the Trust to meet its obligation to provide for Irene Marie Charters Yeakel's reasonable support, care and comfort.

"4. The intent of Spencer H. Charters as found from a reading of his Last Will and the Trust therein contained, and upon analysis of the facts surrounding execution of said Will, is interpreted to mean that excess income, if any, after petitioner has carried out the terms of this Order, shall not be accumulated but shall be distributed to Irene Marie Charters Yeakel."

[1] *Questions:* First: *Did the probate court have jurisdiction to consider on the petition for instructions the matter of the sale of deceased's residence?*

Yes. There is no merit in appellant's contention that since it reported the sale of the residence in its third account current as trustee and the court, by its order dated July 17, 1947, approved the said account that all matters covered therein have become final and no longer come under the supervision of the probate court.

When the third account was rendered to the court and approved, the beneficiary of the trust was a minor of the age of 16 years, and her estate was under the guardianship of appellant who was also the trustee. Since Irene was a minor and therefore under a legal disability she was not bound by the court order approving the account. Otherwise the effect thereof would be to deprive her of a property right, namely, the right to use and occupy the residence.

[2] The law is settled that minors have the right to move to reopen an account affecting their property rights at any time before final distribution. (Probate Code, § 931; Kidell v. Ketler, 146 Cal. 12, 18, 79 P. 514; Ringwalt v. Bank of America, etc., Ass'n, 3 Cal.2d 680, 683 [1], 45 P.2d 967.)

Second: *Did the court by its instructions interpret the will of decedent or did it make a new one?*

By the instructions of the court it interpreted the will. It did not make a new one.

[3-5] These rules are here controlling:

(1) An appellate court is not bound by a trial court's construction of a will when it is based solely upon the terms of the instrument without the aid of evidence. The appellate court must make a final determination as to the meaning of the instrument in accordance with applicable principals of law. (In re Estate of Platt, 21 Cal.2d 343, 352 [4], 131 P.2d 825.)

(2) A will must be read as a whole and all parts thereof are to be construed together and in relation to each other so as to form, if possible, a consistent whole. (In re Estate of Northcutt, 16 Cal.2d 683, 688 [3], 107 P.2d 607.)

(3) A court's inquiry in construing a will is limited to ascertaining what the testator meant by the language which was used. (In re Estate of Beldon, 11 Cal.2d 108, 112 [2], 77 P.2d 1052.)

[6] From a reading of the provisions of the will of decedent set forth above, we are of the opinion that the testator's intention was in accordance with the instructions given to the trustee by the probate court.

At the time of the probate court's order dated April 30, 1954, there was no person in being in the category set forth in section 733 of the Civil Code. Hence such section is not applicable to the facts of the present case.

In view of our conclusions it is unnecessary to discuss other questions presented by counsel.

Affirmed.

MOORE, P. J., and FOX, J., concur.

133 Cal.App.2d 167

PEOPLE of the State of California, ACTING BY AND THROUGH THE DEPARTMENT OF PUBLIC WORKS, Plaintiff and Respondent,

v.

UNION MACHINE COMPANY, a corporation, et al., Defendants.

Julius Harband and Dorothea Harband, Defendants and Appellants.

Civ. 16167.

District Court of Appeal, First District, Division 2, California.

May 23, 1955.

As Modified on Denial of Rehearing June 22, 1955.

Action in eminent domain. The Superior Court, City and County of San Francisco, Preston Devine, J., entered an award for landowners on basis of jury verdict and landowner appealed on grounds of an inadequate award. The District Court of Appeal, Nourse, P. J., held that refusal to allow landowners' experts to testify under direct examination that their opinions were based on prior offers made for land in question without stating price was nonreversible error but when coupling that error with refusal to let landowners cross-examine government expert as to whether his opinion would be changed if he had known of several specified offers to purchase land, there was reversible error.

Reversed.

1. Evidence 🔑113(16)

In condemnation proceeding involving question of land value, a witness on direct examination cannot testify as to particular transactions such as how much has been offered and refused for land in question.

2. Evidence 🔑555

An expert witness usually may be asked on direct examination to state the reasons for his opinion. West's Ann.Code Civ. Proc. § 1872.

3. Eminent Domain 🔑262(5)

In condemnation proceeding, refusal to allow landowners' expert to testify on direct examination that his opinion was based on prior offers made for land in question without stating the amount and circumstances of the offers was nonreversible error.

4. Appeal and Error 🔑949

Where a ruling which might have been made as a matter of discretion was instead based on matters of law of admissibility, the correctness of the rulings must be reviewed on same basis.

5. Evidence 🔑558(8)

In condemnation proceeding involving question of land value, landowners should have been permitted to cross-examine expert respecting offers for land received by landowners at prices higher than value expert placed on land. West's Ann.Code Civ. Proc. § 1872.

6. Eminent Domain 🔑262(5)
Evidence 🔑558(9)

In condemnation proceeding, refusal to allow landowners to cross-examine state's experts as to whether their opinions would be changed if they had known of several specified offers to purchase land at a price considerably higher than they placed on the land, was reversible error. West's Ann. Code Civ.Proc. § 1872.

7. Evidence 🔑558(8)

In condemnation proceedings involving leased land, where government expert witness claimed that rent paid was excessive, landlord should have been permitted to cross-examine witness respecting offers to rent at the same price.

8. Evidence 🔑560

In condemnation proceedings in which government expert witness claimed land in question was bringing excessive rent, a refusal to permit introduction of letter from lessee offering to renew lease at a possibly higher rent was proper in view of the fact that lessee's offer included land other than that in question.

9. Evidence 🔑558(9)

The fact that an expert witness in testifying on value of land did not know of a prior offer made to landowner to lease land, was no reason for excluding cross-examination of expert on offer, if its exact contents and materiality could be shown.

10. Evidence 🔑213(1)

The fact that evidence of offer received by landowner from third party during negotiations with condemnor was in some respects related to condemnation compromise would not necessarily make it inadmissible if it would have been admissible otherwise.

* * *

Maurice Harband, San Francisco, for appellant.

Robert E. Reed, Sacramento, Holloway Jones, Jack M. Howard, John D. Rogers, Thomas F. Vizzard, San Francisco, for respondent.

NOURSE, Presiding Justice.

This is an appeal by defendants in an action in eminent domain, on the ground that errors in evidentiary rulings and instructions led to an inadequate award.

The condemnation for freeway purposes related to part of the property of defendants on Bryant and 8th Streets in San Francisco. While the complaint designated defendants' property, from which a strip was to be taken, as a single parcel (Parcel 2), it was found to consist of two separate parcels (A and B or 2A and 2B). Parcel A was an unimproved corner lot, leased to the Texas Company for gas station purposes from February 1, 1947 to January 31, 1957 at a rental of $300 per month. Pursuant to a provision of the lease, it was terminated by the Texas Company in August 1952, on the ground that condemnation of part rendered the remainder inadequate for gas station use. Plaintiff condemned 1989 of its 6725 square feet. Parcel B, leased to the United States, contained a building fronted on Bryant Street adjoining Parcel A and a driveway on 8th Street (also adjoining Parcel A.) From this driveway plaintiff condemned 687 square feet. Defendants claimed severance damages to Parcel A but not to Parcel B.

The essential disputed point was the value of Parcel A prior to the condemnation. There was general agreement that the use as a service station then was the highest and best use. There was little divergence in the estimates of the part of the land remaining from Parcel A after the condemnation and of the part taken from Parcel B, which were equally evaluated at around $3.50 the square foot. However, plaintiff's sole expert, Mr. Kelly, a state employed appraiser, estimated the value of the land of Parcel A prior to the condemnation at $4.25 a square foot, whereas the valuations of defendants' three experts, prominent real estate brokers, averaged $7.42 a square foot. Accordingly Mr. Kelly arrived at an estimate of $8,453.25 for the part of Parcel A taken and $3,552 for severance damages, whereas the average estimate of defendants' experts for the same items was $14,800 and $17,783 respectively. In support of his low estimate Mr. Kelly urged that the rent of $300 a month for Parcel A was very high. The verdict, after the jury had viewed the premises, was $8,500 for the part of Parcel A taken and $4,000 for severance damages.

Appellants' main contentions on this appeal are that by the sustaining of objections they were prevented from: 1) bringing out on direct examination of their experts that one of the bases of their estimates was recent offers received by appellants for Parcel A (without mentioning the prices offered), 2) from attacking the weight of Mr. Kelly's opinion on his cross-examination by questioning him as to the influence which two specific bona fide written offers allegedly made for Parcel A 3½ or 4 years prior to the condemnation in amounts substantially higher than his estimate would have had on his appraisal, 3) from attacking Mr. Kelly's opinion with respect to the excessiveness of the rent of $300 a month by questioning him as to the other offers of the same rent made to defendants, and an offer of the present lessee to stay at the same or higher rent if it would receive additional land to compensate it for the part taken.

[1-3] With respect to the first of these points appellants concede the existing rule in this state that witnesses cannot upon the direct examination be allowed to testify as to particular transactions such as how much has been offered and refused for the land in question, People v. La Macchia, 41 Cal. 2d 738, 744, at page 748, 264 P.2d 15, but they rely on the statement in that same case that the above rule does not apply where no price is mentioned, citing City and County of San Francisco v. Tillman Estate Co., 205 Cal. 651, 656–657, 272 P. 585, where the same was held as to sales of other

property. As the weight to be given to opinion evidence depends entirely on the reasons given in support thereof an expert witness may as a rule on direct examination be asked to state the reasons for his opinion. § 1872, Code of Civil Procedure, Long Beach City High School Dist. of Los Angeles County v. Stewart, 30 Cal.2d 763, 773, 185 P.2d 585, 173 A.L.R. 249. Insofar as the stated exclusionary rule does not apply appellants should have been permitted to bring out the fact that the opinions of their experts were based in part on offers. In itself their restriction in this respect could not be sufficiently prejudicial to require reversal as without statement of the amounts and circumstances of the offers, which may not be brought out on direct, the permitted statement alone could not be very effective in giving weight to the opinions, but in conjunction with the restriction of the cross-examination this point also is of some importance. Appellants' contention that the whole rule which excludes on direct examination details as to offers received as obsolete, as held by a minority of three in the La Macchia case, evidently cannot be examined by us because we are bound by the opinion of the majority, which, accordingly, we followed in Redwood City Elementary School Dist. v. Gregoire, 128 Cal.App.2d 766, 774, 276 P.2d 78.

With respect to the repeated restriction of questioning of Mr. Kelly on cross-examination as to offers to purchase received by appellants, they rely on the rule that "evidence of an offer may properly be presented at such time for the purpose of testing the weight to be accorded an opinion as to value." People v. La Macchia, supra, 41 Cal.2d at page 748, 264 P.2d at page 22. Appellants duly made offer of proof of two offers received by them, the time and amounts of said offer (which were $7,000 and $10,000 respectively above the estimate of Mr. Kelly) the deposits which accompanied them and further that if the witness would have examined them he would have found the offerors responsible and that if he had known these facts and taken them in consideration his appraisal would have been different, but that he did not try to determine whether offers had been made.

[4] Respondent urges that the restriction can be sustained on the basis of the trial court's discretionary power to limit unreasonable cross-examination, citing People v. La Macchia, supra, 41 Cal.2d at page 743, 264 P.2d 15. However the record shows that such was not the basis of the court's decision. The court repeatedly deferred a ruling on this point because of its importance and because of the difficulty in finding conclusive authority as to the extent to which offers could be used in cross-examination as distinguished from direct examination and finally ruled such evidence out because it had been shown that the expert had not learned of any offers. It must be noted here that the La Macchia case, now the leading case on the matters here involved was decided after the judgment appealed from. "If a ruling which might have been made as a matter of discretion is based entirely upon other grounds, the appellate court will not consider whether the ruling would constitute a proper exercise of the discretionary power." 5 C.J.S., Appeal and Error, § 1583, p. 474. Here the rulings were clearly made as matters of law, of admissibility, not as matters of discretion and we must review their correctness as such. Compare 5 C.J.S., Appeal and Error, § 1586 p. 477.

The essential question is then whether the fact that the witness did not know of the offers prevented his being questioned as to the effect they would have had on his opinion of fair market value if he had known them. Nothing in the language quoted from the La Macchia case requires an affirmative answer to this question. The case permits to bring out offers received "for the purpose of testing the weight to be accorded" to the expert opinion. It is not true that once the jury knows that the expert has not considered any offer their evaluation of his opinion cannot further be influenced by the exact nature of the offers he failed to consider. The showing of specific bona fide recent offers, substantially differing from the expert's estimate and a concession by the expert witness that his estimate would have been different if he had known of them will be much more effective to destroy the weight of the opinion in the mind of the jury than the knowledge alone that no offers were considered. Section 1872, Code of Civil Procedure expressly provides that an expert may be fully cross-examined on the reasons for his opinion. Accordingly it is said in San Diego Land & Town Co. v. Neale, 88 Cal. 50, 62, 25 P. 977, 980, 11 L.R.A. 604 that opposing counsel should "for the information of the jury, and to test the value of the opinion given, be permitted the widest latitude in cross-examination." Under the above rule questioning as to specific offers not investigated by the expert should not have been excluded.

[5, 6] Respondent contends that the ruling could be sustained upon the belief of the trial court that the real purpose of the inquiry on cross-examination was not to test the weight of the opinion of the witness but to prove market value, for which purpose the offers are not considered admissible. East Bay Mun. Utility Dist. v. Keefer, 99 Cal.App. 240, 261, 278 P. 476, 279 P. 178. Again it must be pointed out that there is no indication in the record that this was the basis of the court's ruling, the only ground given being that the expert did not know of the offers. There is no such indication of an endeavor to use the offers to prove market value as would permit us to assume that the court, if it had exercised its discretion in the matter, would have excluded the question on that basis. As the value of Parcel A prior to the condemnation was the essential point in dispute and the jury in this respect closely followed the opinion of plaintiff's sole expert contrary to the opinions of all defendants' experts, the unfounded restriction of the cross-examination of plaintiff's expert on the above important point cannot be considered harmless and must lead to reversal.

[7] In principle the same rule is applicable to questioning concerning offers to rent at the same price as contained in the contract in effect at the time of the condemnation. Such offers were of importance with respect to the position taken by Mr. Kelly as a basis for his estimate that the contractual rent was very high, and in this respect the same kind of cross-examination should be permitted, subject to the trial court's discretion, as concerning the estimate itself. Here also the only ground on which the questioning was excluded was the insufficient one that the expert testified that he did not investigate such offers. As the error treated before requires reversal at any rate we need not consider the effect of the absence of an offer of proof as to the offers to rent. It suffices to state the rule for the purpose of the new trial which will ensue.

[8] On the same grounds appellants complain of the exclusion of cross-examination of the witness Kelly with respect to a letter written by the Texas Company, the lessee of Parcel A, to the plaintiff, indicating a willingness to remain as lessee even after the term of the lease and at a possibly higher rent. Appellants urge that this offer was material to rebut the excessiveness of the existing rent to which Mr. Kelly testified. The offer was obtained by Mr. Kagan, a negotiator for plaintiff, and sent by him to defendants in a letter relating to compromise negotiations. Objection to the questioning of Mr. Kelly as to said offer and to admission in evidence of the letter was sustained on the ground that the witness had no personal knowledge of the negotiations and that the letter was hearsay. Before objections were sustained Mr. Kelly had testified that he knew of the letter, but that the proposal was conditioned on the Texas Company's receiving additional land instead of the portion condemned and that the proposal did not show what land would satisfy the conditions of the company and that so far as he knew that point had not been made sufficiently definite in Mr. Kagan's negotiations to consider the offer in determining the rental value and sales value of Parcel A.

[9, 10] As held herein before the fact alone that the expert witness had no exact personal knowledge of the offer is no ground to exclude his being cross-examined on it, at least if the exact contents of the offer and its materiality can be shown. However the fact that the proposal did not relate to Parcel A alone but included other land insufficiently specified and of the specification of which the witness had no personal knowledge justifies the exclusion of the letter and the cross-examination on it as remote and immaterial, so long as the exact contents of the offer in relation to Parcel A had not been shown by other evidence. No offer of proof to that effect has been made. If such showing were made the letter would not be objectionable as hearsay or as part of negotiations, as urged by respondent. It was respondent who obtained and transmitted the offer and the fact that the offer of a lessee who was not a party to the condemnation compromise was transmitted in the course of the compromise negotiations does not alone justify its exclusion. The fact alone that evidence is in some respect related to a compromise does not necessarily make it inadmissible if otherwise it would have been admissible. Compare California Home Extension Ass'n v. Hilborn, 37 Cal.2d 459, 465, 235 P.2d 369.

Appellants complain of the refusal of an instruction offered by them to the effect that, while unaccepted offers are not in themselves evidence of value, the fact that a witness may be acquainted with such offers or that another witness may be unacquainted with such offers may be considered by the jury in weighing the opinions of the witnesses who have expressed opinions of value for the purpose of testing the soundness of the opinion and the qualification of the witness.

The offered instruction was probably refused because it was in part not in accord with the position taken by the trial court, which prevented appellants from showing that their expert witness had considered offers, a ruling which we held to have been erroneous. The court gave a general instruction as to the influence of shown lack of information of an expert on the weight to be given to his opinion, but, although it contained in one place the word "offers", it cannot be considered sufficiently to cover the subject matter of the instruction proposed and refused, because it is complex and does not express with any clarity the purpose for which the jury may consider the evidence of offers. At a new trial instructions on this point in accordance with the holdings of the La Macchia case will have to be given.

Appellants' numerous additional grievances are not of sufficient importance to merit the space which a separate treatment of each of them would require. We have found that in each instance there was either no error or no prejudice. However, the errors stated before require a reversal.

Judgment reversed.

KAUFMAN, J., and DRAPER, J. pro tem., concur.

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133 Cal.App.2d 269

Harold R. GREEN, Plaintiff and Respondent,

v.

W. C. ANTOINE, Defendant and Appellant.

Civ. 8566.

District Court of Appeal, Third District, California.

May 25, 1955.

Buyer's action to recover down payment on purchase of rotary tiller. The Superior Court, Merced County, R. R. Sischo, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Van Dyke, P. J., held that where buyer found tiller unsuitable for purposes for which he had purchased it, and returned it to seller under understanding that manufacturer would rebuild tiller. but manufacturer merely restored it to original condition and returned it to seller, who then represented that he would rebuild tiller to suit buyer's purposes, but instead retained tiller and used it for his own purposes, date of total failure of consideration, for limitation of purposes, was time when seller exercised ownership and dominion over machine by putting it to his personal use.

Judgment affirmed.

1. Sales 🔑52(5)

In action by buyer of rotary tiller to recover down payment, evidence was sufficient to sustain finding that by reason of unfitness of tiller for purposes for which buyer had purchased it, and by reason of its return to seller and seller's retention and use of it for his own purposes, consideration of contract had totally failed.

2. Sales 🔑391(5)

Where rotary tiller was totally unfit for purposes for which buyer had purchased it, and buyer returned tiller to seller, who retained it and used it for his own purposes, buyer could recover down payment upon implied promise of repayment which arose from failure of consideration.

3. Sales 🔑396

Buyer's cause of action to recover down payment on purchase price of rotary tiller on ground of failure of consideration was a common count for money had and received.

4. Limitation of Actions 🔑49(1)

Where buyer of rotary tiller found tiller unsuitable for purposes for which he had purchased it, and returned it to seller under understanding that manufacturer would rebuild tiller, but manufacturer merely restored it to original condition and returned it to seller, who then represented that he would rebuild tiller to suit buyer's purposes, but instead retained tiller and used it for his own purposes, date of total failure of consideration, for limitation purposes, was time when seller exercised ownership and dominion over machine by putting it to his personal use. West's Ann. Code Civ.Proc. § 339, subd. 1.

5. Appeal and Error 🔑931(1)

On challenge to sufficiency of findings all legitimate and reasonable inferences must be indulged to support judgment.

6. Trial 🔑404(1)

Findings must be liberally construed to support judgment.

7. Appeal and Error 🔑1071(6)

A judgment will not be set aside on appeal because of failure to make express finding upon an issue if a finding thereon, consistent with judgment, results by necessary implication from express findings made.

8. Trial 🔑397(2)

In action to recover down payment on purchase of rotary tiller, wherein defendant pleaded limitations, finding as to date of total failure of consideration, a date within limitation period, sufficiently covered limitation issue, and precluded necessity for making an express finding on plea of limitations. West's Ann.Code Civ.Proc. § 339, subd. 1.

9. Trial 🔑397(2)

Where it appeared from findings made, in action to recover down payment on purchase of rotary tiller, that buyer had never breached his agreement, express finding that buyer had not wilfully breached, repudiated and abandoned contract was unnecessary.

10. Trial 🔑397(2)

Where there was a finding, in action to recover down payment on purchase of rotary tiller, that, due to inadequacy of tiller, there had been failure of consideration, and there was evidence that buyer's use of tiller had been of no benefit to him, finding negating seller's contention that buyer's use of tiller had been consideration was unnecessary.

11. Appeal and Error 🔑1149

Where errors in dates in findings were, as was apparent from record, wrong due to mere clerical misprision, reviewing court amended findings to show correct dates. West's Ann.Code Civ.Proc. § 956 a; Rules on Appeal, rule 23(a).

Stephen P. Galvin, Merced, for appellant.

Blewett, Blewett, Macey & Garretson, by Richard E. Macey, Stockton, for respondent.

VAN DYKE, Presiding Justice.

Respondent Green was plaintiff in the trial court. His occupation was that of farmer and contractor. After a demonstration, during which representations were made to him, he purchased from appellant Antoine an agricultural machine known as a rotary tiller. It was designed by its manufacturer, and was purchased by respondent from appellant, for the purpose of pulverizing soil to a point suitable for use as seed beds in the growth of row crops. The machine was pulled by a tractor but had its own motor that operated the soil pulverizing equipment. Respondent made a down payment of $2,206.90 and agreed to pay a total purchase price of $5,140, plus a financing charge. Respondent put the machine into service and it proved too weak for the strains met. It broke down on four occasions during a total period of use approximating 300 hours. Each time the machine broke, appellant, on being informed of the breakdown, repaired the machine. The breaks were in the rear end assembly. About two years and four or five months before this action was begun respondent returned the machine to appellant and it was taken to the manufacturer whose field representative had so recommended, for the purpose of again repairing it and this time so rebuilding the faulty parts as to eradicate the weakness which was thought to be causing the breakdowns. Respondent borrowed a larger machine of the same type from the appellant and did some further work until the season of the year for such work was over. Respondent, appellant and the factory representative met and discussed the situation as to the machine being purchased. Respondent requested that a heavier machine be delivered to him and that the down payment he had made on the faulty machine be credited to him on the substitute machine, but this proposal was rejected. The manufacturer returned the machine to appellant, but it had not been rebuilt in any way, having merely had a substitution of new parts for the broken parts. Some time thereafter respondent learned that the original machine had been returned by the manufacturer to appellant. He went to see appellant who told him the machine had not been rebuilt. Appellant told respondent that he was going to fix the machine himself. However, respondent heard nothing further from him and made no further payments. Under the agreement the balance was to be paid December 11, 1950, and when it fell due the appellant himself made the payment to the bank which had financed appellant's own first purchase of the machine from the manufacturer. Appellant made no demand on respondent to make the payment and thereafter started using the machine himself in his own operations. There appears to have been no further communication between the parties and the situation remained in that state until in September of 1952 this action was begun by respondent. The complaint was in the form of a common count for money had and received and the theory of respondent therein, as became apparent at the trial, was that there had been a complete failure of consideration and that the parties had mutually rescinded the contract of sale. The trial court found as follows: That respondent bought the machine on March 10, 1951 (this date was in fact March 10, 1950, it being apparent from the entire record that stating the year as 1951 was a clerical error); that at that time appellant did not himself have complete title to the machine, but that the title rested in the bank that financed his purchase of it from the manufacturer; that respondent made the down payment above referred to and agreed to pay the balance within 30 days or if not then paid to pay the financing bank the amount due on appellant's contract with the bank on the following 10th of December; that respondent upon such payment was to receive title; that appellant had guaranteed the machine would perform and that this guarantee was that it would perform satisfactorily on unplowed ground; that the machine did not work satisfactorily on unplowed ground; that it was unable to perform the work for which it was purchased; that respondent returned the machine to appellant in April of 1951 and that appellant then agreed to make certain changes in the machine but did not do so; that appellant forwarded the machine to a repair shop and it was returned to him in June of 1951 without any changes having been made; that respondent thereafter was informed that the machine had been returned to appellant without the changes agreed upon having been made; that in December of 1950 appellant made a payment to the financing bank on his conditional sales contract with it and thereafter used the machine for his own personal use; that appellant did not return to plaintiff the down payment he had received; that its return was demanded and that when demanded appellant told respondent he would think it over, but took no further action until he made the partial payment to the financing bank. As conclusions of law, the court found that the foregoing facts worked a total failure of consideration for the contract between respondent and appellant; that respondent had made an offer of rescission to appellant and that appellant had accepted the same in December of 1951 and that respondent was entitled to judgment for the amount he had paid with interest from the date of rescission. Judgment was thereafter entered in conformity to the findings and conclusions and it is from that judgment appellant takes this appeal.

[1, 2] Appellant in his answer pleaded the statute of limitations found in section 339, subdivision 1, of the Code of Civil Procedure, and here contends that this defense was made out and that he was, therefore, entitled to judgment in his favor. He argues that, assuming the facts warranted a conclusion that rescission had taken place, it could have taken place no later than July 11, 1950, when the machine having been returned from the manufacturer to appellant, the respondent, on being informed it was there, refused to accept it. This date being more than two years before the action was begun, appellant concludes that as a matter of law the defense of limitation was made out. However, this contention fails to give effect to the testimony that when, after breaking down four times in normal use, the machine was returned to appellant, the parties then reached an understanding that the manufacturer would take it and rebuild it in such manner as to correct the weaknesses which apparently were causing the breakdowns and which apparently also were a matter of faulty design. There is testimony directly to the point that the machine was to be remedied and not merely repaired and left with the same inherent weaknesses that were causing the trouble. It is also of record that the manufacturer did not rebuild the machine but, on the contrary, repaired it and sent it back to the appellant with no better capacity to withstand the normal strains of its operations than it had had before. The last discussion between the parties to the contract occurred thereafter and there is evidence that, while respondent refused to accept the machine in its repaired condition, he was told by appellant that he, appellant, would himself rebuild the machine to correct its weaknesses. The record discloses that the entire matter between the two men was left in that status and it was not until the following December and at a date within two years of the filing of the action that appellant, who had the machine all this time, began using it himself, made the payments required by his financing contract with the bank, and thereafter, while retaining the money respondent had paid him, held no further communications with and made no demands of any sort upon respondent. These things having transpired, the trial court was warranted in finding, as it did, that by reason of its unfitness for the purposes for which respondent purchased it, by reason of its return to the seller and by reason of his retention of it and use of it for his own purposes, the consideration of the contract had totally failed, giving rise to a cause of action in respondent based upon the implied promise of repayment which arose from the failure of consideration. It has often been held that where the failure of consideration is total it is not necessary that a formal rescission be made before bringing suit. In Richter v. Union Land, etc., Co., 129 Cal. 367, 373, 62 P. 39, 40, it is said:

> "Nor, where the failure of the consideration is total,—which implies, of

course, that nothing of value has been received under the contract by the party seeking to rescind,—is it necessary that a formal rescission be made before bringing suit. In such cases a suit may always be maintained for the recovery of the consideration paid. * * * [W]here there has been a total failure of consideration as to one party, the law implies a promise on the part of the other to repay what has been received by him under the contract; * * *. 'In either case [that is, suit for the consideration without formal rescission or in case of rescission, both based, however, upon total failure of consideration] the contract is rendered incapable of enforcement, the judgment being a bar to any future action.'" See, also, Morrell v. Clark, 106 Cal.App.2d 198, 202, 234 P.2d 774.

[3, 4] Respondent rightfully pleaded his cause as a common count for money had and received. The trial court was warranted in finding a total failure of consideration from the facts before it and therefore properly concluded that respondent had made out his case and that appellant was bound under his implied promise to return the money he had received and in entering judgment for that sum. The trial court was warranted in fixing the date of total failure of consideration as being that time when appellant exercised ownership and complete dominion over the machine and by putting it to his personal use rendered himself incapable of performing his promise to rebuild the weakened parts and return the machine so reconditioned to respondent. As before stated, respondent testified that when he returned the machine to appellant he thereafter had nothing further to do with it and then "abandoned" the entire transaction. Appellant urges that this testimony compelled the court to fix the date of failure of consideration as of the date respondent returned the machine. This argument, however, places a construction upon this testimony of appellant which the court was not bound to adopt, for respondent also testified concerning the undertaking of appellant to rebuild the weakened parts of the machine himself and stated that had the machine been put in fit condition to do its work he would have gone on with the contract.

[5–9] Appellant makes further contentions. He states them as follows: "The judgment is against the law because the court made no findings on any of the following material issues raised by the answer which were that: (a) The alleged causes of action were barred by the statute of limitations; (b) Plaintiff wilfully breached and repudiated his agreement, and abandoned the contract; (c) The value of use of the equipment during the period plaintiff used it." This is a challenge based upon sufficiency of the findings made and upon the failure to find on material issues. It is well settled that when considering such a challenge all legitimate and reasonable inferences must be indulged to support the judgment of the trial court. In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689; Baker v. Curtis, 105 Cal.App.2d 663, 234 P.2d 153. Findings must be liberally construed to support the judgment. Johndrow v. Thomas, 31 Cal.2d 202, 187 P.2d 681. "A judgment will not be set aside on appeal because of a failure to make an express finding upon an issue if a finding thereon, consistent with the judgment, results by necessary implication from the express findings which are made." Richter v. Walker, 36 Cal.2d 634, 640, 226 P.2d 593, 596. Applying these rules to the appellant's challenge of the findings, it is apparent from what we have already said that the trial court, having justifiably found a total failure of consideration arising by reason of failure of the machine and appellant's actions in December of 1950, was not required to make an express finding that the cause of action then arising was not barred since it then appeared from the record that the complaint was filed within two years from the time the failure of consideration occurred. The judgment, therefore, cannot be reversed for failure to make an express finding upon the plea of the statute. Hill v. Donnelly, 56 Cal.App.2d 387, 392, 132 P.2d 867. What we have just said concerning the matter of findings upon the statute of limitations applies equally to assignment (b), supra, for it appears from the findings made, which are in turn supported by the evidence, that respondent never breached his agreement since no further performance on his part was due under the contract until after the time fixed by the court as marking the total failure of consideration, and since it equally appears that he did not himself repudiate the agreement nor abandon the same. This latter is shown, as we have said above, by his testimony that he would have taken the machine had appellant made it fit for his purposes by strengthening the weak parts.

[10] We will now discuss assignment (c), above, that is, failure of the court to find upon appellant's plea that there had been no failure of consideration since respondent had used the machine for a total of about 300 hours at a reasonable use value, as appellant alleged, of $10 per hour. Treating this as a special plea, the record discloses direct testimony by respondent that because of the frequent breakdowns the use he had from the machine was of no value whatever and that in fact he suffered a loss in attempting to use the machine. This evidence in connection with the court's finding of the ultimate fact of failure of consideration sufficiently disposes of this attack upon the findings.

[11] As we noted above, the court found that the agreement between the parties was made on March 10, 1951; that the machine was returned for the last time in April of 1951 and that the manufacturer returned it to the appellant in June of 1951. It is quite apparent from the record, as we have said, that these dates should all have been fixed in 1950 and that the failure to do so is a mere clerical misprision. Respondent asks us here to correct this error by amending the findings to show that these events occurred in 1950. That we have power to do so in a proper case is well settled. Johndrow v. Thomas, supra, 31 Cal.2d at page 207, 187 P.2d at page 684; Code Civ.Proc., sec. 956a; Rule 23(a), Rules on Appeal. Said the Supreme Court in the case cited: "This court has power where a jury trial is not a matter of right or has been waived, to correct and amend findings which are conflicting as the result of inadvertence in order to affirm the judgment."

For these reasons the Findings are corrected in the following particulars: In Paragraphs I, III, VII, VIII and XIII the date "1951" is changed to "1950" wherever appearing. The following changes are made in the Conclusions of Law: In Paragraph II the date "December of 1951" is changed to read "December of 1950"; in Paragraph III the date "10th day of December, 1951" is changed to read "10th day of December, 1950."

We think nothing further need be said concerning contentions advanced by appellant and not herein specifically discussed.

The judgment is affirmed.

SCHOTTKY and PEEK, JJ., concur.

Herbert HISCHEMOELLER, doing business under the name and style of Hismoco (American Co.), a fictitious firm name, Plaintiff and Respondent,

v.

NATIONAL ICE AND COLD STORAGE COMPANY OF CALIFORNIA, a corporation, Defendant and Appellant.

Civ. 20595.

District Court of Appeal, Second District, Division 3, California.

May 20, 1955.

Rehearing Denied June 16, 1955.

Hearing Granted July 13, 1955.*

Action by owner of chili peppers against warehouseman for damages for alleged negligent storage. The Superior Court, Los Angeles County, Alfred L. Bartlett, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Ashburn, J. pro tem., held that where original owner had deposited chili peppers with warehouseman without declaring value and accepted receipts which referred to tariffs which limited liability in absence of declaration of value, and plaintiff, who purchased the peppers, accepted from warehouseman transfer memoranda which referred to the tariffs, and there was no suggestion of sharp dealing or unfair practices on either side, warehouseman was entitled to benefit of limitation of liability provisions.

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* Opinion vacated 294 P.2d 433.

Judgment reversed.

1. Warehousemen ⚷8

Public warehouseman was a "public utility". Public Utilities Code, §§ 216, 239, 2501–2574, 2502, 2507, 2551, 2552.

See publication Words and Phrases, for other judicial constructions and definitions of "Public Utility".

2. Warehousemen ⚷2

In application to warehousemen, the Food Warehousemen Act prevails at any point of conflict with Public Utilities Act. Public Utilities Code, §§ 216, 239, 2501–2574, 2502, 2507, 2551, 2552.

3. Public Service Commissions ⚷6.8

Absent any sharp or unfair dealing on part of public utility, terms and provisions of its tariffs, rules and regulations on file with regulatory body enter as implied terms into any contract made with that utility, irrespective of absence of actual knowledge of those terms on part of customer.

4. Carriers ⚷155

In considering whether shipper had opportunity to choose between common-law rate and limited liability rate, question is not what contract recites, but whether shipper had in fact a chance to choose between his common-law rate and lower rate with limited liability, or would have been given the alternative had he demanded it.

5. Warehousemen ⚷24(7)

Where original owner deposited chili peppers with warehouseman without declaring value and accepted receipts which referred to tariffs which limited liability in absence of declaration of value, and plaintiff, who purchased the peppers, accepted from warehouseman transfer memoranda which referred to the tariffs, and there was no suggestion of sharp dealing or unfair practices on either side, warehouseman was entitled to benefit of limitation of liability provisions. Public Utilities Code, §§ 216, 239, 2501–2574, 2502, 2506, 2507, 2531, 2534, 2551–2554, 2557, 2574.

6. Bailment ⚷14(1)

A limitation attempting to exempt bailee from liability for ordinary negligence is void.

7. Carriers ⚷158(1)

Under general rule, carrier is not free from liability because goods in their injured condition are worth more than agreed valuation.

8. Warehousemen ⚷34(8)

Plaintiff whose chili peppers were damaged while in hands of warehouseman was entitled to recovery, limited by limitation of liability provisions of contract, on loss of value notwithstanding that peppers had been sold for a sum in excess of agreed value.

9. Warehousemen ⚷24(7)

Where a prudent man could and would have read limitation of liability provision on warehouse receipts, he is held to have notice of such limitation, and his recovery is limited thereby even in absence of actual knowledge and understanding.

◆

James D. Garibaldi, Los Angeles, Gavin McNab, Schmulowitz, Sommer & Wyman, by Nat Schmulowitz, Peter S. Sommer, Ronald P. Klein, San Francisco, for appellant.

McBain & Morgan and Newell & Chester, by Robert M. Newell, Los Angeles, for respondent.

ASHBURN, Justice pro tem.

Plaintiff sues defendant warehouseman for damages for negligence in storage of certain dried chili peppers. The case was tried to a jury and verdict rendered for plaintiff in the sum of $23,112.30. Defendant has appealed. Recognizing a substantial conflict in the evidence on the subject of negligence counsel do not argue that point. Their principal contention is that defendant's liability was limited by its warehouse receipt to a valuation of $100 per short ton, or a total sum computed to be $4,866.35.

[1] Defendant is a public warehouseman and as such a public utility. Public Utilities Code, §§ 216, 239. It is also governed by the Food Warehouseman Act, Public Utilities Code, §§ 2501–2574, which defines food warehousemen as public utilities, §§ 2502, 2507. Section 2551 requires the filing with the Public Utilities Commission (formerly Railroad Commission) of "schedules showing all rates and charges, which are in force for warehousing and storage services of every description, including sorting, handling, weighing, elevating, and packing charges, and all charges directly or indirectly connected with such services, together with all rules which in any manner affect or relate to rates or charges, and showing plainly when they became effective. The rates shall be uniform in their operation and shall apply with equal force and effect to all persons or corporations dealing with the food warehouseman." Section 2552: "Every food warehouseman doing business in the State shall print and keep open to public inspection at each building, structure, warehouse, elevator, or plant maintained by him in this State copies of the schedules filed with the commission pursuant to Section 2551."

Defendant has filed, and kept open to public inspection as required schedules covering its rates and other charges. One of them is Cold Storage Warehouse Tariff No. 12, C.R.C. No. 87, which contains a rule 70–B reading as follows: "Limited Liability.—For the purpose of fixing storage rates and the maximum limit of the warehousemen's liability, the value of merchandise stored shall be conclusively deemed not to exceed, per ton of 2000 lbs.—

"for potatoes and onions	$ 50.00
"for all other vegetables and for fruits and fish[1]	100.00
"for frozen packaged processed foods	200.00
"for butter, eggs and cheese....	500.00
"for all other merchandise......	200.00"

unless the person to whom the warehouse receipt is issuable declares, when such merchandise is offered for storage, that it is of greater value and such greater value is noted on the warehouse receipt by the warehouseman, in which case the value shall be conclusively presumed not to exceed that so declared. The specified tariff storage rates are minimum rates which apply where no value is so declared and noted, or where, if declared, it does not exceed the otherwise presumed limit; and where such declared value exceeds such otherwise presumed limit, an additional rate will be added and charged equivalent to one-quarter of one per cent of the amount of such excess for each month or part thereof. The warehouseman's liability is limited to and shall in no event exceed whichever is smaller of the actual value, or, as the case may be, such presumed or declared limit of value in respect of which the storage rate is so fixed and payable. Such presumed or declared value as an agreed limit, and likewise such limitation of liability, applies separately and proportionately on a weight basis to each part of the stored merchandise; and liability, if any, for any partial loss of or injury to any part thereof shall not exceed that portion of such limited liability with respect to such part, proportionate to the actual loss of or damage thereto.

"The option of declaring such increased value rests with the customer and the warehouseman may not insist upon it." Cold Storage Warehouse Tariff No. 2–D, C.R.C. No. 86, also on file, provided a minimum storage rate of 25 cents per hundred pounds of chilies for the first month and 12½ cents per month for each succeeding month, provided same were in lots of 10,000 pounds or over (as was the case here).

The peppers were originally stored in 1949 by Gonzales & Blanco, who declared no value, and then received two "Memorandum Acknowledgments" on which defendant acknowledged receipt from them of the peppers "To be placed in Cold Storage

[1] Chili peppers fall in this category.

Subject To Limited Liability and other Terms and Conditions as Shown By Warehouse Receipt and/or Rules and Regulations on File with the Railroad Commission of the State of California." It seems a fair inference that conforming warehouse receipt was issued to Gonzales & Blanco. In January 1950 plaintiff, who had had considerable experience with certain types of warehousing, arranged for Security-First National Bank of Los Angeles to finance the deal and purchased the chilies, still in warehouse, from Gonzales & Blanco. Upon authorization from the sellers defendant issued to plaintiff two documents entitled "Transfer Memorandum" which bore these words at the bottom: "This Merchandise is Stored Subject to Limited Liability and other Terms and Conditions as shown by Warehouse Receipt and/or Rules and Regulations on File in This Office and with the Railroad Commission of the State of California." At plaintiff's request defendant issued the warehouse receipts to "Security-First National Bank of Los Angeles as pledgee for Hismoco (American Co.)."[2] The document certifies that defendant has received the goods "subject to all of the terms and conditions contained herein and on the reverse hereof." At the bottom of the face of the receipt is this: "* * * Note. Rates for storage, handling and other services are as fixed by law in Tariffs filed with the Railroad Commission of California and in our office, notwithstanding omission to state same here or erroneous statement thereof." Also: "THE PARTY ACCEPTING THIS RECEIPT THEREBY AGREES TO ITS CONDITIONS."[3] On the reserve side are "Standard Terms and Conditions" which include the following: "These goods are stored and handled subject to the rules, regulations, rates and charges as published in our warehouse schedules on file with the Railroad Commission of California and in our office, and such amendments thereto as may hereafter be filed." Also: "Rates are subject to limited liability as provided by the Tariffs on file with the Railroad Commission and in this office." Neither plaintiff nor the bank made any declaration of value of the peppers at any time.

They were inspected by plaintiff before his purchase in January 1950, and every two or three months during 1950 and found to be in good condition, at least as late as September. When withdrawn from storage in January and February, 1951 the chilies were moldy and damaged. They were sold for $5,131.10, resulting in a loss of $23,112.30, the amount of the verdict.

Defendant insisted throughout the trial that its liability was limited, as matter of law, to $100 per ton of 2,000 pounds, because no higher value was declared and no greater rate than 12½ cents per hundred pounds was charged to or paid by plaintiff. Counsel for plaintiff, on the other hand, tried the case upon the theory that such a limitation of liability, based upon an agreed value, does not bind the bailor unless he voluntarily accepts a warehouse receipt so declaring and does it with full knowledge and understanding on his part. The trial judge accepted this thesis as correct and instructed the jury accordingly.

Appellant's basic contention is that the schedules, with their rates and regulations and limitation of liability, automatically become implied terms of any contract made between a public utility and its customer. And they find support for this view in the recent case of Gardner v. Basich Bros. Construction Co., 44 Cal.2d 191, 281 P.2d 521.

Plaintiff in that case was a highway carrier who had been paid for a certain trucking job on the basis of a prescribed hourly rate. He sued to recover the difference between the amount paid him and an amount which would be due under a higher ton-mileage rate. Both rates were fixed by a tariff issued by the Railroad Commission. It provided that hourly rates would apply "only when notice in writing is given to the carrier, before the transportation commences of the shipper's intention to ship under such rates." Defendants argued that plaintiff could not recover because it had waived any right to a ton-mileage rate. The court said in 44 Cal.2d at page 193, 281 P.2d at page 522: "However, as stated in Gardner v. Rich Mfg. Co., 68 Cal.App.2d 725, 730, 158 P.2d 23, 25, the prescribed rules and rate regulations 'become a part of every contract between a highway contract carrier and the shipper.'" The court assumed, but did not decide the correctness of defendant's position on waiver, and proceeded to determine the applicable statute of limitations. In the course of that discussion it said in 44 Cal.2d at page 194, 281 P.2d at page 522: "The prescribed rate provisions and regulations are deemed a part of every such contract, and the parties are deemed to have contracted with such provisions in mind for otherwise the state's rate-making policy expressed in the Highway Carriers' Act would not be effectual. Gardner v. Rich Mfg. Co., supra, 68 Cal.App.2d 725, 729–730, 158 P.2d 23." Though this Supreme Court case does not actually decide the point raised at bar, it does clearly lend affirmative countenance to appellant's contention.

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[2] This was plaintiff's trade name.

[3] This is printed in small caps; all other matters quoted from the transfer memorandum and the receipt are in small type.

Gardner v. Rich Mfg. Co., supra, 68 Cal.App.2d 725, 158 P.2d 23 dealt also with highway carriers. It was an action by two trustees in bankrupcy to recover the difference between amounts actually collected by the bankrupt carriers and higher rates prescribed by the Railroad Commission. Plaintiffs prevailed and the judgments were affirmed, the court saying in 68 Cal.App.2d at page 730, 158 P.2d at page 25: "The schedule of minimum rates thereby established and prescribed and the rules and regulations governing the same became a part of every contract between a highway contract carrier and the shipper. Pittsburgh, C. C. & St. L. R. Co. v. Fink (1919), 250 U.S. 577, 40 S.Ct. 27, 63 L.Ed. 1151; Johnston v. L. B. Hartz Stores (1938), 202 Minn. 132, 277 N.W. 414. The tariff applicable, on the facts, to any particular shipment cannot be changed by an agreement between the parties (New York Cent. & H. R. R. Co. v. York & Whitney Co., 1921, 256 U.S. 406, 41 S.Ct. 509, 65 L.Ed. 1016), and the carrier or its assignee is entitled to collect the proper rate. 13 C.J.S., Carriers, sec. 393, pp. 873–875; see also note, 83 A.L.R. 245 et seq., and cases there cited. Otherwise, the statute would be ineffectual for the purpose for which it was enacted."

Both sides rely somewhat upon George v. Bekins Van & Storage Co., 33 Cal.2d 834, 205 P.2d 1037, which arose under the Uniform Warehouse Receipts Act (now comprising sections 1858.01 to 1858.85, Civil Code). It was an action to recover the value of certain furniture which was destroyed by fire while stored in defendant's warehouse. The warehouse receipt expressly limited liability to $10 per 100 pounds in the absence of a greater value declared in writing; and there was no such declaration. It appeared further that the storage was originally arranged by telegrams and that later the plaintiffs, upon receiving from defendant a warehouse receipt, signed and returned a written acceptance of same. The receipt stated in bold type and on its face the limitation of liabilty to $10 per 100 pounds. The court held the limitation to be valid and binding and reduced the judgment accordingly. Having held that this valuation clause was a proper permissive provision under section 3 of the Act, the court said, 33 Cal.2d at page 847, 205 P.2d at page 1046 that "The validity of such valuation clauses does not depend on the relationship between the actual value and the stipulated value, or on whether the carrier or bailee has knowledge that the actual value is greater than the stipulated value." At page 848 of 33 Cal.2d at page 1046 of 205 P.2d: "The question remains whether plaintiffs agreed to the stipulated value of their goods in this case. When goods are delivered to a warehouseman for storage and no warehouse receipt is issued at the time of delivery, an implied contract of storage arises containing those terms required by law. If this contract is to be superseded by the contract contained in the subsequently issued warehouse receipt, it is necessary that the bailor agree to the written contract as proposed by the bailee. Ordinarily such assent may be found in the acceptance and retention of the warehouse receipt by the bailor. Taussig v. Bode & Haslett, 134 Cal. 260, 266, 66 P. 259, 86 Am.St.Rep. 250, 54 L.R.A.

774; see, Wilson v. Crown Transfer etc. Co., 201 Cal. 701, 712–713, 258 P. 596; 1 Williston on Contracts [Rev.Ed.] § 90B, p. 266. It is not necessary, however, to decide in this case whether the mere retention of the warehouse receipt would bind plaintiffs to the terms therein. Plaintiffs signed and returned to defendant a written acceptance of the warehouse receipt and contract. By so doing they accepted defendant's offer to store the goods at a rate based on the value clearly stated on the face of the receipt." It was further held in 33 Cal.2d at page 848, 205 P.2d at page 1046, that "* * * it is immaterial on the facts in this case that neither [plaintiff] read the contract they accepted." And at page 849 of 33 Cal.2d, at page 1047 of 205 P.2d. "By issuing its warehouse receipt defendant proposed the terms to plaintiffs on which it would continue to store the goods. Plaintiffs accepted this offer, and defendant's continued performance of the contract as bailee was adequate consideration to support the limitation clause."

Page 850 of 33 Cal.2d, at page 1047 of 205 P.2d: "In the present case, however, the rates were in fact determined by the declared value and had the declared value not been agreed to by plaintiffs the rates would have been increased in accord with the statement to that effect in the warehouse receipt. See Bassi v. Springfield Fire etc. Ins. Co., 57 Cal.App. 707, 712, 208 P. 154." The judgment was modified by reducing same from $3,126.15 to $501.40, a value based on $10 per 100 pounds. This case does not discuss the Public Utilities Act or any of the other statutes regulating warehouses as public utilities. It does stand for the proposition that one who accepts and retains a warehouse receipt without bothering to know its contents is bound by its terms. The case is in no respect inconsistent with appellant's contentions herein.

[2] Although defendant is a public utility within sections 216 and 239 of the Public Utilities Code, and hence subject to all its applicable provisions, it is governed primarily by the Food Warehousemen Act, Public Utilities Code, §§ 2502, 2507, which, at any points of conflict prevails over the Public Utilities Act. Public Utilities Code, § 2506. Section 2551, above quoted, requires the filing of schedules showing all rates and charges of every kind, together with all rules which in any manner affect or relate to rates or charges and concludes as follows: "The rates shall be uniform in their operation and shall apply with equal force and effect to all persons or corporations dealing with the food warehouseman." The commission may make such changes therein as it deems proper. § 2553. And, unless it does so "* * * no change shall be made by any food warehouseman in any rate or charge" except by permission of the commission. § 2554. Section 2556 (b) provides that no such warehouseman shall "Demand, collect, or receive, directly or indirectly from any person or corporation, any different sum for warehousing or storage services than the rates and charges filed with the commission." But the sanctions of the statute apply not only to the warehouseman but also to the customer, the bailor. "No person, or corporation shall solicit, accept, receive, or attempt to obtain from any food warehouseman any rate or charge not filed with the commission." § 2557. Section 2531 forbids all forms of discrimination; section 2532 makes it "* * * unlawful for any person or corporation to solicit, accept, receive, or attempt to obtain from any food warehouseman any rebate, discount, deduction, concession, refund, or remittance, or to solicit, accept, receive, or attempt to obtain from any food warehouseman, any preference, or advantage, either in rates or charges, or in service or facilities afforded." And section 2534: "Every contract, expressed or *implied,* made by any person or corporation in violation of the provisions of this article or of Article 3 of this chapter, is illegal and utterly void and no recovery thereon shall be had." (Emphasis added.) Lastly, section 2574 declares it a misdemeanor to violate or procure, aid or abet any violation of the statute.

These statutory provisions seem to compel the conclusion that the principles announced in Gardner v. Rich Mfg. Co., supra, 68 Cal.App.2d 725, 158 P.2d 23 are controlling here. Respondent demurs to this on the ground, among others, that the George case, supra, holds that in the absence of delivery of a warehouse receipt at the time of receiving the goods "an implied contract of storage arises containing those terms required by law." And counsel say that this would not read an agreed valuation into the contract because its inclusion in the tariff was optional with the warehouseman. This overlooks the fact that that provision, once included in the schedule and not disapproved or changed by the commission, must be observed by bailor and bailee and no departure can be made from it unless or until a change is approved by the commission. Moreover, under section 2534 no contract may contain an express or implied term at variance with that or any other provision of the tariff. It was specifically held in Kings Laboratories v. Yucaipa Valley F. Co., 18 Cal.App.2d 47, 62 P.2d 1054 that a contract for storage of fruit at a rate less than that authorized by the commission violates the Food Warehousemen Act and is illegal and void.

[3] The rule is firmly established that, absent any sharp or unfair dealing on the part of the public utility, the terms and provisions of its tariffs, rules and regulations on file with the regulatory body enter as implied terms into any contract made with that utility and that absence of actual knowledge of those terms on the part of the customer is legally inconsequential.

John Breuner Co. v. Western Union Tel. Co., 108 Cal.App. 243, 291 P. 445 so holds. As its title suggests it involved the liability of a telegraph company. At page 250 of 108 Cal.App., at page 448 of 291 P., the court said: "Under the authorities hereinafter cited, it is our conclusion that the rules of service are an inseparable part of the public service regulated and to be rendered, and that when one contacts or contracts with such public service the rules governing necessarily become a part of the contract from which neither of the parties may deviate. Rates of public service must be uniform, and it must follow that to secure uniformity of rate there must be included within the rate a uniformity of service.

"Respondent argues that, admitting the service to be regulated and controlled by the rules, nevertheless one dealing with the telegraph company is not presumed to know the rules and is not chargeable with any knowledge thereof. This contention is likewise fully answered in the cited cases and to the contrary of the claim made by respondent. It would tend rather to cripple and render useless the public need and service if the matter of regulation were made a personal element of contract in each transaction. And if we were to engage in presumption in each individual case, the harm resulting would affect all parties. * * * And to put the public service dependent upon the proof of actual knowledge of every rule properly adopted as regulatory of the service would eventually narrow and restrict the utility to limitations seriously hampering its efficiency. Western Union Tel. Co. v. Esteve Bros. & Co., supra, 256 U.S. 566, 41 S.Ct. 584, 65 L.Ed. 1094; Cultra v. Western Union Tel. Co., 44 I.C.C 670, Id., 61 I.C.C. 541; Davis v. Henderson, 266 U.S. 92, 45 S.Ct. 24, 69 L.Ed. 182; Davis v. Cornwell, 264 U.S. 560, 44 S.Ct. 410, 68 L.Ed. 848.

"From the foregoing it is manifestly our conclusion that when plaintiff delivered for transfer the funds in question, it did so mindful of the rules of service adopted by the defendant telegraph company and that these rules entered into and became an integral part of the contract."

Home Ins. Co. v. Los Angeles Warehouse Co., 16 Cal.App.2d 737, 61 P.2d 510, 511 was an action to recover for damage to stored sugar, caused by fire. The warehouse receipt incorporated by reference the "rules, regulations, rates and charges" published and filed with the commission. One of them was a requirement that any claim for damages must be made in writing within 30 days after delivery of the goods. Held, this became a binding term of the contract and no recovery could be had without compliance.

Riaboff v. Pacific T. & T. Co., 39 Cal. App.2d Supp., 775, 778, 102 P.2d 465, 466. Action for damages for negligent misspelling of plaintiff's name in telephone directory. Defendant relied upon a rule or regulation of its filed tariff which limited the amount of its liability for such errors or omissions. Same was incorporated by reference in plaintiff's application for service. Held, it became part of the contract, which could not "be varied or departed from" and represented "'the whole duty and the whole liability of (appellant).'"

Cole v. Pacific Tel. & Tel. Co., 112 Cal. App.2d 416, 246 P.2d 686 was an action for damages for failure to include plaintiff's advertisement in defendant's telephone directory. Defendant relied upon a limitation of liability under its rules and regulations filed with the Public Utilities Commission. Held that the rule was a part of the contract binding both parties. After reviewing pertinent cases, the court summarized the matter in 112 Cal.App.2d at page 419, 246 P.2d at page 688: "The theory underlying these decisions is that a public utility, being strictly regulated in all operations with considerable curtailment of its rights and privileges shall likewise be regulated and limited as to its liabilities. In consideration of its being peculiarly the subject of state control, 'its liability is and should be defined and limited.' Correll v. Ohio Bell Tel. Co., supra, [63 Ohio App. 491, 27 N.E.2d 173]. There is nothing harsh or inequitable in upholding such a limitation of liability when it is thus considered that the rates as fixed by the commission are established with the rule of limitation in mind. Reasonable rates are in part dependent upon such a rule."

Butler v. Bell Oil & Refining Co., 70 Cal.App.2d 728, 161 P.2d 559. Plaintiff, a highway contract carrier, sought to recover from the shipper the amount of a certain undercharge. Defendant claimed this could not be done because the rate actually paid was "'solemnly agreed to and accepted by it at the time the service was rendered.'" 70 Cal.App.2d at page 730, 161 P.2d at page 560. This division of this court adopted the language of Gardner v. Rich Mfg. Co., supra, 68 Cal.App.2d 725, 158 P.2d 23, to the effect that the filed tariff becomes an implied term of the contract and then addressed itself to the argument that "the Act does not and was not intended to regulate the conduct of the shipper"; rejecting this view it said in 70 Cal.App.2d at pages 730 and 731, 161 P.2d at page 560: "The collection of undercharges, however, is simply a step toward making the authorized regulation of highway carriers more effective. It is in furtherance of the purposes of the Act, among which are the establishment of just and reasonable rates and the prevention of discrimination. * * * The fact that the shipper has to pay the difference between a legally established rate (appellant does not dispute the legality of the tariff here involved), and a lesser rate for which he was able to bargain privately, does not mean that the shipper is being regulated. It is merely an incident in aid of the effective enforcement of the Railroad Commission's order." Judgment for plaintiff was affirmed.

The rule that the authorized tariff automatically becomes a part of the contract with the utility, regardless of actual knowledge on the part of the shipper or other customer, is a well-established principle in the Federal Courts. American Railway Express Co. v. Daniel, 269 U.S. 40, 46 S.Ct. 15, 70 L.Ed. 154; Western Union Telegraph Co. v. Esteve Brothers & Co., 256 U.S. 566, 41 S.Ct. 584, 65 L.Ed. 1094, Galveston, H. & S. A. R. Co. v. Woodbury, 254 U.S. 357, 41 S.Ct. 114, 65 L.Ed. 301; Southeastern Exp. Co. v. Pastime A. Co., 299 U.S. 28, 57 S.Ct. 73, 81 L.Ed. 20; American Railway Express Co. v. Lindenburg, 260 U.S. 584, 591, 43 S.Ct. 206, 67 L.Ed. 414, 419; Midland Realty Co. v. Kansas City P. & L. Co., 300 U.S. 109, 114, 57 S.Ct. 345, 81 L.Ed 540, 544; McTighe v. New England Telephone & Telegraph Co., 2 Cir., 216 F.2d 26, 30; Feinberg v. Railway Express Agency, 7 Cir., 163 F.2d 998.

Respondent claimed that he never had *personal* knowledge of the terms of the transfer memoranda or the warehouse receipts. And his counsel take the position that a bailor is bound by the rates, rules and regulations of the warehouseman, especially those relating to agreed valuation and liability graduated according to declared value, only if he freely makes a contract with full knowledge and understanding of same. To this end they rely upon Scott's Valley Fruit Exchange v. Growers Refrigeration Co., 81 Cal.App.2d 437, 184 P.2d 183; McQueen v. Tyler, 61 Cal.App.2d 263, 142 P.2d 466; Fitch v. Carpenter, 70 Cal.App.2d 827, 161 P.2d 824; and George v. Bekins Van & Storage Co., supra, 33 Cal.2d 834, 205 P.2d 1037. That the George case does not support this contention appears from the previous discussion of that opinion. The other cited cases do lend apparent support to appellant's position but they actually are not in conflict with the cases already reviewed. All of them deal with situations in which an enforcement of the claimed limitation would assist the defendant in furthering some form of unfair dealing.

Scott's case grew out of the warehousing of certain pears; defendant claimed its liability for negligence was limited to $25 unless the true value of the property was stated in the warehouse receipt. Upon each deposit of pears defendant delivered a "hand receipt" which purported to incorporate the terms of a warehouse receipt which had a declared value clause; but plaintiff never received an original or copy of that receipt nor was he informed of its contents; defendant knew this as well as the fact that "plaintiff believed that the rate charged for the storage was based on the full value of the pears." "Defendant makes no contention that the storage charges assessed by it and paid by Hunt[4] were anything less than it would have charged had the 'true value' of the pears been expressly declared." 81 Cal.App.2d at page 447, 184 P.2d at page 189. It was held that the receipt and its terms were not effectively incorporated by reference into the "hand receipts" and that plaintiff was not bound by the declared value limitation. To this point the discussion proceeded as if there were no Public Utility Act involved. Then, at pages 449–450, of 81 Cal.App.2d, at page 190 of 184 P.2d, the question of its effect was disposed of, in this language: "It is next urged that the effect of the judgment here under review is to grant to plaintiff a preference over other depositors in violation of section 19 of the Public Utilities Act [Stats.1915, P. 115;] 2 Deering's Gen. Laws, Act 6386, prohibiting a public utility from granting preferences. This argument is necessarily grounded upon the assumption that all of the terms of the warehouse receipt are binding on plaintiff. In addition to the fact that there is no evidence that plaintiff was in fact granted a preferential rate, the argument under consideration necessarily falls with the holding that the trial court was justified in finding that the terms of the warehouse receipt were not part of the contract of bailment." It seems to us that this assumes the whole question presented in the case at bar; no application for hearing in the Supreme Court was made; and this decision cannot be considered as authoritatively disposing of cases above reviewed, such as Gardner v. Basich Bros. Construction Co., supra, 44 Cal.2d 191, 281 P.2d 521; Gardner v. Rich Mfg. Co., supra, 68 Cal.App.2d 725, 158 P.2d 23; George v. Bekins Van & Storage Co., supra, 33 Cal.2d 834, 205 P.2d 1037; John Breuner Co. v. Western Union Tel. Co., supra, 108 Cal.App. 243, 291 P. 445; Butler v. Bell Oil & Refining Co., supra, 70 Cal.App.2d 728, 161 P.2d 559.

McQueen v. Tyler, supra, 61 Cal.App.2d 263, 142 P.2d 466, 467, was an action to recover against a highway carrier for damages for loss of household goods. Defendant relied on a provision in its "freight bill" limiting liability to 10 cents per pound per article lost. A jury, in answer to a special interrogatory, said that the freight bill did not " 'constitute a contract between the parties, limiting such liability and entered into fairly between the parties.' " And the court said in 61 Cal.App.2d at page 265, 142 P.2d 468, the only question was the sufficiency of the evidence to support that finding. It appeared that plaintiff had signed the freight bill in the dark when he could not read it and under misrepresentation as to its contents,—with no knowledge of the 10 cent limitation. The case was decided primarily upon the basis of section 2176, Civil Code, which applies only to carriers, see Riaboff v. Pacific T. & T. Co., 39 Cal.App.2d Supp. 775, 777, 102 P.2d 465, and, so far as pertinent, provides that a consignor, by accepting a bill of lading or written contract for carriage, with a knowledge of its terms, assents to the rate of hire and also to a limitation stated therein upon the amount of the carrier's liability in case property carried in packages, trunks, or boxes, is lost or injured, when the value of such property is not named. The court held that a contract limiting liability "must not only be reasonable, but must be freely and fairly made between the parties", 61 Cal.App.2d at page 267, 142 P.2d at page 469 and that knowledge of its terms would be a necessary condition to the shipper's assent to the limitation; that those conditions were not present and therefore the limitation was not binding on plaintiff. Then the court said, concerning the effect of the tariff on file with the Railroad Commission, 61 Cal.App.2d at page 268, 142 P.2d at page 469: "Nor does the fact that the contract limiting the carrier's liability was required by the rules and regulations of the Railroad Commission and was in the exact form prescribed by such rules, take the case out of the operation of the code sections hereinabove referred to and make the contract binding on McQueen, in view of the uncontradicted evidence and the jury's finding thereon that McQueen's assent to the contract was not fairly obtained. Furthermore, the rules of said commission require a higher rate to be charged where the valuation of the property is placed by the shipper at more than 10¢ per pound per article, and it does not appear that plaintiffs would not have been willing to pay whatever rate would have been necessary to carry the property at its true valuation. On the contrary, the evidence positively shows that McQueen would not have signed the freight bill if he had been aware of the purported limitation of value contained therein." Essentially this is a holding that section 2176 complements the Public Utilities Act and modifies *pro tanto* as to carriers the rule that such tariffs enter automatically into the contract for carriage. At bar we do not deal with a carrier or with section 2176. This distinction was drawn in Taussig v. Bode & Haslett, 134 Cal. 260, 266, 66 P. 259, 261, 54 L.R.A. 774: "Their acceptance of the receipt and storage of the goods with knowledge of this condition made it binding upon them as one of the terms of the contract. The cases cited by counsel in which it has been held that notices printed or stamped on bills of lading, but not signed by the consignors, do not exempt common carriers from their common-law liability, are not in point."

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[4] Hunt was a commission merchant who negotiated the contract of bailment for plaintiff.

[4] Fitch v. Carpenter, supra, 70 Cal.App.2d 827, 161 P.2d 824, another carrier case, involved a bill of lading which was signed by plaintiffs' son, without authority and without knowledge on plaintiffs' part. They did not ratify the boy's act; they did ask for a copy of the "receipt" but never got one and never knew the contents of the bill of lading. It was held first that a purported limitation of liability contained in the bill was not operative because the document was not signed by the shipper as required by the last sentence of Civil Code section 2176, viz.: "But his assent to any other modification of the carrier's obligations contained in such instrument can be manifested only by his signature to the same." Secondly, it was held that the fact the rate conformed to the filed tariff made no difference. "That is a matter of contract and is governed by section 2176 of the Civil Code." 70 Cal.App.2d at page 832, 161 P.2d at page 826. Finally it was ruled that the argument that a preferential rate would result from the rejection of limited liability could not prevail because plaintiffs had no knowledge that they were receiving a preference or that there was a higher rate applicable to a declared value. Also that there was no election by plaintiffs to ship at a lower rate based on a ten cent valuation; that they had no opportunity to make any election. This case was decided by this same division only 14 days after Butler v. Bell Oil & Refining Co., supra, 70 Cal.App.2d 728, 161 P.2d 559 had held that the tariff rate automatically enters into the shipping contract as an implied term. It was not intended to impinge upon that rule by indirection; the Bell case is not mentioned. The Fitch decision proceeds upon the implied predicate that section 2176 constitutes

a complement to the Public Utilities Act and upon the further consideration voiced in New York, N. H. & H. R. Co. v. Nothnagle, 346 U.S. 128, 135, 73 S.Ct. 986, 990, 97 L.Ed. 1500, 1507: "* * * only by granting its customers a fair opportunity to choose between higher or lower liability by paying a correspondingly greater or lesser charge can a carrier lawfully limit recovery to an amount less than the actual loss sustained. * * * Binding respondent by a limitation which she had no reasonable opportunity to discover would effectively deprive her of the requisite choice; such an arrangement would amount to a forbidden attempt to exonerate a carrier from the consequences of its own negligent acts." The quoted rule applies to such instruments as red caps' checks, baggage checks, invoices, and similar papers that do not indicate to the ordinary mind any attempt to create a contract. The general rule is set forth in 13 C.J.S., Carriers, § 94, p. 182 as follows: "In considering whether a shipper had an opportunity to choose between the common-law rate and the limited liability rate, it is held, the question is not what the contract recites in respect to the matter, but whether he had in fact a chance to choose between his common-law rate and a lower rate with limited liability. It is not essential that the alternative should be actually presented to the shipper, however; nor is it material that he did not know of the choice if such choice existed; it is sufficient if it would have been given had he demanded it." See, also, annotation to White v. Southern R. Co., 208 S.C. 319, 38 S.E.2d 111, 165 A.L.R. 988, 1005, 1022.

[5] At bar we deal with an ordinary business transaction between business men; no suggestion of sharp dealing or unfair practices on either side; plaintiff bought what he paid for and paid for what he bought. There is present no good reason for denying defendant the benefit of the limitation of liability set forth in the contract.

But this conclusion does not sustain appellant's claim that it was entitled to a nonsuit, or a directed verdict, or a judgment non obstante. Appellant's counsel assume and assert, without citing supporting authority, that the sale of the chilies for $5,131.10, a sum in excess of the agreed value ($4,866.35), spells absence of any right of recovery by plaintiff.

[6] The verdict establishes an actual loss of $23,112.30, which was caused by defendant's negligence. This is the net loss after deducting the sum of $5,131.10 for which the peppers were sold in their damaged condition. The tariff, above quoted, says: "The warehouseman's liability is limited to and shall in no event exceed whichever is smaller of—the actual value, or, as the case may be, such presumed or declared limit of value in respect of which the storage rate is so fixed and payable. * * *" If this is construed to mean that defendant escapes all liability the limitation becomes void as an attempt to exempt the bailee from liability for ordinary negligence. See Franklin v. Southern Pac. Co., 203 Cal. 680, 686–688, 265 P. 936, 59 A.L.R. 118 and cases cited infra.

In The Ansaldo San Giorgio I v. Rheinstrom Bros. Co., 294 U.S. 494, 55 S.Ct. 483, 79 L.Ed. 1016, 1019, the carrier's bill of lading contained this clause: "'In the event of claims for loss, damage or short delivery the same shall be adjusted on the basis of the invoice value of the entire shipment adding expenses necessarily incurred.' The proof was that, owing to favorable market conditions existing at destination, the market value of all the merchandise which remained, sound as well as damaged, exceeded the values stated in the invoices, plus freight." The court held in 294 U.S. 498, 55 S.Ct. 485, 79 L.Ed. at page 1021, that the quoted clause "* * * would be unreasonable and contrary to public policy even if supported by a valid consideration, and cannot estop the respondent to claim damages measured according to the general rule", and continued: "The contract plaintiff requires that if, after deduction of all loss and damage, the remaining cargo, in its then condition is worth more at destination than the whole cargo at place and time of shipment, the carrier shall be wholly exonerated. As pointed out by the court below if there were a short delivery of fifty cases out of a shipment of one hundred cases, but the market value of the goods delivered at the port of destination were equal to the invoice value of the hundred cases, plus freight, the carrier would pay nothing for negligent loss of half the shipment. Such an agreement is against public policy as its effect is to relieve the carrier from the consequences of its negligence."

In discussing the forms of valuation clauses frequently used the court said concerning the type involved in our case in 294 U.S. 497, 55 S.Ct. 484, 79 L.Ed. at page 1020: "The damages are computed in the usual way without reference to the stipulation, but, if when so computed they exceed the agreed limit of value, no recovery of the excess may be had."

[7, 8] 13 C.J.S., Carriers, § 113, p. 223: "Under the general rule, the carrier is not free from liability because the goods in their injured condition are worth more than the agreed valuation; * * *." The following cases are to the same effect; indeed there seem to be none to the contrary: Lewis v. Chicago & Northwestern Railway Co., 199 Ill.App. 438, 440; Christensen v. Chicago, Milwaukee & St. P. Ry. Co., 194 Ill.App. 562; United States Express Co. v. Joyce, 36 Ind.App. 1, 69 N.E. 1015, 1016–1017; Greening v. Chicago & N. W. Ry. Co., Mo.App., 183 S.W. 1121, 1122; Atchison, T. & S. F. Ry. Co. v. Smyth, Tex.Civ.App., 189 S.W. 70, 75; Chesapeake & O. Ry. Co. v. Rebman & Clark, 120 Va. 71, 90 S.E. 629, 630; Norfolk & W. Ry. Co. v. A. J. Steele & Son, 117 Va. 788, 86 S.E. 124, 125–126; Baird v. Denver & R. G. R. Co., 49 Utah 58, 162 P. 79, 81; Starnes v. Louisville & N. R. Co., 91 Tenn. 516, 19 S.W. 675; Brown v. Cunard S.S. Co., 147 Mass. 58, 16 N.E. 717, 719.

The verdict is manifestly excessive, but that fact alone might not warrant a reversal, for appellant has at all times in the trial court and here insisted that it had no liability and has never raised the point just discussed. But counsel have preserved and presented good grounds for reversal with respect to certain instructions given by the court and refusal of defendant's proffered instructions on agreed value and limited liability.

Plaintiff tried the case throughout upon the theory that it was incumbent upon defendant to prove that he had actual knowledge of the clauses in the "transfer memoranda", standard form of receipt, and tariffs on file and kept open to inspection. And the judge adopted this theory and instructed the jury accordingly. Authorities above cited and discussed establish the incorrectness of this view. The case was actually tried upon a false issue. The only instruction given upon agreed valuation or limitation of liability was the following given on plaintiff's request: "While a contract of storage between a warehouseman and the owner of the property being stored may, under proper circumstances, contract to limit the amount which the owner may recover from the warehouseman in the event the latter should be liable for loss or damage to the property, such special contract of limitation must be freely and fairly made between the parties and it must appear that the owner of the property accepted the contract with knowledge of its terms, such knowledge being a necessary condition to the owner's assent to the limitation.

"It follows that with respect to any special contract limiting liability on which the defendant in this action may rely, the defendant has the burden of proving that the plaintiff accepted such special contract limiting liability with knowledge of its terms. Should defendant fail in this burden, then its defense based upon such special contract must also fail." It was erroneous because it required actual knowledge by plaintiff of the terms of the warehouse receipt, etc., and placed the burden on defendant to prove the fact. This was markedly prejudicial at bar, because there was present no element of unfair dealing or of anything departing from the ordinary course of business conducted by business men.

Plaintiff did not make the original deposit of the chilies. He bought them from Gonzales & Blanco, who had warehoused them at the minimum rate, he paid the minimum amount, made no inquiry about the storage charge or any other phase of the existing bailment, requested issuance of new receipts to his pledgee after receiving a "transfer memorandum" expressly referring to limited liability; made no examination of any pertinent document; received the warehouse receipts from the bank when he paid off the loan in September, 1950; held the same until January 31, 1951, making periodic inspections of the peppers, but paying no attention whatever to the terms of his contract. If he was ignorant at all these times as to the terms of the documents it was a case of conscious ignorance, for which he can blame no one but himself or his own agents.

[9] The court gave instructions set forth in the margin which plainly told the jurors that actual knowledge and understanding on plaintiff's part of the clauses limiting liability were essential to any such limitation; they were plainly erroneous.[5]

The court refused defendant's request to give the following instructions: "If you find that when the non-negotiable warehouse receipt (Plaintiff's Exhibit 1) was received by the plaintiff from the Security-First National Bank of Los Angeles, the circumstances were such that a prudent man could and would have read the limitation of liability on the document, then you are instructed that in law the plaintiff had notice of the limitation of liability. * * *

"If you find that when the non-negotiable warehouse receipts (Plaintiff's Exhibit 1) and the transfer memorandum (Defendant's Exhibit A) were received by plaintiff's agents acting for him the circumstances were such that a prudent man could and would have read the limitation of liability on these documents, then you are instructed that in law the plaintiff had notice of the limitation of liability." They were correct statements of law covering defendant's secondary theory of the case, see Merrill v. Pacific Transfer Co., 131 Cal. 582, 587, 63 P. 915; Curtis v. United Transfer Co., 167 Cal. 112, 114, 138 P. 726, and should have been given.

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[5] "In order that the terms of another document can be incorporated by reference into a contract so as to bind the parties to that contract, the reference to said other document must be called to the attention of the party to be charged therewith and such party must consent thereto and the terms of the incorporated document must be known to or easily available to the contracting parties.

"While a contract of storage between a warehouseman and the owner of the property being stored may, under proper circumstances, contract to limit the amount which the owner may recover from the warehouseman in the event the latter should be liable for loss or damage to the property, such special contract of limitation must be freely and fairly made between the parties and it must appear that the owner of the property accepted the contract with knowledge of its terms, such knowledge being a necessary condition to the owner's assent to the limitation.

"It follows that with respect to any special contract limiting liability on which the defendant in this action may rely, the defendant has the burden of proving that the plaintiff accepted such special contract limiting liability with knowledge of its terms. Should defendant fail in this burden, then its defense based upon such special contract must also fail. * * *

"Did the defendant's breach of contract proximately cause any loss or damage to the plaintiff?

"If you answer that question in the negative, the plaintiff would still be entitled to a verdict but would not be entitled to any compensatory damages. If you answer the last question in the affirmative, you will then find what loss or damage the defendant's breach of contract caused the plaintiff and return a verdict in his favor for the amount thereof. * * *

"Was that negligence the proximate cause of damage to the plaintiff's *goods?*

"If you answer that question in the negative, plaintiff is not entitled to recover *on that issue*, but if you answer it in the affirmative, you then will find what damage plaintiff thus has been caused to suffer and return a verdict in his favor for the amount thereof. * * *

"If under these circumstances you should find that the plaintiff is entitled to a verdict, it will then be your duty to award plaintiff such amount of damages as will compensate him for the loss or damage suffered by him as a proximate result of the defendant's breach of contract or negligence, if any.

"The measure of such loss in the case at bar is the difference between the reasonable market value of the plaintiff's chilies as of February 1, 1951, and the reasonable net salvage value of the chilies to the plaintiff.

"In determining the reasonable net salvage value of the chilies, you should deduct from the reasonable gross *v*alvage the reasonable costs actually incurred by the plaintiff, if any, in reconditioning the chilies."

The errors above discussed were prejudicial. Judgment is reversed.

SHINN, P. J., and PARKER WOOD, J., concur.

133 Cal.App.2d 325

Alexandrine VERDIER, Plaintiff, Cross-Defendant and Appellant,

v.

Paul VERDIER, Defendant, Cross-Complainant and Respondent.

Civ. 16086.

District Court of Appeal, First District, Division 2, California.

May 31, 1955.

Rehearing Denied June 30, 1955.

Hearing Denied July 27, 1955.

Action by wife against husband, who had allegedly defaulted in performance of separation agreement, for support and other allowances pendente lite. Husband cross-complained for wife's breach of covenant not to molest him. The Superior Court, City and County of San Francisco, Edward Molkenbuhr, J., entered judgment adverse to wife, and wife appealed. The District Court of Appeal, Draper, J. pro tem, held that, where wife refused payments offered by husband for purpose of avoiding waiver of her rights under claimed default of husband, mere fact that she did not prevail upon such claim would not deprive wife of her right to support thereafter in accordance with the agreement.

Judgment affirmed in part and in part reversed, and case remanded with directions.

1. Husband and Wife 🔑278(1), 281

In action by wife against husband, who had allegedly defaulted in performance of separation agreement, for support and other allowances pendente lite, evidence was sufficient to sustain trial court's finding that amendment to separation agreement had not been procured by fraud and that husband had fully performed the agreement as amended. West's Ann.Civ.Code, § 137.

2. Husband and Wife 🔑302

Where husband had fully performed separation agreement as amended, there was not any wilful failure to provide, and, therefore, wife's only remaining right to support from husband would be that allowed under the amended agreement. West's Ann. Civ.Code, § 137.

3. Husband and Wife 🔑298(1)

Even if decree of separate maintenance, based upon showing of ground for divorce other than failure to provide, could support award beyond that provided in separation agreement, such contention would be applicable only if such ground for divorce was pleaded. West's Ann.Civ.Code, § 137.

4. Husband and Wife 🔑296

As in divorce cases, complaint in action for separate maintenance must set forth facts showing grounds for divorce relied upon as basis for the separate maintenance. West's Ann.Civ.Code, § 137.

5. Pleading 🔑236(1)

Allowance or rejection of motion to amend complaint is matter within trial court's sound discretion.

6. Stipulations 🔑14(1)

Where action by wife against husband for support had been commenced on October 2, 1948, and, at pre-trial conference, trial court had indicated that evidence could be admitted only as to grounds pleaded, denial of motion, made, on May 7, 1952, at end of three week trial, to amend third amended complaint to allege adultery, habitual intemperance and extreme cruelty was proper, even though parties had stipulated that, after court's decision, wife could elect to avail herself of remedies under separate maintenance statute. West's Ann.Civ.Code, § 137.

7. Husband and Wife 🔑279(1)

Where, in action by wife against husband, who had allegedly defaulted performance of separation agreement, for support and other allowances pendente lite, wife, for purpose of avoiding waiver of her rights under claimed default of husband, refused tender offered by husband through payments into court, mere fact that she did not prevail upon such claim would not deprive wife of her right to support thereafter in accordance with the agreement.

8. Estoppel 🔑53

Waiver, as distinguished from estoppel, requires an actual intent to relinquish a right, clear showing of intent to relinquish must be made, and doubtful cases will be decided against a waiver.

9. Tender 🔑21

Failure to accept a tender does not discharge the obligation to pay money. West's Ann.Civ.Code, § 1500.

10. Tender 🔑19(2)

Offer to pay extinguishes the obligation only if the amount is unconditionally deposited in name of creditor so that deposit becomes at once creditor's property. West's Ann.Civ.Code, § 1500.

11. Husband and Wife 🔑279(6)

In action by wife against husband, who had allegedly defaulted in performance of separation agreement, for support and other allowances pendente lite, evidence was sufficient to sustain the trial court's finding that wife had "molested" husband in violation of the separation agreement.

12. Husband and Wife 🔑279(6)

Where separation agreement did not indicate intention that wife's performance of covenant against molestation of husband was condition precedent or concurrent with performance of his obligation to make monthly payments to her, and agreement not to molest appeared to be but incidental to, or an elaboration of, agreement to live separate and apart, breach of molestation clause, to husband's damage in amount of $500 as found by court, would not excuse husband's performance of agreement to pay wife support money at rate of $400 per month. West's Ann.Civ.Code, § 175.

13. Husband and Wife 🔑279(1)

Where there is not any extrinsic evidence to aid court in construing separation agreement, question of proper construction of agreement is one of law for court.

14. Contracts 🔑303(1)

Breach of one independent covenant does not excuse performance of another independent covenant.

15. Contracts 🔑147(3)

Meaning and intention of parties, as collected from all parts of instrument rather than from a few technical expressions, is guide in determining character and force of parties' respective undertakings.

16. Contracts 🔑221(2)

To construe covenants as dependent is to work a forfeiture as to one party, and obligation of a contract is not to be regarded as a condition precedent unless made so by express terms or necessary implication.

17. Contracts 🔑328(1)

Where breach of covenant is partial and is capable of being fully compensated, strong tenancy is to regard it as insufficient to constitute a defense.

18. Injunction 🔑118(3)

Where, in action by wife against husband for support and other allowances pendente lite, wife sought, as incident to other relief, to have husband enjoined from continuing prosecution of divorce action commenced by him in France, such injunction was properly denied in view of facts pleading did not raise an issue as to such injunction.

19. Appeal and Error 🔑931(6)

The district court of appeal would presume that, in non-jury trial, findings were not based on incompetent evidence in view of fact that there was competent evidence to support them.

20. Appeal and Error 🔑883

Where wife, in open court, waived her privilege by permitting testimony by her previous attorney and was joined in such matter by her trial counsel, wife could not disallow such waiver on appeal.

John D. Martin, Oakland, Heller, Ehrman, White & McAuliffe, F. Whitney Tenney, San Francisco, for appellant.

Morgan J. Doyle, Alfred F. Breslauer, San Francisco, for respondent.

DRAPER, Justice pro tem.

Plaintiff and defendant were married in 1918. They executed a separation agreement January 10, 1937, by which "each now agrees from this time forward to live separate and apart from the other, and each agrees not to molest the other". Defendant agreed to pay plaintiff $500 per month and "in case his income increases", an additional amount of half of such increase.

By 1946, defendant husband was in default in performance of that agreement. By "Agreement Amending Contract" and "Agreement and Receipt", both executed May 11, 1946, the monthly payments were reduced to $400 from May 1, 1946, and the wife was paid $15,000 in cash in satisfaction of all then due under the 1937 agreement and for traveling expenses, attorneys' fees and costs.

The present action was commenced October 2, 1948. Plaintiff alleged that the 1946 amendment was procured by false and fraudulent representations of defendant, and that after July of 1948 defendant had failed to pay her any amount, under the agreement or otherwise, despite his financial ability to do so. The allegations of fraud were directed at the 1946 amendment only. The 1937 agreement was not attacked.

By order to show cause, Mrs. Verdier sought support and other allowances pendente lite. Her request was denied on the ground that, since she did not seek to set aside the original agreement, she was limited to recovery upon it and could not seek relief under Civil Code sec. 137.

The Supreme Court, in Verdier v. Verdier, 36 Cal.2d 241, 223 P.2d 214, held that it is performance, rather than mere existence, of a separation agreement which may bar recovery outside the agreement. Thus the complaint, which alleged the husband's ability to pay and his failure to do so, was "consistent with either an action to enforce the 1937 contract as such or an action for relief under section 137." 36 Cal.2d at page 248, 223 P.2d at page 218. If she were in fact seeking to maintain both forms of action, she could be compelled to elect. The order denying relief pendente lite was reversed, and the case remanded for further proceedings.

These proceedings were many and varied. By March 4, 1952, at least three appeals and one proceeding in prohibition were pending in the District Court of Appeal. On that date, counsel stipulated for early trial of the present action, and agreed that the several appellate proceedings be vacated or "held in abeyance" until conclusion of trial. They agreed also that plaintiff's election of remedies could be deferred.

Following a pre-trial conference April 3, 1952, trial began April 15 and concluded May 7. The court found that the 1946 amendment was not procured by fraud, that defendant had fully performed the separation agreement as amended in 1946, and that plaintiff had breached the agreement by molestation of defendant. It therefore concluded that plaintiff was not entitled to rescind the 1946 amendment; that since defendant had not breached the agreement plaintiff had shown no failure to provide and could not recover under section 137; that plaintiff's breach terminated the agreement and that defendant was not obligated to make any further payments thereunder. Defendant had paid into court $400 per month from November 1, 1948 onward. The trial court, upon the theory that Mrs. Verdier's breach terminated the agreement, ordered these sums returned to defendant. Plaintiff appeals.

Appellant wife asserts that the evidence is insufficient to sustain certain of the findings. In general, it may be observed that there is quite as much conflict in the evidence as in the married life of the parties.

However, we discuss briefly the evidence on the allegation that the 1946 amendment was procured by fraudulent misrepresentation.

The parties agree that to establish her case, wife must show a material representation which was false, was known by husband to be untrue, was made to induce reliance by wife, and was in fact relied upon by her. Hobart v. Hobart Estate Co., 26 Cal.2d 412, 422, 159 P.2d 958.

Appellant emphasizes specific representations of her husband's income and expenses, made in 1942. But the evidence shows that, in 1942, the representations as to income were true, and there is no evidence as to the 1942 expenses.

The 1946 negotiations were conducted, for the husband, wholly by J. R. Bearwald, who died in 1947. He stated that husband could not afford to pay $500 per month, and that if wife would not accept the $400 figure, she could sue. The evidence shows that the husband's income increased substantially in 1945 and 1946 over 1942, but there is at most a conflict as to whether any representation to the contrary was made. Also, husband was critically ill in 1945 and 1946, and incurred large hospital and medical expenses. On the whole record, the trial court could reasonably conclude that the evidence was insufficient to show that Bearwald's representations were relied upon, that they were untrue, or that they were more than mere expressions of opinion.

[1] It is true that the wife's allowance under the amended agreement seems disproportionate to husband's income of 1946 and later years. However, considering all the evidence as to the circumstances in May of 1946, we cannot say that the finding is not sustained.

Appellant wife also urges that the 1946 amendment falls because of husband's failure to secure an agreed guaranty. Husband agreed that Bearwald and Mrs. de Tessan should give written guaranties of his performance of the amended agreement. No such guaranty was ever given by Bearwald. But there is direct evidence of express waiver of this guaranty by Mrs. Verdier. It seems clear that the trial court accepted this testimony as true.

The evidence is also sufficient to sustain the trial court's finding that Mr. Verdier had performed the agreement on his part.

[2] Thus the trial court found against the wife on both of the grounds which the Supreme Court had held to be stated in her complaint. She could not recover under the 1937 agreement because she could not show the 1946 amendment to have been procured by fraud. Since the husband had fully performed the separation agreement, as amended, there was no wilful failure to provide. This was the only ground discussed by the Supreme Court as a basis for separate maintenance without limitation to the amount provided by the agreement. It follows that the wife's only remaining right to support is to $400 per month under the amended agreement.

Appellant does not dispute this reasoning if her rights under section 137 are limited to those arising from wilful failure of her husband to provide for her. She asserts, however, that under one of the clauses of section 137 she is entitled, if she can show any ground for divorce, to a decree of separate maintenance, providing for a support allowance not limited by the terms of the separation agreement.

Section 137 allows separate maintenance in two situations. One arises "when the husband wilfully fails to provide for the wife." This is the clause considered by the Supreme Court in Verdier v. Verdier, 36 Cal.2d 241, 223 P.2d 214, 216, supra. The other arises when either spouse "wilfully deserts" the other, or when either "has any cause of action for divorce as provided in Section 92 of this code."

[3, 4] The wife argues that a decree of separate maintenance, based upon showing of a ground for divorce other than failure to provide, could award support beyond that provided in the agreement. If this argument is valid, a point which we expressly refrain from deciding, it can apply here only if such ground is pleaded. As in divorce cases, 16 Cal.Jur.2d 363, the complaint must set forth facts showing the grounds for divorce relied upon as a basis for separate maintenance. Helpling v. Helpling, 50 Cal.App. 676, 680, 195 P. 715.

The complaint here alleges no facts to show any ground for divorce save wilful failure to provide. The wife points to an allegation which narrates the marriage, the financial circumstances of the parties, and the making of the 1937 agreement, and then sets forth that "Plaintiff had ample grounds for divorce at said time but acceded to Monsieur Verdier's desire not to divorce." Certainly this very general allegation, specifically directed to a period eleven years before the complaint was filed, cannot take the place of a present allegation of specific grounds.

On the last day of trial, the wife moved to amend her complaint to allege adultery, habitual intemperance and extreme cruelty. This was after the trial court had announced its views of the effect of all the evidence. The motion was accompanied by a request for continuance of the trial. The motion to amend was denied.

[5, 6] The allowance or rejection of a motion to amend is within the sound discretion of the trial court. Industrial Indemnity Co. v. Golden State Co., 117 Cal.App.2d 519, 540, 256 P.2d 677. Here the action had been commenced October 2, 1948. The complaint had been construed by the Supreme Court in 1950. Three amended complaints had been filed after that decision. At pre-trial conference the trial court had indicated its view that evidence could be admitted only as to grounds pleaded. The trial required more than three weeks. Under these circumstances, the motion of May 7, 1952 (the last day of trial) to amend the third amended complaint was most tardy. The order denying the motion was proper. Westwood Temple v. Emanuel Center, 98 Cal.App.2d 755, 764, 221 P.2d 146.

But plaintiff also urges that the stipulation of March 4, 1952 authorizes her to assert these additional grounds. As already pointed out, the litigation by then had reached a remarkable procedural snarl. The parties stipulated that all matters then pending in the District Court of Appeal should "go off calendar" and "remain in abeyance". They also agreed to early trial of the present case. Since a principal issue involved in the appeals was plaintiff's election between her cause of action for rescission of the 1946 amendment (and consequent enforcement of the original agreement) and that for separate maintenance, the stipulation provided:

> "5. In the trial of said action numbered 380328, the said Superior Court may try both the issues raised by the cause of action for rescission of the 1946 agreement and enforcement of the 1937 agreement included in the pleadings therein and the relief sought pursuant to Section 137, Civil Code of the State of California. It is expressly stipulated that the said Court may afford plaintiff any relief available under Section 137 Civil Code of the State of California, or for relief under contract rescission consistent with the evidence adduced at said trial.
>
> "6. In the event that the Court finds in favor of plaintiff on both the cause of action for rescission of contract and for relief under section 137, Civil Code of the State of California, then after such decision, plaintiff may elect whether she wishes to avail herself of the remedies available to her under Section 137, Civil Code of the State of California or for the appropriate relief upon rescission of the contract."

There can be no question that this stipulation was entered into in the light of the Supreme Court decision in this case. The stipulation appears to have been made in the course of a hearing before the District Court of Appeal. Portions of the transcript of that hearing were read at the trial, and support the view that the parties intended only to resolve their procedural impasse by deferring plaintiff's election, if one became necessary, until conclusion of trial.

Clearly it was to express this intent fully, rather than to broaden the pleadings in the present action, that the parties included their reference to the relief to be awarded. We cannot construe the reference to "any relief available under Section 137" as broadening the issues raised by the pleadings. Rather, the parties were avoiding all the problems raised by the judgment for defendant after sustaining of demurrer to the Third Amended Complaint and agreeing to go to trial on that complaint. The stipulation in no way provides for any amendment of the pleadings, nor does it deprive the trial court of its power to restrict such amendment.

Appellant wife next argues that the trial court erred in denying her future payments under the support agreement as amended, and in ordering return to respondent husband of the support payments deposited in court by him after commencement of this action.

[7] This portion of the judgment is based in part upon a finding that the wife had "waived" all her rights to the amounts deposited in court, as well as to all future support, by refusing to accept payments tendered by her husband during pendency of this action. Whether it be deemed a finding or a conclusion, this ruling cannot be supported.

The record is clear that there was a very real dispute between the parties as to whether respondent was in default in certain payments due in 1948. These payments had been paid to the sheriff, under writ of attachment, rather than to the wife. When the full amount of the writ had been paid, respondent tendered to his wife payment for the sum next due. Upon advice of counsel, she refused that payment and those later offered. Her announced purpose was to avoid waiver of her rights under the claimed default of her husband. The mere fact that she did not prevail upon this claim does not deprive her of her right to the support provided by the agreement.

[8] Waiver (as distinguished from estoppel, which is not claimed here) requires an actual intent to relinquish a right. See cases collected at 25 Cal.Jur. 926 et seq. Clear showing of the intent to relinquish must be made, and doubtful cases will be decided against a waiver. Greninger v. Fischer, 81 Cal.App.2d 549, 184 P.2d 694. Here it is not even suggested that Mrs. Verdier ever intended to relinquish her rights.

[9, 10] Mere failure to accept a tender does not discharge the obligation to pay money. Redpath v. Evening Express Co., 4 Cal.App. 361, 367, 88 P. 287. An offer to pay extinguishes the obligation only if the amount is deposited in the name of the creditor, Civ.Code, sec. 1500, and such deposit must be unconditional, and so made that the deposit becomes at once the property of the creditor. Segno v. Segno, 175 Cal. 743, 167 P. 285; Righetti v. Righetti, 5 Cal.App. 249, 90 P. 50. These requirements were not met here.

[11] The second basis of the court's ruling on this issue is grounded in its finding that Mrs. Verdier had "molested" her husband. The wife does not directly attack this finding of fact. In any event, it is sustained by substantial evidence.

The real question is the effect of such molestation upon Mr. Verdier's obligation. The trial court found that the wife "is not entitled to have or receive * * * any of the moneys * * * deposited with (the clerk) * * * or any money whatsoever." The conclusion of law was that all her rights under the separation agreement "have terminated and come to an end."

The result is that Mrs. Verdier is denied all support of any kind from November 1, 1948, and there is refunded to the husband $286 deposited in court by him in November, 1948, and $400 similarly deposited each month thereafter.

As to the payments falling due before January 18, 1952, the findings themselves negative the judgment. Although the court found that molestation began in 1946, the specific finding is that the contract was "fully and finally and completely terminated and at an end by the 19th day of January 1952." No authority is suggested for a holding that a "termination" in January 1952 has the retrospective effect of excusing payment of support which fell due in and after November 1948. More than $15,200 was deposited in court after commencement of this action and before the date of breach as found. It seems axiomatic that these payments were not affected, and that they should not have been refunded to respondent, but should be paid to appellant.

[12] But we have concluded that the breach of the molestation clause does not excuse any performance by the husband of his agreement to pay support money.

[13] The issue, of course, turns upon construction of the agreement. There is no extrinsic evidence in aid of construction, and the question therefore is one of law for this court. In re Estate of Wunderle, 30 Cal.2d 274, 280, 181 P.2d 874; Western Coal & Mining Co. v. Jones, 27 Cal.2d 819, 826, 167 P.2d 719, 164 A.L.R. 685. The

1937 contract was brief. Its first paragraph is:

> "Paul Verdier and Alexandrine Verdier, the signers of this agreement, are husband and wife; and each now agrees from this time forward to live separate and apart from the other, and each agrees not to molest the other."

This is the only reference to molestation. The 1946 amendment makes no reference to molestation, amends only other portions of the agreement, and in no way modifies the paragraph quoted above.

Is the effect of this agreement such that Mrs. Verdier's "molestation" of her husband excuses him from all further payment of the agreed support? We think not.

It should be noted that, in addition to holding that Mrs. Verdier's breach bars all her rights under the agreement, the court found that the same breach caused damage to Mr. Verdier in the sum of $500. Judgment for this amount was awarded to him on his cross-complaint.

[14, 15] Whether breach of the agreement not to molest bars Mrs. Verdier's recovery of agreed support payments raises the question whether the two covenants are dependent or independent. If the covenants are independent, breach of one does not excuse performance of the other. Kaupke v. Lemoore Canal & Irrigation Co., 20 Cal.App.2d 554, 67 P.2d 407. The question is wholly one of construction of the agreement. The general rule is " 'to make the meaning and intention of the parties, collected from all the parts of the instrument rather than from a few technical expressions, the guide in determining the character and force of their respective undertakings.' " Musto v. Grosjean, 208 Cal. 453, 459–460, 281 P. 1022, 1024.

[16, 17] To construe covenants as dependent is to work a forfeiture as to one party, and no obligation of a contract is to be regarded as a condition precedent unless made so by express terms or necessary implication. Where a breach is partial and is "capable of being fully compensated", the strong tendency is to regard it as insufficient to constitute a defense. Redpath v. Evening Express Co., supra, 4 Cal.App. 361, 88 P. 287.

We have found no California decision directly in point here. In other jurisdictions, however, the pronounced tendency is to regard the provision against molestation and that for payment of support as being independent covenants. This rule is often applied even where the language of the agreement indicates dependency of the covenants. See cases collected in 160 A.L.R. 473, et seq.

In the case at bar, there is no language in the agreement indicating any intention that performance by the wife of the covenant against molestation is a condition precedent to or concurrent with performance of his obligation to pay. Rather, the agreement not to molest appears but incidental to, or an elaboration of, the agreement to live separate and apart.

It is difficult to conclude that a molestation compensable by $500 damages is so serious a breach as to deprive the offending wife of support which, from commencement of this action to the present, amounts to more than $31,000, and which is continuing to run at the rate of $400 per month.

It would seem that the contract language should be clear to compel such a result. Here there is not the barest recital of any such intent.

Respondent contends that the cases from other jurisdictions, referred to above, are distinguishable on the ground that no statute comparable to Civil Code sec. 175 was there involved. He reads these decisions as being based upon a duty of support which is negatived, in California, by the fact that the parties are living apart. We do not so read the decisions. In any event, the argument overlooks the fact that the parties here are living apart only because of the agreement, which in turn was induced by his promise to pay support money to his wife.

Respondent cites four California cases for his view that he is relieved of all duty to comply with his agreement for support. They are not in point.

In Smith v. Smith, 7 Cal.App.2d 271, 46 P.2d 232, the parties made a property settlement agreement in 1923. It provided for payment of $250 per month to the wife. In 1928, they amended this agreement to provide that the payments be increased from $250 to $300 per month. Wife agreed to refrain from molesting or interfering with husband. The amendment specifically provided that if wife breached this covenant, the amendment should be of no further force or effect, the rights of the parties thereafter would be governed by the 1923 agreement only, and husband would have credit upon that agreement for all added payments made by him under the 1928 amendment. The wife violated her covenant, and the court enforced the amendment agreement by relegating her to her rights under the original agreement.

There was no possible room for doubt in the construction of the Smith agreement, which unequivocally provided for relinquishment of certain benefits upon breach. No such provision is remotely suggested by the langauge of the Verdier agreement, and we hold that there is no room to imply any such provision.

The agreement in Forsland v. Forsland, 46 Cal.App. 405, 189 P. 327, was even clearer. There husband had deposited $1,000 in escrow, to be paid to his wife if she did not molest him or any of his employees for a fixed period. That agreement is of no aid in construing the Verdier contract.

Pezzoni v. Pezzoni, 38 Cal.App. 209, 175 P. 801, 802, presents the reverse of the common situation. There the husband agreed to go to Switzerland and that he "at no time hereafter will ever molest or approach (his wife) against her will." She paid his fare plus funds for clothing and pocket money, and agreed to pay him $25 per month, all specifically "in consideration of Victor keeping to the above agreement." Victor went to Switzerland, but returned to California and, after a time, sued his wife for the monthly payments of $25. The court held that he had breached his agreement, and could not recover. Here again, the agreement was clear and specific. While there was no express provision that his return from Switzerland would terminate his right to payments, the implication of this condition was necessitated by the language of the agreement.

Sharon v. Sharon, 68 Cal. 29, 8 P. 614, has no bearing whatever on the issue here.

For the reasons given above, we are satisfied that Mrs. Verdier's covenant not to molest is independent of Mr. Verdier's agreement to pay. The contract is silent upon this point. We see no reason to imply a condition not expressed by the parties. She is entitled to payment of $400 per month under the amended separation agreement.

[18] Appellant assigns as error the refusal of the trial court to enjoin respondent from continuing prosecution of a divorce action commenced in France. There is a conflict of evidence as to the domicile and citizenship of one of the parties at the time that action was filed. The pleadings raise no issue as to such injunction. Apparently, it was sought, at trial, solely as an incident to other relief. In the light of our conclusion that judgment upon the complaint must be for respondent, there is nothing to support such an injunction.

[19] Appellant also asserts reversible error in the offering of improper evidence. The voluminous record does contain much that should not have been presented, but it is difficult to say which counsel outdid the other in presenting it. The trial judge attempted to limit these activities, asked both sides to "desist from scurrilous statements", and stated that he would ignore the irrelevant matters. Even without these statements, it would be presumed in this non-jury trial that the findings are not based on incompetent evidence where there is competent evidence to support them. Southern California Jockey Club v. California, etc., Racing Board, 36 Cal.2d 167, 176, 223 P.2d 1.

[20] Apparently as a portion of this same contention, appellant complains that she waived her privilege and permitted testimony by her previous attorney. But this waiver was made by appellant in open court and joined in by her trial counsel. Certainly she cannot disavow the waiver on appeal.

The judgment is affirmed insofar as it denies relief to appellant upon each of the theories of her complaint, and in its award of damages to respondent upon the cross-complaint. The portions of the judgment determining that appellant's rights to support under the amended separation agreement are terminated, and ordering return to respondent of the sums deposited in court, are reversed. In the interests of justice, costs on appeal are awarded to appellant.

The case is remanded to the trial court, with directions to modify its findings, conclusion and judgment in accordance with the views herein expressed.

NOURSE, P. J., and KAUFMAN, J., concur.

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133 Cal.App.2d 321

Chester WALLACE, doing business under the firm name and style of Wallace Roofing Co., Plaintiff and Respondent,

v.

CARPENTERS LOCAL UNION NO. 1040 OF UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; and North Coast Counties District Council of Carpenters, Defendants and Appellants.

Roofers, Damp and Waterproof Workers Local Union No. 240 of United Slate, Tile and Composition Workers Association, Defendants and Respondents.

Civ. 8007.

District Court of Appeal, Third District, California.

May 27, 1955.

Action for an injunction enjoining labor organizations from engaging in any work stoppage by reason of a dispute between them concerning the question of union jurisdiction. From a judgment granting a temporary injunction in the Superior Court, Humboldt County, Delos A. Mace, J., the defendants appealed. The District Court of Appeal, Finley, J. pro tem., held that where the function of the Appellate Court on the record was either to decide or dismiss the appeal it would not dismiss the action or dissolve the injunction on the ground that one of the unions involved was no longer in existence.

Motion to dismiss and dissolve the injunction denied.

Appeal and Error 🔑1175(7)

Where there was no motion to dismiss appeal in labor dispute and court was asked only to dismiss action and dissolve injunction, function of appellate court was only to decide appeal or dismiss it, and it would not dismiss action or dissolve the injunction, on grounds that a roofers' union involved in the dispute was no longer in existence and that hence there was no longer any need for the injunction.

Todd & Todd, San Francisco, for defendants and appellants.

Falk & Falk, Eureka, for plaintiff-respondent.

P. H. McCarthy, Jr., F. Nason O'Hara, Herbert S. Johnson, San Francisco, for defendants and respondents.

FINLEY, Justice pro tem.

This matter is presently before us upon motion by appellants for an order of this court dismissing the action and dissolving a temporary injunction heretofore issued by the trial court in favor of plaintiff Wallace, a roofing contractor, and directed to both appellant and respondent labor organizations enjoining them from "engaging in any work stoppage or from threatening any work stoppage" by reason of a dispute between them concerning the question of union jurisdiction. Appellants took an appeal from the judgment granting a temporary injunction, which appeal is now pending. There is no motion to dismiss the appeal, and movant announced at argument that no dismissal was desired. This court is asked only to dismiss the *action* and dissolve the injunction "and for such other and further order as to the court may seem meet and proper in the premises."

This action was commenced by plaintiff and respondent Wallace, a contractor doing business as Wallace Roofing Co. It is alleged that he entered into a collective bargaining agreement for the period here involved with Carpenters Local Union No. 1040 of the United Brotherhood of Carpenters and Joiners of America, hereinafter referred to as the Carpenters Union, which included the branch of carpentry known as "roofing." Subsequently plaintiff entered into a contract with Local Union 240 of the United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association, hereinafter referred to as the Roofers Union, which also covered the division of the craft of carpentry known as "roofing." Both unions are or were at the time the action was commenced members of the National Joint Board for Settlement of Jurisdictional Disputes established within the Building and Construction Trades Department of the American Federation of Labor, which board handles disputes concerning claims of jurisdiction by member unions. Plaintiff alleged that a dispute arose over which of the above unions had jurisdiction over the "roofing" work carried on by plaintiff, which was followed by certain work stoppage by the Carpenters Union and threats of other stoppage. Plaintiff sought and was granted a temporary injunction restraining appellant Carpenters Union from engaging in any work stoppage arising out of the assignment of work by plaintiff as long as he employed members of unions affiliated with the American Federation of Labor, and also ordering that any questions concerning disputes over jurisdiction be submitted to the National Joint Board for settlement.

Appellants' motion to dismiss the action and dissolve the temporary injunction is based upon affidavits submitted by appellants wherein it is stated that respondent Roofers Union is no longer in existence. It is claimed by appellants that this nullifies the entire cause of action since there can be no existing dispute between appellants and a union which no longer exists; that there is no longer any need for an injunction and nothing to submit to the National Joint Board for settlement.

There are no counter-affidavits on file by the respondent Roofers Union and nothing before us to indicate that appellants' contention regarding the present nonexistence of respondent Roofers Union is not correct. However, the function and the jurisdiction of this court in the present state of the record is either to decide the appeal or dismiss it, but not to dismiss the action or dissolve the injunction.

The motion is denied.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

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133 Cal.App.2d 376

Mollyanne ESHELMAN, Plaintiff and Appellant,

v.

Robert C. ESHELMAN, Defendant and Respondent.

Civ. 20895.

District Court of Appeal, Second District, Division 2, California.

June 1, 1955.

Divorce proceeding. From order of the Superior Court, Los Angeles County, Wallace L. Ware, J., modifying child custody provision of divorce decree, the mother appealed. The District Court of Appeal, McComb, J., held that where counsel for mother filed notice of appeal from order modifying child custody provision of divorce decree, trial court exceeded its jurisdiction in refusing to stay enforcement of its order.

Reversed.

1. Constitutional Law ⚷321
Judgment ⚷17(1)

A party is not bound or concluded by a judgment unless he has had his day in court and this means that a party must be duly cited to appear and afforded an opportunity to be heard and at such hearing to offer evidence in support of his contentions.

2. Constitutional Law ⚷321

Where counsel for mother, who had been awarded custody of two small sons, suggested he would like to present evidence on advisibility of placing children in military school and on mother's fitness, and court postponed such evidence to later date and on that date refused to permit counsel to present such evidence but made an order changing custody of child and directing that they be placed in military academy, mother was deprived of her day in court by not being permitted to present testimony she desired.

3. Divorce ⚷312.4

Where counsel for mother filed notice of appeal from order modifying child custody provision of divorce decree, trial court exceeded its jurisdiction in refusing to stay enforcement of its order.

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Austin, Austin, Jones & Chaffee, Compton, for appellant.

Robert M. Kaufman, Los Angeles, for respondent.

McCOMB, Justice.

An interlocutory decree of divorce was granted plaintiff from defendant on February 6, 1950. Such order awarded the custody of the two minor children of the parties to plaintiff. On October 13, 1954, the trial judge modified the previous order relative to the custody of the children and awarded them to defendant. From this latter order, plaintiff appeals.

Facts: Plaintiff on December 23, 1953, filed an order to show cause for modification of the order permitting defendant to visit his children. On April 20, 1954, defendant filed an application for a modification of the order awarding the custody of the children to plaintiff. These matters came on for hearing June 17, 1954. At that time the court directed an investigator to examine the physical, spiritual and psychological environment of the two minor children and the matter was continued until October 8, 1954. On such date evidence was introduced on behalf of defendant, at the termination of which the following colloquy occurred between the court and plaintiff's counsel:

"The Court: * * * I will give consideration to any school or schools that Dr. Eshelman and his former wife, Mollyanne Eshelman, will recommend, and to the end that we determine what school these boys are going to be placed in, I am going to continue the matter until Wednesday, the 13th of October, at 9:00 o'clock.

"Right now, I am going to make an order that on that day both of these boys are going to be packed up and taken to some school and we will make further disposition of the question of visitation by both parents thereafter.

"For all other issues involved in this case, we have agreed upon the date of November 8, at which time the Court will endeavor to conclude all phases of this most unhappy litigation.

"Mr. Pinnick: Your Honor, I apologize before I make this statement, but it is my opinion that I haven't been given an opportunity to present evidence combatting this order or combatting the proposition that these boys should go to a military school. I would like to have that order read, not that the Court will now order that they be ready to go to military school, but will take evidence on the advisibility of placing them in school on Wednesday, and make the order at that time that they shall go to school.

"The Court: Well, Mr. Pinnick, I will be indulgent to you to the extent that you may be heard, provided it will not interfere with the resumption of a trial that is going on on that day. It is a trial that was continued over from last Thursday. I have a trial pending in this court at this time. I will hear you, but it will have to be limited to that time.

"Now, understand counsel, that this matter has been considered by the Superior Court in this County for several years and understand that we have already had evidence at the previous hearings in this matter regarding what is best for the welfare of those boys. While I appreciate the fact that you are newly substituted in here and have lacked the opportunity to experience what has preceded this proceedings here this morning, and while I want to be perfectly reasonable with you and give you every opportunity to be heard, I can't, for the interests of these children, vacate the order that I have made unless you show me good cause next Wednesday morning. These orders are always subject to alteration.

"Mr. Pinnick: Yes, sir. I thought perhaps that some qualified opinions should be allowed to be expressed on whether the boys should go to a military school.

"The Court: Mr. Pinnick, I will be very glad to hear from you Wednesday [October 13] morning."

Thereupon the matter was continued until Wednesday, October 13. When court convened on October 13, 1954, after the court had recited some previous facts pertaining to the litigation between the parties, the following occurred between the court and plaintiff's counsel:

"The Court: * * * Let the record also show that the Court has had the advantage of discussing this matter with Mr. Warren Benton. Mr. Warren Benton is, in one sense, a court attache and doing a high minded work with his associates in investigating home conditions and environments and the fitness of parents who have the custody of children of tender years. Mr. Benton has made numerous reports to this court covering many back hearings. I have talked to Mr. Benton as late as this morning. I have told him that it was my opinion that at the present time there is quite a crisis with reference to the welfare of these two little fellows, and that I think that something should be done in order to give them a new atmosphere and a new opportunity to forge out into the status of development that has long since been retarded. He agreed with me wholeheartedly and he said that he felt that that is precisely what he would like to have done himself.

"Now when I speak of Mr. Benton, I am speaking of advice and observations of an expert. I don't claim to be an expert, but I am trying to deal with these problems with a heart. It isn't like taking these children away from mother and father; they will have many opportunities to visit with their children and we will cooperate in every way we can with the school authorities to the end that the children are made happy and that the parents will have an opportunity to live normal lives, seeing the children whenever they can.

"Now, do you desire to protest that, Mr. Pinnick?

"Mr. Pinnick: Your Honor, did you make a finding as to who now has legal custody?

"The Court: No, I am not disturbing that order. This case is continued until the 8th of November for further decisions to be made, and as far as the physical custody of the children are concerned, when they are in that school they are of course going to be in the custody of the school authorities. Otherwise the school wouldn't be able to do anything for them.

"Mr. Pinnick: Well, Your Honor, there are cases that show that the law presumes that the person are fit and I would like to remind the Court that we haven't been allowed to put on any evidence on behalf of the plaintiff's side, as to her fitness.

"The Court: Well, you may be reminded, counsel, that you and Mrs. Austin have come into this case very lately. Mrs. Austin is as late as this morning and you are as late as last week, and there have been quite a number of hearings up here and the Court has heard a considerable amount of testimony in connection with the claims and counterclaims of both parents in this case.

"Mr. Pinnick: Yes, Your Honor, I am relying upon my client's advice that she hasn't been able to present on the witness stand testimony in support of her fitness.

"The Court: Well let us bravely cooperate on this thing. It has, after all, developed into an age old tug of war and is a rope that you are using around the life of these two children. You are using the life of the older one and that will break soon, and soon you will come into the life of the other one. Let's not ruin the lives of these children. It isn't a contest where you will win or they will win or the lady on one hand and the father on the other will win. Let's win for these children; let's do something for them.

"Mr. Pinnick: Yes, Your Honor, that is the way I feel about it, only I feel the children will win, as you put it, with the mother. I respectfully submit that they are better off with the mother. I can't help my opinions on this thing. I wouldn't submit the notice I am going to submit without feeling that way, and then I would like also to call your Honor's attention to [Roche v. Roche] 25 Cal.2d 141 [152 P.2d 999], which says the artifices of giving bare legal custody to the parents and putting the actual physical custody in strangers cannot be used to deprive a parent of custody unless there is a clear finding of unfitness of that parent.

"The Court: I thought I had found that.

"Mr. Pinnick: Yes, you did your Honor.

"The Court: Counsel, I respect you sincerely and I am not trying to be short with you. It seems I have been having more than my share of heartaches up here for the last two weeks and that is not enough. I will see you all on November 8.

* * * * * *

"Mr. Pinnick: Might I call your Honor's attention to the case of [Luck v. Luck] 83 Cal. 574 [23 P. 1035], which says that an appeal may be taken from this order and that such an appeal suspends and stays the jurisdiction of the Court to enforce the modification. I believe I am within my rights to say that the children shall not go to school pending that appeal.

"The Court: I don't agree with you and I think you had better be very careful about thwarting the Court's order on this.

"Mr. Pinnick: I am, your Honor. I researched this point carefully and I can give you the citations, if you wish.

"The Court: Well, November 8 will roll around soon. Meanwhile I hope those children are in that school.

"Mr. Kaufman: Your Honor, will you also include in the order that the father has the right at 7:00 or 8:00 o'clock tonight to pick up the children for the purpose of bringing them immediately to that school.

"The Court: Is that the arrangement that you have made, Dr. Eshelman?

"The Defendant: Your Honor, I have made arrangements to put the children in as soon as I can get them in my possession to take them there or furnish the transportation. I can furnish the transportation this evening and have them in the school tonight or tomorrow morning.

"The Court: Do I understand you counsel for the mother of these children, that you are not going to permit that?

"Mr. Pinnick: *I think it is our legal right to say that this appeal suspends the order of the court.*

"The Court: *There is no appeal pending.*

"Mr. Pinnick: *I have just filed a notice of appeal, your Honor, and that is the institution of the appeal from this specific order, and under the law the situation—*

"The Court: Well, apparently you don't want us to.

"Mr. Kaufman: Will you also include in the order, your Honor, that the father has the right to pick up the children at 7:00 o'clock tonight.

"The Court: Yes, that is in the order. If you want to thwart it, you will suffer the consequences. What is the name of the school?

"Mr. Kaufman: The Ramsey Military Academy, Santa Monica.

"Your Honor, one point further on the question of custody. Shall we, in view of the attitude of counsel and plaintiff in this particular action.—will your Honor make an order granting the custody of these children so we may have a right to pick up the children?

"The Court: Yes. Let the previous order of this Court awarding custody to the mother, be vacated and set aside, and from now on the custody of these children for the purpose of effectuating the order of this Court is now in the father. He is awarded the legal custody of these children."

Questions: First: *Was plaintiff deprived of her day in Court?*

[1] *Yes.* It is a cardinal principle of our jurisprudence that a party shall not be bound or concluded by a judgment unless he has had his day in court. This means that a party must be duly cited to appear and af-

forded an opportunity to be heard and at such hearing to offer evidence in support of his contentions. His right to a hearing does not depend upon the will, caprice or discretion of the trial judge who is to make a decision upon the issue. Judgment without such an opportunity is lacking in all of the attributes of a judicial determination. (McClatchy v. Superior Court, 119 Cal. 413, 418, 421, 51 P. 696, 39 L.R.A. 691; Del Ruth v. Del Ruth, 75 Cal.App.2d 638, 646 [6], 649, 171 P.2d 34; Moore v. California Minerals etc. Corp., 115 Cal.App.2d 834, 836 [2], 252 P.2d 1005.)

[2] Applying the foregoing rule to the record in the instant case it is apparent that plaintiff was deprived of her right to present evidence at the hearing on October 8th. In response to plaintiff's counsel's suggestion that he would like to present evidence, the court said: "Mr. Pinnick, I will be very glad to hear from you Wednesday [October 13] morning." On October 13th, after the court had made a lengthy statement he asked plaintiff's counsel if he desired to protest, in reply to which plaintiff's attorney stated in substance that he would like to present evidence by calling his client to the witness stand and taking her testimony. This the court refused to permit but made an order changing the custody of the children and directing that they be placed in a military academy. Thereupon the matter was continued to November 8th.

Clearly plaintiff was deprived of her day in court by not being permitted to present the testimony she desired. Mr. Justice Shinn, in Del Ruth v. Del Ruth, 75 Cal.App.2d 638, at page 646, 171 P.2d 34, at page 39, aptly states the rule thus: "* * * A trial of this sort is not an arbitration; it is an inquiry for the determination of matters of fact. * * * it is not within the discretion of the court to arbitrarily refuse to receive competent, relevant and material evidence."

[3] Second: *Did the trial court exceed its jurisdiction in refusing to stay enforcement of its order modifying the custody of the children after the notice of appeal from such order had been filed?*

Yes. An appeal from a custody order deprives a trial court of jurisdiction to change the custody status which exists at the time of the appeal. (Lerner v. Superior Court, 38 Cal.2d 676, 680 [1], 242 P.2d 321.) In view of the foregoing rule the trial court erred in making an order changing the custody of the children pending the appeal from his previous order.

Reversed.

FOX, J., concurs.

Raymond V. RUDOLPH, Plaintiff and Respondent,

v.

Allen TUBBS, Chas. S. Ehrhorn, and Chas. S. Ehrhorn, doing business under the fictitious name and style of Navy Gas Co., Defendants and Appellants.

Civ. 4937.

District Court of Appeal, Fourth District, California.

May 31, 1955.

Rehearing Denied June 24, 1955.
Hearing Granted July 27, 1955. *

General store owner's fire damage action against, inter alias, lessor of adjoining oil station and such lessor's gasoline tank truck driver. Plaintiff alleged that "white gas" tank filled from truck had been negligently located, that gasoline had been permitted to overflow from tank, that the top thereof had not been secured after filling, that the driver had failed continuously to man the nozzle with which the tank was filled, that the driver had dragged the hose used in filling the tank across a live battery, that there had been no fire extinguisher in the truck, and that the driver had been smoking a cigar. The Superior Court, Tulare County, Gregory P. Maushart, Judge assigned, entered a judgment adverse to the defendants adverted to above, and they appealed. The District Court of Appeal,

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* Opinion vacated 291 P.2d 913.

Griffin, J., held that evidence would not sustain a verdict for plaintiff based upon any of the specific allegations of negligence.

Reversed.

1. Negligence ⚷134(4)

In general store owner's fire damage action against lessor of adjoining oil station and such lessor's gasoline tank truck driver, wherein it was alleged that "white gas" tank filled from truck had been negligently located, that gasoline had been permitted to overflow from tank, that the top thereof had not been secured after filling, that driver had failed continuously to man nozzle with which tank was filled, that driver had dragged hose used in filling tank across a live battery, that there had been no fire extinguisher in truck, and that driver had been smoking a cigar, evidence would not sustain verdict for plaintiff based upon any of the specific allegations of negligence.

2. Appeal and Error ⚷172(1)

Doctrine of res ipsa loquitur could not be considered for first time on appeal where plaintiff had alleged in his complaint specific acts of claimed negligence and had made no general allegation of negligence or allegation of general negligence, and case had not been tried upon theory of res ipsa loquitur or jury instructed on application of that doctrine or in regard to necessity of establishing proof of all required elements before it could be applied.

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Crowe, Mitchell & Hurlbutt, Visalia, for appellants.

Walch & Griswold, Hanford, for respondent.

GRIFFIN, Justice.

Plaintiff and respondent Raymond V. Rudolph leased a general store, and certain adjoining quarters in the store building, in Farmersville. He owned the stock and fixtures. Several gasoline pumps were located in front of the store building. One of the other rooms, in the form of a lean-to (14 x 14 ft.) connected with this store building, was used for the storage of oil supplies in connection with the oil station business. Defendant Mack Langford leased from defendant and appellant Ehrhorn, the oil station portion of the premises, including an office room (12 x 14 ft.) which adjoined the oil store room and which was used in connection with the filling-station business. Langford kept his "white gas" in a 50-gallon oil drum in the rear portion of this store room on a frame rack near the wooden partition wall. A battery charger was located on a bench, and a car battery was on the ground near the door and had just been placed there by Langford. There was an automatically controlled electric air compressor located just outside of the north store room wall which wall was composed of corrugated iron. The west wall and the roof of the entire store building was of the same material. The oil room doors consisting of two parts, were open to the street.

Appellant Allen Tubbs, employed by appellant Ehrhorn, doing business under the fictitious name and style of Navy Gas Co., was delivering some white gasoline to this station. He drove his truck to a place near the front of the oil store room, pulled the hose and nozzle from the truck to the oil drum, a distance of about 20 feet, and filled it with 40 gallons of gasoline. Afterwards, he reeled up the hose to the tank truck.

The testimony of plaintiff shows that he was in his store on June 25, 1951, about 10 a. m. and Langford's son ran in and told him of a fire in the oil storage room; that at a point about 4 feet from the entrance to that room plaintiff saw fire around the gasoline drum, about the height of the ceiling, and made considerable effort to extinguish it, without avail. The fire department was called. Plaintiff testified that about that time (about 10 minutes after he learned of the fire) he saw appellant Tubbs standing about 10 or 15 feet from the oil room, smoking a half-smoked cigar, and talking to Langford, Jr. However, on a previous trial he indicated he saw Tubbs for the first time with the cigar fully 20 minutes or more after the fire started, and at that time the oil truck had been moved away by Tubbs. There was practically a complete loss of the building and contents by the fire. Plaintiff estimated the value of his stock in trade at around $6,000; that he salvaged about $1,300 of that amount, and that the fixtures and furnishings were valued at about $12,473.

Langford, Sr., testified that as he stepped out of the oil station office into the open to obtain a battery carrier in the oil room, he lit a match to light a cigarette, and that he then noticed a fire in the back end of the oil room about 21 feet from where he was then standing; that there was no explosion but the fire was about three feet high and three feet wide; that Tubbs was then standing by the side of the cab of his truck near the oil room talking to young Langford; that he told them there was a fire in the oil room and then went to see Rudolph about a fire extinguisher. He testified that if Tubbs was then smoking he did not notice it.

The son testified he was talking to Tubbs when his father came out of the office, and that he said "there is a fire" in the oil room; that Tubbs was "doing something with the hose", and that he stopped and looked for a fire extinguisher on Tuggs' truck but did not find one; that he looked in the oil room and the fire was near the oil drum up against the back of the building and was three or four feet in diameter and four feet high; that he secured a fire extinguisher bomb from Rudolph's store and tried to extinguish the fire, without success.

Appellant Tubbs testified the front end of his truck was parked three or four feet from the oil room; that the hose was kept on the truck about 16 inches back of the cab; that the hose nozzle was carried to the oil drum about 25 feet away from the truck; that the barrel was partly filled with gas and the cap replaced in the drum; that the supply of gas was shut off at the brass nozzle and that he walked back to the truck with the nozzle in his hands, hung it in position on the truck, and then reeled up the hose by hand; that no one was with him while he was in the oil room; that he smoked cigars or cigarettes but did not light one on that occasion until after the fire was about out, when he walked over to the cafe, bought a cigar, lit it, and then stood by the burned building; that the first time he saw a fire was when Langford, Sr. told him there was a fire in the oil room; that he then saw the fire in back of the oil room about three feet west of the oil drum blazing from the ground and no flash or explosion from the gasoline was seen or heard; and that there was no singeing of his hair or clothing, or any evidence of burn marks on him.

Another witness testified he was buying a new battery from Langford; that he took the old one and placed it just inside the oil room and went into the office; that he came out of the office with Langford, Sr., and when he was about five feet from the entrance to the oil room Langford discovered a fire and Tubbs was at that time standing near his truck; that the fire was burning at the back end of the oil room.

Another witness testified that when he first saw the fire he observed smoke coming from the "back of the building" near a tree by the compressor, which he indicated, and also "coming out of the back of the oil room" above the roof. One witness stated that there was a bigger fire in the store room adjoining the oil room than there was in the oil room.

A duly qualified expert testified that to ignite gasoline it took either a flame, spark, high pressure or high temperature; that immediately after filling a tank, such as that here involved, vapors will rise out of it and, being heavier than air, will settle down to the surface of the ground and may even go through cracks in the wall, and if there is no breeze to dissipate them it is dangerous to smoke or light matches around such an area at that time; that under these circumstances the vapors would ignite with a "swish" or "flash" and the action would be immediate and spontaneous and the person present would definitely know that such vapors had been ignited, but if the cap was off the tank, as indicated, after the building burned, there would be no explosion; that a lighted cigarette would ignite vapors, but put directly into a liquid it would not, it would drown, but the flipping of a lighted match or lighted cigarette into gas vapors might cause them to become ignited, but it would probably be instantaneous; that if vapors were ignited by lighting a match or cigarette the flash would probably singe or burn the hair, eyelashes and clothes of a person standing near the vapors; that if gasoline was poured on the ground and thus lighted a different effect would result and no explosion would result from this type of fire.

The claimed acts of negligence charged in plaintiff's complaint against these defendants are enumerated therein as follows: that the 50-gallon tank was the property of Ehrhorn and was placed in the above location by said appellant Ehrhorn, with the knowledge and consent of the defendant Mack Langford; that the placing and maintaining of that tank in that location was dangerous, careless and negligent on the part of each defendant; that Tubbs negligently filled the tank with gasoline "in that he allowed gasoline to overflow from said tank", failed to secure the top on said tank after having filled the same, failed continuously to man the nozzle with which said tank was filled; and from the outside of the building adjacent to his tank truck wound up the hose used in filling said tank by dragging the same, with nozzle attached, along the floor of such building across a live battery; and failed to have in his tank truck from which he was filling the aforesaid tank, a fire extinguisher of any kind; that plaintiff is informed and believes and alleges that Tubbs was "smoking a cigar at the time and place above set out". Then follows an allegation that defendant Langford was in the vicinity where the tank was being filled with gasoline and that at that time and place negligently and carelessly lighted a cigarette; and that as a result of the negligence, carelessness and recklessness of the defendants "as above alleged", "a fire was ignited" at or in the immediate vicinity of the aforesaid tank in the oil room above described, which destroyed plaintiff's equipment, etc., to his damage in the sum of $19,238.42. Plaintiff claimed loss of profits from the operation of the business at $700 per month, totaling $84,000. Apparently, at a former trial on these issues, plaintiff obtained a judgment for $5,000. A new trial was granted, upon the grounds of insufficiency of the evidence to sustain the verdict. On a retrial the jury found in favor of the defendant Mack Langford, but found a verdict against appellant Ehrhorn individually, and as doing business under the fictitious name and style of Navy Gas Co. in the sum of $22,000, for loss of stock in trade and furnishings and fixtures. It was conceded at the trial that there was no proof of loss of profits. To the astonishment of all parties concerned, including the trial judge, the verdict exceeded the proof of the amount of damages thus sustained by approximately $5,000, whereupon, counsel for defendants moved for judgment in favor of the defendants notwithstanding the verdict. After the jury was polled and was excused, and before the verdict was recorded, counsel for plaintiff moved the court to reduce the acount of the verdict to the proven amount of damage, to wit, $17,173. Accordingly, the court reduced the amount and ordered the verdict recorded in accordance with the reduction. Counsel for defendants again moved for a verdict in favor of the defendants notwithstanding the verdict as recorded, which motion was again denied. A motion for new trial on all statutory grounds was subsequently denied.

While the irregularity of such proceedings is not raised in the briefs, it appears to us that the ordinary and usual procedure of reducing an excessive verdict by motion for new trial on the ground of insufficiency of the evidence to support the verdict was not followed. Appellants would, under these circumstances, have been in a much different position than they now find themselves. Hansen v. Bledsoe, 130 Cal.App.2d 70, 278 P.2d 514. The verdict, as recorded, was not the one returned by the jury. In effect, the trial judge has substituted his judgment for that of the jury as to what damages plaintiff actually suffered. The evidence might well support an amount less than that awarded by the trial court. Whether the trial court could have ordered the jury again to retire and fix an amount in accordance with the evidence produced is, at the present time, problematical. See Crowe v. Sacks, Cal.App., 275 P.2d 589. Hearing granted by the Supreme Court.

[1] The real question for determination on this appeal is the sufficiency of the evidence to show negligence on the part of these appealing defendants to justify any verdict for plaintiff.

The evidence in respect to placing the oil drum in the position indicated is that the drum formerly belonged to Ehrhorn, and when he maintained that station he kept the drum and gasoline contained therein out in the open by an ice house; that when he surrendered the premises to Langford the empty tank was placed in this oil room for safe keeping. The evidence is silent as to who placed it on the rack in the position it was at the time of the fire. At least there is no evidence that appellant Ehrhorn placed or maintained the tank in that location at the time of the fire. From a mere examination of the testimony in this respect, no act of negligence is indicated which would support the verdict.

There is no indication that Tubbs recklessly filled the tank with gasoline or allowed it to overflow from the tank. In fact, the evidence is that he only placed 40 gallons in the 50-gallon empty tank. The claimed failure of Tubbs to secure the cap on the tank after having filled it arises from the fact that after the fire the cap could not be located. There is no indication that the failure to secure the cap on the tank after it was thus filled was the proximate cause of the "fire being *ignited*" at or in the immediate vicinity of the aforesaid tank. Counsel for plaintiff argues in this connection in his brief that even though Tubbs did not light the fire, it might well be that the actual cause of the entire store building burning was proximately caused from leaving the cap off of the gasoline drum, and accordingly Tubbs was negligent in this respect. It is appellants' contention that the cap was not screwed in tightly because it would aid in drawing off the gasoline from the spigot when placed in use by Langford.

It will be noted that the complaint charged Tubbs with the specific act of "igniting" the fire which destroyed plaintiff's property, and there is no suggestion in the complaint that this appealing defendant was negligent because after the fire was ignited he did or failed to do anything that caused the fire to spread to and damage plaintiff's property. There is no evidence that this appealing defendant failed continuously to man the nozzle or that he wound up the hose to the tank truck by dragging it with the nozzle attached, along the floor of the building across a live battery. In fact, there is no evidence the battery was live. It was taken from a car and was replaced by a new battery. There is no evidence that any sparks came from it, and in fact the testimony of the expert witness indicates that if the gas fumes had been lighted by live sparks there would have been a "swish" or flash of fire instead of the character of the fire indicated by the witnesses. The claim that this appellant failed to have on his tank truck a fire extinguisher was not negligence in itself, and it does not indicate that the failure to have such a fire extinguisher was a proximate cause of the ignition of the fire as pleaded.

The last claim that Tubbs was smoking a cigar is not necessarily indicative of negligence unless such act was a proximate cause of the ignition of the fire, as pleaded. The only evidence bearing on this subject is the testimony of the plaintiff at the last trial that he saw Tubbs somewhere between ten minutes after he was notified of the fire and a half hour thereafter, smoking a half-burned cigar while he was standing outside near his truck. This appellant endeavors to account for his half-smoked cigar by stating that he secured it and first smoked it when the fire was about subdued, and after he had moved the gasoline truck away from the premises. He positively stated he was not smoking it while in the oil room or while engaged in the act of filling the tank, which took only about two minutes of that time. Considering this evidence in connection with the testimony of the expert witness, had the gasoline fumes ignited from the lighting of a match or cigar in the oil room while these fumes were predominant, there would have been a flash or splash and there would have been some evidence of the burning of the person or his clothing. There concededly was no evidence of any such burning or that the cigar ignited the gasoline fumes causing the fire.

The was considerable evidence offered by the appellants indicating that the fire may have started from a spark from the compressor located just outside of the north end of the oil room, or combustion from the storage room of plaintiff adjoining the oil room. The actual cause of the ignition of the fire was problematical. Counsel for plaintiff took great pains in not indicating to the jury what he believed was the cause of the fire, but left it to the jury to determine that fact, arguing that the plaintiff's property was burned and someone must have been negligent in starting the fire. As will be noted, the pleadings do not indicate that plaintiff was seeking a recovery upon the theory of *res ipsa loquitur.* The cause was not tried on that theory. No instructions were offered or given on the subject matter, and for the first time on appeal it is now claimed that the judgment can be supported upon that theory, citing such cases as Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, 247 P.2d 344; Rose v. Melody Lane, 39 Cal.2d 481, 247 P.2d 335; Knell v. Morris, 39 Cal.2d 450, 247 P.2d 352; and Gish v. Los Angeles Ry. Corp., 13 Cal.2d 570, 583, 90 P.2d 792.

[2] Since there is no substantial evidence supporting the specific allegations of negligence set out in the complaint, the question then arises whether or not, under the pleadings and the evidence, plaintiff is entitled to have the doctrine of *res ipsa loquitur* applied in order to support the judgment.

The principles of the rule are stated in the case of Zentz v. Coca Cola Bottling Co., supra [39 Cal.2d 436, 247 P.2d 347], to be that:

> "* * * it must appear, either as a matter of common experience or from evidence in the case, that the accident is of a type which probably would not happen unless someone was negligent. In the absence of such a probability there would be no basis for an inference of negligence which would serve to take the place of evidence of some specific negligent act or omission. The defendant, of course, should not be liable unless it appears from all the facts and circumstances that there is a sufficient causal connection between his conduct and the plaintiff's injury, and it has been held that *res ipsa loquitur* will not apply if it is equally probable that the negligence was that of someone other than the defendant. * * * the doctrine is not applicable where it is 'at least equally probable that the accident was caused by some fault * * * for which defendants were not liable' and where 'it cannot be said that it is more likely than not that the accident was caused by the negligence of *defendants*'. * * * In dealing with this problem the courts have usually said that the defendant must have 'management' or 'control' of the agency or instrumentality which caused the injury. * * * the purpose of this requirement is to eliminate the possibility that the accident was caused by someone other than the defendant."

Applying this rule, it may be very well granted that fires do start in or about service stations under a number of circumstances such as faulty wiring, sparks emanating from motors, or combustion, as well as by smoking or lighting cigarettes or cigars, and the cause of the fire here in question may have been from one of these origins. At least the evidence in that respect is conflicting and open to several possibilities. The extent of control appellants exercised over the instrumentality which may have caused the fire is also open to question. Regardless of these questions, we are impelled to hold that the doctrine cannot be here considered for the first time on appeal due to the fact that plaintiff did allege in his complaint seven specific acts of claimed negligence of these appellants, and made no general allegation of negligence or allegation of general negligence. The case was not tried upon the theory of *res ipsa loquitur,* and the jury was not instructed on the application of that doctrine nor in regard to the necessity of establishing proof of all the required elements before it could be applied.

In the case of Leet v. Union Pacific R. Co., 25 Cal.2d 605, 155 P.2d 42, 158 A.L.R. 1008, relied upon by plaintiff, after discussing the holdings in many cases, the court concluded (quoting from the syllabus) that:

> "If plaintiff alleges negligence specifically and generally he may rely on

the doctrine of *res ipsa loquitur,* and the general inference of negligence flowing therefrom, without limitation to the particular acts of negligence alleged, inasmuch as by the general allegation of negligence defendant is notified that he must meet such a broad inference."

It adopts the holding in Marovich v. Central California Traction Co., 191 Cal. 295, at page 306, 216 P. 595, at page 600, wherein it is stated that: "* * * where the plaintiff in his complaint makes no general allegation of negligence or no allegation of general negligence, instructions applying the doctrine of *res ipsa loquitur* should not be given. This must be so, for the reason that in such case the plaintiff can recover only upon proof of one or more of the specific acts or omissions alleged in his complaint."

Accordingly, the judgment must be and is reversed.

BARNARD, P. J., and MUSSELL, J., concur.

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133 Cal.App.2d 304

Vincent R. CARUSO et al., Plaintiffs and Appellants,

v.

C. L. ABBOTT et al., Defendants and Respondents.

Civ. 16316.

District Court of Appeal, First District, Division 1, California.

May 27, 1955.

Rehearing Denied June 24, 1955.

Hearing Denied July 20, 1955.

Action for damages and injunction by funeral director on ground that coroner pursuant to conspiracy appointed other funeral directors, as deputies, to enable directors to obtain all funeral business from coroner cases. The Superior Court, County of Contra Costa, Norman A. Gregg, J., sustained general and special demurrers to complaint, without leave to amend and plaintiffs appealed. The District Court of Appeal, Draper, J. pro tem., held complaint alleged sufficient facts to entitle plaintiff to opportunity to attempt amendments which would set out, with definiteness and particularly, a cause of action.

Reversed.

1. Officers 🔑116

Where the law vests in public officer discretion to act or refrain from action, officer will not be held personally liable for error or negligence in the exercise of that discretion, if acts are done without malice or corruption and within scope of authority conferred by law.

2. Officers 🔑114

Public officers exercising judicial functions are exempt from personal liability to those claiming loss by reason of their decisions and even allegation of malice does not restrict this exemption.

3. Coroners 🔑23

Where complaint, based on theory of restraint of trade, alleged coroner appointed owners of undertaking establishments as deputies for particular sections of county, to enable owners to obtain funeral business of coroner cases, complaint did not show coroner or deputies were exempt from personal liability as having acted, in a judicial or quasi-judicial capacity. Health and Safety Code, §§ 10450, 7102.

4. Coroners 🔑23

If county coroner appointed funeral directors his deputies, to enable directors to obtain all funeral business from coroner cases in their respective sections of county, thereby restricting trade and restraining competition, the fact that directors acquired custody of bodies lawfully, and as public officers, would not exempt them from personal liability for subsequent unauthorized abuse of that authority. Health and Safety Code, §§ 10450, 7102; West's Ann.Bus. & Prof. §§ 16700–16758; U.S.C.A.Const. Amend. 14; 42 U.S.C.A. § 1983.

5. Appeal and Error ⚿917(1)

On appeal from judgment entered on order sustaining general and special demurrer to complaint, court must assume allegations of complaint to be true.

6. Pleading ⚿207

In action by funeral director for conspiracy between coroner and other funeral directors, appointed deputies to enable them to obtain all funeral business from coroner cases, thereby restricting trade and restraining competition, allegations of complaint that deputies pursue their investigations in such a way as to embarrass next of kin and subject reputable licensed physicians to harassment, had no apparent connection with claim and were subject to special demurrer. Health and Safety Code, §§ 10450, 7102; West's Ann. Bus. & Prof. §§ 16700–16758; U.S.C.A. Const. Amend. 14.

7. Pleading ⚿243

Funeral director's complaint which alleged that pursuant to conspiracy county coroner appointed other funeral directors as deputies to handle all coroner cases in their respective districts, to enable such directors to obtain funeral business of coroner cases, thereby restricting trade and restraining competition, stated sufficient facts to entitle plaintiff to opportunity to attempt amendments which would set out, with definiteness and particularity, a cause of action. Health and Safety Code, §§ 10450, 7102; West's Ann.Bus. & Prof. §§ 16700–16758; U.S.C.A.Const. Amend. 14.

8. Injunction ⚿22

Where complaint requested injunction against conspiracy pursuant to which coroner, subsequently retired, appointed funeral directors as deputies, allegedly to enable funeral directors to obtain funeral business from coroner cases, injunction could not be granted against coroner because essence of cause of action was coroner's power to appoint and retain deputies. Health and Safety Code, §§ 10450, 7102; West's Ann.Bus. & Prof. §§ 16700–16758.

◆

Long & Levit, Bert W. Levit, George England, David C. Bogert, San Francisco, for appellant.

Francis W. Collins, Dist. Atty., of Contra Costa County, Martinez, for respondent, C. L. Abbott as County Coroner.

Tinning & DeLap, T. H. DeLap, Richmond, for respondents.

DRAPER, Justice pro tem.

General and special demurrer to amended complaint was sustained without leave to amend. Plaintiffs appeal from judgment entered upon this order.

Appellants are licensed funeral directors doing business in Contra Costa County. They allege that respondent Abbott (not a mortician) is coroner of that county, and that the other 14 respondents are the owners of 8 undertaking establishments operating in the county.

The complaint alleges that 30% of all deaths in the county occur under circumstances which require signing of a death certificate by the coroner, pursuant to Health and Safety Code sec. 10450, and charges that respondents have conspired and combined to restrict trade and restrain competition, particularly that of appellants, in the undertaking business derived from such "coroner cases" in the county.

Appellants allege that to effect such restraint, respondents have divided the county into districts and respondent coroner has appointed one of respondents as the sole deputy in each such district, in order to enable the mortician so appointed to obtain all the funeral business of coroner cases in his district.

It is alleged that the bodies in all coroner cases in each district are required to be brought to the funeral establishment of the deputy coroner of that district for investigation and examination. (Although alleged as an act in furtherance of the conspiracy, this seems justified, if not required, by Health and Safety Code sec. 7102.) The gravamen of the complaint, however, is that respondent deputies use the custody thus acquired, through a series of acts and practices (at least some of which appear to be contrary to the statutory regulations prescribed for the mortuary business), to secure the funeral business in such cases for themselves and to exclude appellants therefrom, even in cases where next of kin have designated appellants to perform such services.

It is then alleged that appellants have "lost to" respondent deputies the funeral business of "numerous coroner cases to which (appellants) were summoned by relatives, families or next of kin, by peace officers or by others" and have been otherwise injured in their business, to their damage in the sum of $60,000.

The first count is asserted to be a cause of action under the Cartwright Act, Business and Professions Code secs. 16700–16758, and appellants seek twofold damages. The second count, based upon the same facts, seeks a recovery for unfair competition and restraint of trade under common law rules. The third count also incorporates the allegations of the first, and alleges that the acts of respondents, done in their official capacities, constitute a denial of due process and equal protection of the laws, in violation of the Fourteenth Amendment.

Appellants pray for damages and for injunction. At argument on the demurrer, counsel for plaintiffs specifically requested leave to further amend the complaint.

Respondents pleaded the statute of limitations as a ground of demurrer, but, in their brief, disclaim reliance upon that ground as a defense to the acts alleged to have been done within 3 years before filing the complaint.

Respondents' principal contention is that each cause of action "has for its foundation the acts of the coroner and his deputies acting for him and performed as public officers." Except for this issue, no serious question is raised that a cause of action is stated under the Cartwright Act, as well as for violation of the common law rights against restraint of trade. Speegle v. Board of Fire Underwriters, 29 Cal.2d 34, 172 P.2d 867.

[1] Respondents assert that, as public officers, they are exempt from personal liability in damages for acts done by them in the performance of their official duties. They cite County of San Mateo v. Maloney, 71 Cal. 205, 12 P. 53; Porter v. Haight, 45 Cal. 631; Downer v. Lent, 6 Cal. 94; People v. Standard Accident Ins. Co., 42 Cal.App.2d 409, 108 P.2d 923; and Jones v. Richardson, 9 Cal.App.2d 657, 50 P.2d 810. These cases do establish that where the law vests in a public officer discretion to act or refrain from action, he will not be held personally liable for error or negligence in the exercise of that discretion.

But substantially all these decisions contain language limiting the rule to acts done without malice or corruption, and within the scope of the authority conferred by law.

[2, 3] In a related field, it has long been the rule that officers exercising judicial functions are exempt from personal liability to those asserting loss by reason of their decisions, and that even the allegation of malice does not restrict this exemption. Bradley v. Fisher, 80 U.S. 335, 13 Wall. 335, 20 L.Ed. 646; Turpen v. Booth, 56 Cal. 65. This rule has been extended to quasi-judicial functions. Wilson v. Sharp, 42 Cal.2d 675, 268 P.2d 1062; White v. Brinkman, 23 Cal.App.2d 307, 73 P.2d 254; Pearson v. Reed, 6 Cal.App.2d 277, 44 P.2d 592.

Respondents cite People v. Devine, 44 Cal. 452; Gray v. Southern Pacific Co., 21 Cal.App.2d 240, 68 P.2d 1011; and Huntly v. Zurich General Accident & Liability Ins. Co., 100 Cal.App. 201, 280 P. 163, for the rule that a coroner acts in a judicial capacity in holding an inquest. But the allegations of the amended complaint here do not relate to inquests, and there seems little reason to hold that a coroner or his deputies act in a judicial or quasi-judicial capacity as to the matters which are the basis of this complaint.

Although not referred to in the briefs, well established rules of law place definite limitations upon a public officer's exemption from personal liability.

Police officers are personally liable in damages for false imprisonment. Hughes v. Oreb, 36 Cal.2d 854, 228 P.2d 550; Oppenheimer v. City of Los Angeles, 104 Cal.App.2d 545, 232 P.2d 26; Collins v. Jones, 131 Cal.App. 747, 22 P.2d 39. These decisions make it clear that acts in excess of the authority of a police officer render him personally liable, even though he purports to act in his official capacity.

In Coyne v. Nelson, 107 Cal.App.2d 469, 475, 237 P.2d 45, 49, a police officer was held liable in both compensatory and punitive damages upon evidence that he "without good faith imprisoned respondent for the purpose of aiding in the extortion of money from him."

Kaufman v. Brown, 93 Cal.App.2d 508, 514, 209 P.2d 156, 159, suggests strongly that an officer's unreasonable delay in taking a prisoner before a magistrate renders the officer personally liable "regardless of the lawfulness of the arrest in the first instance."

A police officer has been held personally liable for damages for battery committed in the course of an arrest made by him while on duty. Appier v. Hayes, 51 Cal. App.2d 111, 124 P.2d 125.

A sheriff who lawfully acquires custody of property under writ of attachment is liable in damages to a third party claimant whose rights are ignored in the sale of such property under execution. Thompson v. Byers, 116 Cal.App. 214, 2 P.2d 496.

In Withington v. Shay, 47 Cal.App.2d 68, 69, 117 P.2d 415, 119 P.2d 1, a sheriff sold property under decree ordering foreclosure of mechanic's liens. The decree made no provision for disposition of any surplus over the amount necessary to satisfy the liens. There was a surplus, execution was levied upon it, and the sheriff paid such surplus to the execution creditor. Judgment in favor of beneficiaries of a trust deed against the sheriff, as well as the execution creditor, was affirmed.

[4] It is apparent that respondent deputies cannot claim exemption from liability for misusing or exceeding their authority in respect to bodies coming into their custody in their official capacity. The mere fact that they acquire such custody lawfully, and as public officers, does not exempt them from personal responsibility for subsequent unauthorized abuse of that authority.

The allegations here are that respondents, to permit respondent deputies to monopolize the funeral business of "coroner cases" in their county, combined to, and did, misuse their official authority to further their private business interests. The complaint alleges, in part, that respondent deputies, having obtained custody of bodies in their official capacity, "delay the performance of their duties as deputy coroners in coroner cases while they attempt to secure such funeral business for themselves"; that they "delay the release of bodies to morticians who are not deputy coroners but who have been designated by the * * * next of kin to * * * make funeral arrangements"; and that they "perform services on bodies which are in their possession as deputy coroners without permission * * * contrary to the * * * instructions of * * * next of kin."

These allegations are somewhat qualified, and they lack the directness and precision which is to be expected in pleading. Appellants assert their intent to allege specifically that all these acts are wholly outside any official duty of respondents, and are done solely to secure private business for respondent deputies.

[5] However imperfectly, these allegations assert that respondents acted for private gain, and not in the discharge of their public duties. If these allegations be true, as we must assume on this appeal, respondents did not merely err in the performance of their public duties; rather, they deliberately disregarded the limits of their official authority, and did so solely for private gain.

The true basis for the rule exempting an officer from personal liability is that he should not suffer personally where, in his official capacity, he exercises a discretion which his public office requires him to exercise. Implicit in this reasoning is the requirement that his discretion be exercised in his public capacity and within the scope of his official authority. If a group of officials conspire to exceed their authority, even to the point of violation of express statutes governing their conduct, and for the sole purpose of their private business advantage, they cannot reasonably expect extension of the shelter of official immunity to their acts.

[6, 7] We do not hold that the complaint is good as against special demurrer. The allegations that respondent deputies "pursue their investigations * * * in such a way as to embarrass * * * next of kin", and that they "subject reputable licensed physicians to harassment", have no apparent connection with any claim of appellants against respondents.

Nor do we suggest or speculate that the allegations are susceptible of proof. We are concerned here only with the pleading. Sufficient facts are alleged to entitle appellants to attempt amendments which would set out, with definiteness and particularity, the causes of action upon which they rely. "The question presented is whether the plaintiffs under any view of the facts disclosed have stated or can state a cause of action for relief as against the defendants." Simpson v. Gillis, 1 Cal.2d 42, 49, 32 P.2d 1071, 1075.

[8] Since judgment, respondent Abbott has retired as coroner. On the authority of United States v. Boutwell, 84 U.S. 604, 17 Wall. 604, 21 L.Ed. 721, appellants concede that there can now be no injunction against him. The stipulation of the parties does not cover the situation of the deputies, and we are not judicially informed whether they have been reappointed. But the essence of plaintiffs' cause of action, so far as it seeks an injunction, is a conspiracy based upon the coroner's power to appoint and retain named deputies. Clearly that has ceased with the coroner's retirement, and there is no field for the necessarily prospective operation of an injunction.

We have entertained doubt as to the right to maintain an action in the courts of this state for damages only, under the third count (denial of due process and equal protection of the law). There is room for the view that the Civil Rights Statute, 42 U.S.C.A. § 1983, establishes a cause of action for damages cognizable only in the federal courts. However, since this point is not raised by the parties, we do not pass upon it here.

The judgment is reversed, with directions to the trial court to grant plaintiffs leave to amend their amended complaint.

PETERS, P. J., and FRED B. WOOD, J., concur.

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133 Cal.App.2d 374

Beatrice SEABRON, Plaintiff and Appellant,

v.

John H. SEABRON, Defendant and Respondent.

Civ. 20774.

District Court of Appeal, Second District, Division 1, California.

June 1, 1955.

Wife's action for separate maintenance. The Superior Court, Los Angeles County, Elmer D. Doyle, J., dismissed wife's order to show cause why husband should not pay her attorney's fees, costs, alimony pendente lite, and support for minor child of parties. Wife appealed. The District Court of Appeal, Drapeau, J., held that wife had right to attack validity of Alabama divorce decree obtained by husband on ground that Alabama court did not have jurisdiction to grant it.

Order reversed.

1. Judgment 🔑818(1, 7), 822(1)

If a judgment of a court of a sister state is valid and regular on its face, it must be accorded full faith and credit in this state, but if such court was without jurisdiction either of the cause or the parties the judgment may be ignored, and such lack of jurisdiction may be shown by evidence other than the record of the judgment and even by evidence opposed to recital contained in such record. West's Ann.Code Civ.Proc. § 1916.

2. Divorce 🔑357(1)

In wife's action for separate maintenance, wife had right to attack validity of Alabama divorce decree obtained by husband on ground that Alabama court did not have jurisdiction to grant it. West's Ann. Code Civ.Proc. § 1916.

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Guerin & Guerin, Los Angeles, for appellant.

No appearance, for respondent.

DRAPEAU, Justice.

The Superior Court dismissed an order to show cause why the defendant should not pay plaintiff her attorneys' fees, costs, alimony pendente lite, and support for a minor child of the parties. The order to show cause issued concurrently with the filing of plaintiff's complaint for separate maintenance.

Upon the hearing of the order to show cause it was stated by counsel: That plaintiff left her husband in the State of Alabama; that he obtained a decree of divorce from her in that state; that he never has been a resident of California, and that the plaintiff induced him to come here by representing to him that she wanted him to have the child six months out of the year, but that when he came here to arrange for this he was served with process in this case.

The decree is an exhibit, and appears to be regular on its face.

[1, 2] Plaintiff appeals from the order of dismissal. She contends that she had a right to attack the validity of the decree, upon the ground that the Alabama court did not have jurisdiction to grant it. This the trial court refused to permit.

It is a familiar principle that a judgment of a court of a sister state if valid, and if regular on its face must be accorded full faith and credit in this state. Worthley v. Worthley, 44 Cal.2d 465, 283 P.2d 19.

But if such court was without jurisdiction either of cause or parties the judgment may be ignored. Section 1916, Code of Civil Procedure; Hammell v. Britton, 19 Cal.2d 72, 119 P.2d 333; In re Culp, 2 Cal.App. 70, 83 P. 89.

And lack of jurisdiction may be shown by evidence other than the record of the judgment, and even by evidence opposed to recitals contained in such record. Strauss v. Strauss, 90 Cal.App.2d 757, 203 P.2d 857.

It follows, therefore, that the order dismissing the order to show cause must be, and is reversed.

WHITE, P. J., and DORAN, J., concur.

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133 Cal.App.2d 311

The PEOPLE of the State of California, Plaintiff-Respondent,

v.

ONE 1950 CADILLAC 2-DOOR CLUB COUPE, ENGINE NO. 506263120, Defendant,

Tollie B. Matthews, Claimant and Appellant.

Civ. 16415.

District Court of Appeal, First District, Division 1, California.

May 27, 1955.

Proceeding for forfeiture of automobile allegedly used in transportation of a narcotic illegally. The Superior Court, County of Alameda, Richard H. Chamberlain, J., entered judgment of forfeiture and owner of vehicle appealed. The District Court of Appeal, Peters, P. J., held that even if owner of automobile had been previously acquitted of criminal charge based upon same facts upon which subsequent forfeiture proceeding was grounded, an acquittal on the criminal charge was not a bar to the forfeiture proceeding.

Judgment affirmed.

1. Criminal Law 🔑163

Judgment 🔑559, 648

Even if owner of automobile, subject of a forfeiture proceeding, was acquitted of charge of selling and furnishing a narcotic, doctrines of res judicata, double jeopardy or estoppel by judgment would not be applicable in forfeiture proceeding for use of automobile in unlawful transportation of narcotics, since the charge in the subsequent forfeiture proceeding would involve different elements, even if both proceedings were essentially criminal in nature.

2. Judgment 🔑559

Even if owner of automobile, subject of forfeiture proceeding, was acquitted of criminal charge of selling and furnishing of a narcotic, acquittal was not a bar to a subsequent forfeiture proceeding for unlawful use of automobile in transportation of narcotic, even though both proceedings were based on identical facts. Health and Safety Code, §§ 11500, 11612.

3. Judgment 🔑559

Acquittal of a criminal charge is not a bar to a subsequently tried proceeding, if the subsequent proceeding is not criminal in nature.

4. Judgment 🔑559

Revocation of a license is not a criminal proceeding, and is not barred by an acquittal of a criminal charge involved in the license proceeding.

5. Forfeitures 🔑5

Proceeding to forfeit automobile because of its use in unlawfully keeping, depositing and concealing narcotics, is civil in nature. Health and Safety Code, §§ 11610 et seq., 11617, 11619, 11710 et seq.

6. Criminal Law 🔑290

Double jeopardy is an affirmative defense which must be pleaded.

7. Judgment 🔑559

The difference in degree of burden of proof in criminal and civil cases precludes application of doctrine of res judicata in subsequent civil case.

8. Forfeitures 🔑5

The higher degree of proof on which the acquittal in criminal proceeding is based prevents its admissibility as conclusive evidence or any evidence in subsequent forfeiture proceeding.

Haley & McInerney, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., Charles A. Barrett, Victor Griffith, Deputy Attys. Gen., for respondent.

PETERS, Presiding Justice.

Tollie B. Matthews, the registered and legal owner of a motor vehicle, appeals from a judgment forfeiting the vehicle to the state because used to transport a narcotic illegally. By his answer Matthews raised the defense that he had been acquitted of a criminal charge growing out of the same transaction and, therefore, had been once in jeopardy. During the trial he moved to dismiss on this ground. The trial court denied the motion, found the facts in favor of the state, and ordered the vehicle forfeited. Matthews appeals on a Clerk's Transcript, his sole contention being that his motion to dismiss should have been granted.

The trial court found that on September 28, 1953, one Percy was an occupant of the vehicle here involved; that Percy then was in possession of heroin; that Matthews, the registered and legal owner of the car, was the driver of the car and knew that Percy was in possession of heroin; that the allegations of the Notice of Seizure are true; that on December 1, 1953, Matthews and Percy were jointly charged by information "with a violation of Section 11500 of the Health and Safety Code * * *, to wit, the sale and furnishing of a narcotic, to wit, heroin, on September 28, 1953"; that Percy was convicted "on said charge" and Matthews was acquitted "on said charge"; that before trial of the criminal charge this forfeiture proceeding was filed. Based on these findings the trial court ordered the forfeiture.

No question of the sufficiency of the evidence is or can be raised on this appeal. The sole contention made is that the forfeiture was imposed as a penalty or as punishment, and that an acquittal of a criminal charge, as a matter of law, is a bar to a forfeiture based upon the same transaction.

[1] It is by no means clear that the criminal charge and the forfeiture proceeding are based on the same facts, although admittedly they grew out of the same transaction. All we have before us is the Clerk's Transcript. The Notice of Seizure forming the legally required basis of this forfeiture proceeding, Health and Safety Code, § 11612, recites that the vehicle was seized, and avers that forfeiture is sought because "said vehicle was used to unlawfully keep, deposit, conceal, convey, carry or transport narcotics, to wit—heroin, or said narcotics were unlawfully possessed by an occupant thereof." This allegation was found to be true. All that we know about the criminal charge is what appears in the unchallenged finding. It recites that Percy and Matthews were jointly charged "with a violation of Section 11500 of the Health and Safety Code * * *, to wit, the sale and furnishing of a narcotic." It is obvious that a charge of "sale and furnishing" a narcotic requires different proof from a charge of unlawful transportation or unlawful possession by an occupant. Obviously, in order to show a sale the prosecution must prove certain facts that are different from the facts that must be proved in an unlawful transportation charge. Thus, even if the forfeiture and criminal proceedings were both essentially criminal in nature, so that in a proper case the doctrines of once in jeopardy, *res judicata* or estoppel by judgment would be applicable, it is very doubtful if any of those doctrines would be applicable where the criminal charge involves different elements, and is essentially a different charge from that involved in the forfeiture proceeding.

[2] However, we are not inclined to rest our decision on this ground alone. Both sides to this appeal assume that the "charges" involved in the two proceedings were identical, grew out of the same transaction, and are based on identical facts. As an alternative ground of this opinion, see Bank of Italy, etc. Ass'n, v. Bentley, 217 Cal. 644, at page 650, 20 P.2d 940, it is our conclusion that, even where the criminal charge and the forfeiture proceeding are based on the same identical facts, an acquittal on the criminal charge is not a bar to the forfeiture proceeding.

Appellant's argument to the contrary is based on certain language appearing in two opinions, one by the United States Supreme Court and the other by the California Supreme Court. The first of these cases is Helvering v. Mitchell, 303 U.S. 391, 58 S.Ct. 630, 82 L.Ed. 917. In that case the Commissioner of Internal Revenue sued for a statutory 50 per cent additional assessment imposed on the taxpayer if found to have had a fraudulent intent to evade the tax. The taxpayer had been acquitted of a criminal charge of a wilful attempt to evade the tax. He pleaded this acquittal as a defense to the fraudulent assessment suit. The court discussed at length the distinctions between civil and criminal sanctions, the differences in proof in civil and criminal proceedings, emphasized the fact that the assessment case was civil in nature, and concluded that the 50 per cent penalty was intended as remedial and was not basically penal. It therefore held that neither the doctrine of *res judicata* nor once in jeopardy was applicable. In so holding, the Court used the following language upon which appellant here relies, 303 U.S. at page 397, 58 S.Ct. at page 632: "That acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based has long been settled. [Citing cases.] *Where the objective of the subsequent action likewise is punishment, the acquittal is a bar, because to entertain the second proceeding for punishment would subject the defendant to double jeopardy*". (Italics added.) The Court then went on to hold that the legislation providing for the 50 per cent penalty imposed a civil sanction and was remedial in nature, and was not a criminal sanction intended as punishment. For that reason the doctrines of once in jeopardy and *res judicata* were held not applicable.

Appellant next contends that forfeiture of a vehicle in a narcotics case in California is intended as punishment, constitutes a criminal penalty, and that the Supreme Court of California has so held. To establish this premise appellant quotes a portion of one paragraph from the opinion in People v. One 1941 Chevrolet Coupe, 37 Cal.2d 283, 231 P.2d 832. That case involved the question as to whether the owner of a vehicle in a forfeiture proceeding under the very statute here involved was entitled to a jury trial. In the course of its 20-page opinion the Court stated, 37 Cal.2d at page 302, 231 P.2d at page 845: "Although the suit by the state is nominally *in rem* against the vehicle itself, in reality it is directed against those who have property interests in the vehicle. The automobile is not itself an offender but has merely been used in the commission of an offense. The statute operates to transfer property rights in the automobile to the state, *as a penalty against the owners* for this misuse." (Italics added.)

The argument of the appellant is very simple, and is based on the italicized portions of the two opinions quoted above. He points out that the Helvering case held that jeopardy applies if the forfeiture is imposed as punishment. Then he points out that the Supreme Court of California has held that forfeiture is imposed as a penalty for the criminal misuse of the vehicle. Thus, to him, the conclusion is inescapable that the acquittal on the criminal charge is a bar to the forfeiture. While this syllogistic reasoning has the virtue of simplicity, the difficulty is that the premises upon which it is based are unsound.

It should be pointed out that the federal cases on this subject were interpreting the Fifth Amendment to the United States Constitution, which is a restriction on the federal government and not on the states. People v. Bechtel, 41 Cal.2d 441, 260 P.2d 31. The federal cases on this subject, at most, are merely persuasive and not controlling. People v. One 1952 Chevrolet, 128 Cal.App.2d 414, 275 P.2d 509.

Moreover, the federal rule is by no means as clear or as simple as appellant states it. The confusion arises because most of the equivocal language in the federal cases was used in an attempt to distinguish, without overruling, the 1885 decision of the Supreme Court of the United States in Coffey v. United States, 116 U.S. 436, 6 S.Ct. 437, 29 L.Ed. 684. In that case it was held that a judgment of acquittal for attempting to defraud the government of the tax on distilled spirits was a bar to a forfeiture of the distilled spirits and distilling equipment based on the same facts. The Court held that the fraudulent acts involved in the criminal charge embraced "all of the acts," 116 U.S. at page 442, 6 S.Ct. at page 440, involved in the forfeiture suit. The Court recognized that the forfeiture proceeding was a civil action *in rem* requiring only a preponderance of the evidence while the criminal action required proof of guilt beyond a reasonable doubt, but nevertheless held the acquittal a bar, because the forfeiture was imposed as a "punishment" for an act that had been found non-existent in the criminal proceeding. See also United States v. La Franca, 282 U.S. 568, 51 S.Ct. 355, 74 L.Ed. 1134.

Since 1885 the Coffey case has been discussed and distinguished by the federal courts until it is very doubtful indeed if much of the original holding remains intact. Thus, in the Helvering case, supra, the Coffey case was distinguished on the ground that the sanction involved in the Coffey case was "penal" while that in the Helvering case was "remedial." In Murphy v. United States, 272 U.S. 630, 47 S.Ct. 218, 71 L.Ed. 446, it was held that an acquittal of a criminal charge of maintaining a nuisance by keeping liquor illegally on the premises was not a bar to an action in equity to abate the nuisance. It was argued that under the Coffey case the abatement was an additional penalty for the same act. Mr. Justice Holmes, speaking for the Court, found that although the "contention is plausible it seems to us unsound." 272 U.S. at page 631, 47 S.Ct. 218. He then went on to hold that "The mere fact that it [abatement] is imposed in consequence of a crime is not conclusive", and then held that abatement is imposed primarily for prevention and not as a second punishment. The federal cases have generally held that the once in jeopardy or *res judicata* arguments are not applicable to proceedings *in rem* to forfeit a thing because of its status. United States v. Three Copper Stills, D.C., 47 F. 495; United States v. One Machine for Corking Bottles, D.C., 267 F. 501; Various Items v. United States, 282 U.S. 577, 51 S.Ct. 282, 75 L.Ed. 558.

The prevailing view of the federal courts towards the Coffey case was well expressed by the Ninth Circuit Court in United States v. Gramer, 191 F.2d 741, 27 A.L.R. 2d 1132, where a criminal acquittal for misbranding drugs was held not to be a bar to an action to confiscate the drugs. The Court stated, 191 F.2d at page 743: "Subsequent decisions of the Supreme Court have strictly limited the operation of the Coffey rule, but the case has never been expressly overruled." After discussing several cases, the Court continued, 191 F.2d at page 743: "We need not dwell upon the problem of whether or not the Coffey case, even if limited to its facts, is still the rule in federal courts. The expressions of the Court of Appeals for the Third Circuit in United States v. One Dodge Sedan, 3 Cir., 113 F.2d 552, 553, adequately covered our views on that subject when it stated that '* * * only the shibboleth of "stare decisis" has saved it from express repudiation.' A consideration of the subsequent holdings of the Supreme Court, discussed above, lead us to the conclusion that in the case before us neither the judicial doctrine of *res judicata* nor the constitutional mandate against double jeopardy operates to prevent the action here involved."

After further discussion the Court concluded, 191 F.2d at page 744: "If the Coffey case is to be considered as the law its doctrine, if taken to rule the instant case, would lead to great governmental limitation and public harm. An acquittal, even through wholly inadequate proof of violation of the Food, Drug and Cosmetic Act [21 U.S.C.A. § 301 et seq.], could practically stop the government from preventing the sale of a most harmful or wholly ineffective nostrum. Extension of the Coffey rule would not be justified unless clearly required."

The language of the Third Circuit in the case referred to supra—United States v. One Dodge Sedan, 113 F.2d 552—was even more pointed. The action was one to confiscate an automobile for the illicit transportation of alcohol. The driver of the car had been acquitted of the criminal charge of acting as convoy officer in the transportation. The Court held that the acquittal was not a bar in the proceeding to forfeit the car owned by the wife of the defendant in the criminal proceeding. In distinguishing the Coffey case the Court stated, 113 F.2d at page 553:

> "That case has received a distinctly 'unfavorable press'. It has also suffered by implication, at least, in later decisions of the same tribunal. These cases certainly limit its holding to the particular facts. One has indeed the impression that only the shibboleth of 'stare decisis' has saved it from express repudiation.
>
> "We think that the particular facts of the principal case [that the wife and not the driver of the car owned the vehicle] give us the necessary loophole * * *."

See also United States v. Twenty Strings Seed Pearls, D.C., 34 F.2d 142; United States v. 2,180 Cases of Champagne, etc., D.C., 4 F.2d 735; Stone v. United States, 167 U.S. 178, 17 S.Ct. 778, 42 L.Ed. 127; United States v. One Stephens Automobile, D.C., 272 F. 188.

[3] The California courts in passing on the question here involved have not adopted precisely the same rule that appellant claims that the federal courts have adopted, namely, that whether the acquittal is a bar depends upon whether the sanction imposed is "remedial" or intended as a "punishment," but have adopted the more logical approach of holding that an acquittal is not a bar in a subsequently tried proceeding if the subsequent proceeding is not criminal in nature. The rule that appellant claims the federal courts have adopted (and we believe that such courts have only given lip service to such rule and actually apply a rule similar to that applied in California) is almost impossible to apply. Every civil sanction, such as forfeiture of property, an additional penal-

ty, deprivation of a license, etc., can be considered in various ways. Obviously, so far as the wrongdoer is concerned, such a sanction, in a very real sense, is an additional punishment to that provided by the penal laws. So far as the public is concerned, however, such a sanction is "remedial" in that it acts as a deterrent, helps in the enforcement of the law, and, to some extent, reimburses the government for the expense of enforcing the statute. Practically no civil sanction is entirely remedial or entirely intended as a punishment.

[4] As already stated, the rule adopted in California is that the acquittal of a criminal charge is not a bar to a subsequent proceeding if the latter is a civil proceeding and not criminal in nature. Thus, in In re Anderson, 107 Cal.App.2d 670, 237 P.2d 720, a defendant was acquitted of a criminal charge of carrying a concealed weapon. Later a proceeding to revoke his parole based on the same facts was instituted. It was held that it was not barred by the acquittal, because the subsequent proceeding was civil in nature. In Ex parte Morris, 194 Cal. 63, 227 P. 914, the defendant was criminally prosecuted for failure to obey a court order. Later he was charged with contempt for the same reason. The later proceeding did not place the defendant in double jeopardy because it was civil in nature. It is also well settled that since the revocation of a license is not a criminal proceeding, it is not barred by an acquittal of the criminal charge involved in the license proceeding. Traxler v. Board of Medical Examiners, 135 Cal.App. 37, 26 P.2d 710.

[5] There is no doubt that a proceeding to forfeit a car under section 11610 et seq. of the Health and Safety Code is civil in nature. The Legislature has so provided. Section 11617 provides that "the proceeding has priority over other civil cases." Moreover, the procedure provided is civil and not criminal. Thus, section 11619 provides for a verified answer by the owner. The people may appeal from an adverse decision, a right not present in criminal cases. It should also be mentioned that forfeiture is not found in that portion of the code dealing with "Penalties." They are provided for in section 11710 et seq. of the Health and Safety Code. It is also a fact that in some cases forfeiture will be decreed in spite of the guilt or innocence of the owner, as where the owner lends his car to a friend who transports narcotics without the owner's knowledge or consent. People v. One 1941 Ford 8 Stake Truck, 26 Cal.2d 503, 159 P.2d 641. In that case the Court also held that the purpose of the forfeiture provisions was "curbing the traffic in narcotics". 26 Cal.2d at page 506, 159 P.2d at page 642.

Moreover, the Supreme Court has held the action for a forfeiture to be civil. In People v. One 1941 Chevrolet Coupe, 37 Cal.2d 283, 231 P.2d 832, the Court was called upon to decide whether a lien holder has a right to a jury trial under the very statute here involved. The Court held that to decide the point the historical nature of the action as it existed at common law had to be ascertained. The opinion contains a detailed, lengthy and very interesting discussion of the nature of forfeiture actions in California. After such analysis the Court concludes that such actions are civil in nature.

[6] The point here involved was recently discussed (October of 1954) in the case of People v. One 1952 Chevrolet, 128 Cal.App.2d 414, 275 P.2d 509. That case, like the instant one, involved an attempted forfeiture of a vehicle because of its use in transporting narcotics. The owner had been acquitted of the criminal charge of possession. The owner maintained that the acquittal was a bar, or at least should have been admitted in evidence as evidence that the owner was not in unlawful possession of narcotics. The owner had not pleaded jeopardy as a defense, but he did offer at the trial to prove the fact of the acquittal. The offer was rejected. The Court first held that double jeopardy was an affirmative defense which had to be pleaded, and, since not here pleaded, this argument was not available on appeal. The Court then passed on whether the acquittal was admissible in evidence and

stated, 128 Cal.App.2d at page 418, 275 P.2d at page 511:

> "However, the fact that the forfeiture proceeding is considered a civil action in which no proof beyond a reasonable doubt is required [citing cases] leads to the conclusion of inadmissibility of the prior judgment of acquittal.
>
> [7] "'Where the same acts or transactions constitute a crime and also give a right of action for damages or for a penalty, the acquittal of defendant when tried for the criminal offense is no bar to the prosecution of the civil action against him, nor is it evidence of his innocence in such action. The acquittal ordinarily is not a bar to a civil action even by the state.' 50 C.J.S., Judgments, § 754, pp. 272–273. * * * In Helvering v. Mitchell, 303 U.S. 391, 397, 58 S.Ct. 630, 632, 82 L.Ed. 917, it is said: 'The difference in degree of the burden of proof in criminal and civil cases pre- res judicata. The acquittal was cludes application of the doctrine of "merely * * * an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused." (Citation.) It did not determine that Mitchell had not willfully attempted to evade the tax.' Most of the above authorities were quoted in In re Anderson, 107 Cal.App.2d 670, 237 P.2d 720 (hearing by Supreme Court denied) in which the court held that the fact that a parolee was acquitted of a charge of possessing a gun capable of concealment did not preclude the Adult Authority from revoking his parole for possession of a gun, although both decisions related to the same facts. The court also cited a Tennessee case, Galyon v. State, 189 Tenn. 505, 226 S.W.2d 270 as declaring that proceedings for revocation of parole are civil in nature."

The Court then holds that forfeiture proceedings are civil in character. It then discusses the Coffey case and again holds that since jeopardy had not been pleaded it was not available. In this connection the Court stated, 128 Cal.App.2d at page 420, 275 P.2d at page 512: "We therefore need not decide whether there is here such identity of the basis of both prosecutions and such an intrinsically punitive character of the forfeiture that the doctrine could apply, although it may be said that an affirmative answer to both questions seems improbable." The Court then quotes the "unfavorable press" portion of the opinion in the case of United States v. One Dodge Sedan, 3 Cir., 113 F.2d 552, and then points out that, 128 Cal.App.2d at page 420, 275 P.2d at page 513: "Even in the federal courts it [the Coffey case] is followed only with reluctance, where no 'loophole' through which to deviate from it can be found. * * *

[8] "This state court, for which the authority of the Coffey case in this matter is not binding but at most persuasive, does not need a loophole to be able to hold that the higher degree of proof on which the acquittal in the criminal proceeding is based prevents its admissibility as conclusive evidence or any evidence in the forfeiture proceedings."

Much of what the court said about the Coffey case was undoubtedly dicta, but it is sound dicta, and we approve and adopt it as part of this opinion.

The judgment of forfeiture is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

133 Cal.App.2d 345

Alex A. ROHAR, Plaintiff and Respondent,

v.

Henry P. OSBORNE, Sr., doing business as Shank's Economy Store, an Individual; Henry P. Osborne, Jr., doing business as Shank's Economy Store; Ker-O-Kil Manufacturing Co., a corporation; Coast Agencies Poultry Equipment Dealers et al., Defendants,

Henry P. Osborne, Sr., and Henry P. Osborne, Jr., Appellants.

Civ. 20626.

District Court of Appeal, Second District, Division 1, California.

May 31, 1955.

Rehearing Denied June 20, 1955.

Hearing Denied July 27, 1955.

Action to recover for injuries sustained by plaintiff as result of explosion of weed burner manufactured by one defendant and rented to plaintiff's employer by another defendant. The Superior Court, Los Angeles County, Samuel R. Blake, J., entered judgment for manufacturer of weed burner but against store which rented it, and owners of store appealed. The District Court of Appeal, White, P. J., held that the court did not err in giving instructions on doctrine of res ipsa loquitur.

Judgment affirmed.

1. Negligence 🔑121(2)

Res ipsa loquitur applies where accident is of such nature that it can be said, in light of past experience, that it probably was result of negligence by someone and that defendant is probably person who is responsible, and in determining whether such probabilities exist, courts rely upon common knowledge and testimony of expert witnesses, circumstances relating to accident in each case such as extent of control exercised by defendant, plaintiff's conduct, likelihood of negligence by third person, and whether defendant is better able than plaintiff to explain what happened.

2. Negligence 🔑121(2)

Even though accident occurs some time after defendant relinquishes control of instrumentality, application of doctrine of res ipsa loquitur is not precluded if there is evidence that instrumentality had not been improperly handled by plaintiff or some third person, or its condition otherwise changed, after control was relinquished by defendant, provided it is made to appear that defendant had sufficient control or connection with accident that it can be said he was more probably than not person responsible for plaintiff's injury.

3. Explosives 🔑8

In action to recover for injuries sustained by plaintiff as result of explosion of weed burner manufactured by one defendant and rented to plaintiff's employer by another defendant, submission to jury of instructions on doctrine of res ipsa loquitur was not erroneous.

4. Trial 🔑296(3)

In action to recover for injuries sustained by plaintiff as result of explosion of weed burner manufactured by one defendant and rented to plaintiff's employer by another defendant, instruction which referred to change in construction of instrumentality after leaving manufacturer's possession was not erroneous, but was applicable to liability of defendant manufacturer where another instruction was also given which referred to change in condition of instrumentality as relating to store owner's liability.

5. Bailment 🔑33

In action to recover for injuries sustained by plaintiff as result of explosion of weed burner manufactured by one defendant and rented to plaintiff's employer by another defendant, instructions upon warranty in applicable language of statutes governing duty required of one letting personal property was not error. West's Ann. Civ.Code, §§ 1714, 1955.

6. Bailment 🔑14(1)

Bailor of chattels impliedly warrants that he has exercised reasonable care to ascertain that equipment is safe and suitable for purpose for which it is hired.

Murchison & Cumming, R. Bruce Murchison, and Bicknell J. Showers, Los Angeles, for appellants.

Hahn, Ross & Saunders, Los Angeles, for respondent.

WHITE, Presiding Justice.

Plaintiff instituted this action to recover damages for personal injuries allegedly sustained as a result of the negligence of defendants.

Defendants Henry P. Osborne, Sr. and H. P. Osborne, Jr. operated a hardware store known as Shank's Economy Store. Defendant Ker-O-Kil Manufacturing Company, a corporation, was the manufacturer of the weed burner which was the instrumentality by which plaintiff was injured. Trial by jury resulted in a verdict and judgment in favor of Ker-O-Kil Manufacturing Company, makers of the instrumentality causing the injury and in favor of plaintiff against defendants Henry P. Osborne, Sr. and H. P. Osborne, Jr. Motion for a new trial was denied and from the judgment entered against them on the verdict, the last-named defendants prosecute this appeal.

The complaint tendered three causes of action, in the first of which it was alleged that a certain weed burner had been negligently stored and maintained by defendants Osborne, Sr. and Osborne, Jr. It further alleged that the defendants just named rented the burner to one W. E. Pruitt, the employer of plaintiff, and was in the physical possession of the latter. The second cause of action alleged the weed burner to be inherently a dangerous instrument, and alleged negligence in the manufacture, storage and rental thereof. The third cause of action alleged a warranty that the weed burner was "strong and of sturdy composition". By their answers defendants generally denied these allegations, and the cause proceeded to trial on the theory of negligence in the manufacture of the burner by the defendant Ker-O-Kil Manufacturing Company, negligence in the storage, maintenance and rental of the weed burner by defendants Henry P. Osborne, Sr. and H. P. Osborne, Jr., and upon the third cause of action upon the theory of warranty as against all defendants.

As to the factual background surrounding this litigation we regard the following as a fair epitome thereof as shown by the record. On May 28, 1952, plaintiff was employed by one W. E. Pruitt, as a general hand on a chicken ranch and was directed to go to the store of Henry P. Osborne, Sr. and H. P. Osborne, Jr. (hereinafter referred to as defendants) to pick up a weed burner which plaintiff's employer had arranged to rent for use on his chicken ranch. This weed burner had been acquired by defendants from the Ker-O-Kil Manufacturing Company, approximately five years before or on or about 1947, and it had been used by both defendants many times yearly without complaint, accident or trouble.

During the same period of time the burner had been maintained also for the incidental use of customers and had been rented to others many times yearly and returned to appellants without complaint or notice of any trouble or failures.

The rentals of the weed burner to defendants' customers usually occurred in the springtime and during the remaining months of the year defendants stored the burner on the concrete floor in a corner of their store.

The weed burner consists of a cylindrical tank with a plate bottom and top, which is welded onto the sides of the tank. At the top there is a two-inch tube, in which there is a pump similar to a bicycle pump, which may be unscrewed and removed, so that the bottom and the inside of the tank is visible. There is attached to the top of the tank a steel tube which is the outlet for the kerosene, which in turn is connected with a flexible hose at the end of which is a heating coil and fire jet. The kerosene is poured into the two-inch hole, the top is screwed on, and the pump is then operated to create pressure inside the tank.

After obtaining the weed burner from the defendants the plaintiff then, at about eight o'clock in the morning, put three gallons of kerosene in the weed burner, or filled it about two-thirds full and pumped it up to fifteen pounds pressure. He put nothing in this tank but kerosene, and he testified he knew the difference between kerosene and any other distillate. He next put kerosene in the torch trough end of the weed burner and took a piece of paper and set it afire, all of which was proper procedure. From the time that the plaintiff obtained the weed burner until the moment of the explosion, no one used it except him. From time to time he would lay the tank down and go about fifty feet away to change a water hose, and then he would return to the tank, pick it up and continue to use it.

He laid the tank down and extended the hose with the flame at the end so no fire or heat would get to the tank—the fire or flame was 6 feet from the tank.

On the last occasion, he then turned the valve down a little, and the flame from the torch was about three to four inches in length. He set the tank down, went fifty feet to change the water hose and returned to within three feet of the weed burner. He was stooping down to pick up the tank, when it failed and exploded.

It is conceded that the burner was delivered to plaintiff with all parts thereof properly affixed and that up to the time of the explosion, as testified by the plaintiff, "it operated normally". There is no question but that both plaintiff and defendants were aware that the burner had been previously used and was a secondhand unit without any fuel therein at the time of delivery to plaintiff. The latter testified he was familiar with the operation of weed burners and had years of experience using them. That he did not read the instructions affixed to the tank of the burner.

The record supports the following contentions advanced by plaintiff:

"An inspection of the tank, particularly Exhibits 1 and 2, show very clearly the rusted condition of the inside of the tank, especially around the bottom where there are large pitted indentures, and particularly around the welding that held the bottom to the sides of the tank. This, of course, is conceded by the appellant and it is very obvious from the exhibits themselves. As to the pressure inside of the tank, the only evidence on the pressure was that the respondent used the hand pump and pumped up the pressure to fifteen pounds per square inch. The pressure that was exerted or the force that was pushing against the welds where the bottom of the tank was fastened to the sides of the tank was six hundred sixty (660) pounds of total force.

"This tank was not subject to severe internal pressure because there was no bulging of the side walls.

"You can, by visual inspection, determine that there is rust on the bottom of this weed burner.

"The connection of the bottom and the top with the sides of the tank were extremely thin due to the rust condition of the tank, and that caused the failure of the tank."

It might also be stated that rental of the equipment here in question was more or less of a courtesy extended by defendants to their customers and the rental fee was $1.

It is first contended by appellants that the court erred in submitting to the jury instructions on the doctrine of *res ipsa loquitur*. In the case of Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, 446, 247 P.2d 344, 349, Mr. Chief Justice Gibson, speaking for a unanimous court, in a clear and well-reasoned opinion, epitomizes the rule as follows:

[1] "In summary, it appears from the foregoing that, as a general rule, res ipsa loquitur applies where the accident is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone and that the defendant is probably the person who is responsible. In determining whether such probabilities exist with regard to a particular occurrence, the courts have relied both upon common knowledge and the testimony of expert witnesses, and they have considered the circumstances relating to the accident in each particular case, such as the extent of control exercised by the defendant, the plaintiff's own

conduct, the likelihood of negligence by some third person, and, in some situations, evidence that the defendant is better able than the plaintiff to explain what happened. All of these matters have been treated as aids to help the courts in determining whether the accident was of such a nature that the injury was more probably than not the result of the defendant's negligence."

[2] The same case enunciates the principle that notwithstanding, as in the instant case, the accident occurs sometime after the defendant relinquishes control of the instrumentality, application of the doctrine is not precluded if there is evidence that the instrumentality had not been improperly handled by plaintiff or some third person, or its condition otherwise changed, after control was relinquished by the defendant, provided of course, it is made to appear that "the defendant had sufficient control or connection with the accident that it can be said that he was more probably than not the person responsible for plaintiff's injury." 39 Cal.2d at page 444, 247 P.2d at page 348.

In view of the foregoing rules, the main question presented to us is whether from the evidence there was a balance of probabilities pointing to appellant's negligence as the most likely explanation of the accident. If there was, then respondent was entitled to invoke the aid of the doctrine of *res ipsa loquitur.* Under the facts and circumstances present in the case at bar it would seem reasonable to say that without negligence on the part of someone, the accident would not have occurred.

In the light of common experience and the evidence adduced at the trial, what are the possibilities in this case? We are impressed that they are as follows:

(1) The tank on the burner was improperly constructed by defendant manufacturer;

(2) That respondent's conduct was such that he applied heat to the tank and caused it to fail; and

(3) Improper maintenance and storage by appellants which caused severe rusting of the side walls and bottom of tank, which caused the tank to fail.

As to the first, there was a conflict of evidence. The jury found in favor of defendant manufacturer, and neither appellants herein or respondent challenges the correctness of this finding.

As to the second possibility, the record is barren of any evidence that respondent's operation of the instrumentality caused the failure of the tank. Appellants offer the inference that the substance used in the tank was gasoline and not kerosene. But, there is not in the record a scintilla of evidence to support such an inference. The only testimony presented in this regard was that of respondent who stated that he used kerosene, while his employer, who purchased the substance, testified that he purchased kerosene and it was used in the tank.

As to the third possibility, there was testimony that when the tank came back from a previous rental, appellants emptied the liquid out and stored the tank for months with no fluid in it. That this was contrary to the instructions of the manufacturer, pasted on the side of the tank and reading: "Keep enough fuel in the tank when not in use so the bottom of the pump is in the fuel; otherwise, check valve may leak kerosene. *Also prevents corrosion.*" (Emphasis added.) There was also testimony that for a period of four years appellants never looked inside the tank or inspected the inside for corrosion, or made any tests to determine leakage. An expert witness for appellants testified, among other things, that he had noticed rusted pits in the bottom of the tank, and that the rust had weakened the welds and the bonds between them, and that one of the causes of the tank exploding was the rust on the bottom of the tank, and that, in his opinion, there were three causes or probabilities which caused the tank to fail and explode:

(1) Excessive internal pressure;

(2) Internal explosion; and

(3) Rust that weakened the welds of the tank.

[3] There was no evidence that respondent put excessive pressure in the tank. He testified that he pumped it only to fifteen pounds per square inch, which according to the evidence was far below an excessive amount of pressure. The record is devoid of evidence of an internal explosion being caused by the conduct or action of respondent or anyone else. But, there was evidence of the weakened condition of the welds of the top and the bottom due to rust. In view of the foregoing it seems manifest to us that there is a balance of probabilities pointing to appellants' negligence as the most likely explanation of the accident. The court therefore, did not err in giving instructions on the doctrine of *res ipsa loquitur*.

[4] Appellants assert error as a matter of law in the giving of an instruction wherein the following clause was included: "and if you find that from the time the instrumentality left either or both defendants' control to the time of the accident it did not suffer any damage from any person or agency and its *construction* was not changed". (Emphasis added.) Appellants contend that the use of the word "construction" was erroneous as that is not the test; it is whether the "condition" has been altered or changed. As pointed out by respondent, it must be remembered that this action was against two defendants, one the manufacturer, against whom it was claimed that the "construction" of the tank was faulty in that the bottom was affixed in a convex manner instead of a concave. The instruction complained of was proper as to the manufacturer, in that it dealt with whether the "construction" of the tank at the time of the accident was the same as when it left the manufacturer's control.

In another instruction relating to the cause of action against appellants herein, the court referred to the "condition" of the tank at the time of the accident being the same as when it left appellants' control. Insofar as the respective theories advanced by the pleadings against both the manufacturer and the renters of the tank were concerned, it was important that both the "construction" and "condition" of the tank be mentioned in the instructions. And, the court did fully and fairly instruct the jury that insofar as appellants' liability was concerned it was the "condition" and not the "construction" that should be considered by the jury. When the instructions on the doctrine of *res ipsa loquitur* are read in their entirety as they should be, we cannot see wherein the jury was either misled or confused.

[5] Appellants' next contention is that the court erred in submitting to the jury instructions upon warranty. In that regard the court instructed the jury in the applicable language of Section 1955 of the Civil Code which, in part provides that one who lets personal property must "put it into a condition fit for the purpose for which he lets it, and repair all deteriorations thereof not occasioned by the fault of the hirer and not the natural result of its use." When the instructions given are viewed in the light of the foregoing code section and Section 1714 of the Civil Code defining negligence, it is manifest that instructions based on the provisions of these sections were proper in that both code sections constitute the law of this State and are applicable to the issues presented by the pleadings and raised by the evidence in the case at bar. Monroe v. East Bay Rental Service, 111 Cal.App.2d 574, 575, 576, 245 P.2d 9. Appellants rely on the case of Rainbow Petroleum Co. v. Union D. & P. Co., 115 Cal.App. 275, 1 P.2d 489, but this case does not aid them because therein the action was upon a contract in writing for the rental of oil-well drill pipe. When an action was instituted for agreed rental value of missing pipe, the defendant for the first time complained of defects alleged to have interfered with the success of its project, and to have caused the loss of a portion of the pipe. The appellate court observed that at the time the contract was entered into a representative of the renter called to inspect the pipe and was advised that little was known as to its condition except as to the use to which it had been devoted, and that " 'if they wanted to rent it, it was up to them' "; that he

should "'take whatever pipe he wanted out of the pile.'" The court simply held that the buyer having purchased after an examination of the property, "will, in the absence of any representations by the seller, be held to have purchased entirely upon his own judgment." The dissimilarity in this case and the one now engaging our attention is at once apparent.

Although admitting there was some conflict in the evidence upon the issue, appellants urge the absence of warranty of the equipment furnished because there was no privity of contract between them and respondent. The record reflects that appellant Henry P. Osborne, Sr. was asked the direct question, "Who did you rent it to?" and replied, "Mr. Alex Rohar (respondent)." Whatever conflict existed as to privity of contract was resolved by the jury against appellants and cannot be disturbed.

[6] Appellants' contention that the instructions made them an insurer against all personal injuries sustained from the operation of the bailed chattel cannot be sustained. The instructions merely advised the jury that the bailor impliedly warranted that he had exercised reasonable care to ascertain that the equipment was safe and suitable for the purpose for which it was hired. This is a correct statement of the law. McNeal v. Greenberg, 40 Cal.2d 740, 742, 255 P.2d 810; Rae v. California Equipment Co., 12 Cal.2d 563, 569, 86 P.2d 352. The court also instructed the jury that "You are further instructed that it is the duty of the plaintiff to prove each of the allegations of his complaint, particularly that before you may find against the defendants, Henry P. Osborne, Sr., Henry P. Osborne, Jr., and Shank's Economy Store, you shall require the plaintiff prove some act of negligence, as hereinbefore defined, before you may find against them, and in the event you find that the plaintiff has failed to prove any specific act, then, and in that event, you shall find in favor of defendants."

Appellants' contention that no inspection of the interior portion of the tank could be made is contrary to testimony given by Robert E. Snyder, a qualified mechanical engineer, who testified:

"Q. Now, particularly directing your attention to Defendant's E, I ask you whether or not it isn't true that a person looking into a closed tank, such as we have here, would be unable to ascertain whether or not there were rust pits in such a tank without the use of microscopes or some other mechanism of enlarging it? A. He could see them.

"Q. You think he could see them? A. I do."

From what we have herein stated, it follows that the court did not err, as claimed by appellants, in denying their motion for nonsuit.

For the foregoing reasons, the judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

133 Cal.App.2d 433

Joel David BRANDWEIN, Individually, and Joel David Brandwein, as sole heir of Renee Brandwein, deceased, Plaintiff and Appellant,

v.

Frank R. RODRIGUEZ, doing business as Keystone Auto Court, et al., Defendants and Respondents.

Civ. 20417.

District Court of Appeal, Second District, Division 1, California.

June 6, 1955.

Action for wrongful death of wife and for personal injury to plaintiff from asphyxiation in room at defendant's automobile court. The Superior Court, Santa Barbara County, Ernest D. Wagner, J., granted a new trial after return of verdict for the plaintiff, and the plaintiff appealed. The District Court of Appeal, Doran, J., held that where the judge had, contrary to statute, permitted the jury to take to the jury room the deposition of a witness who deposed that he had become sick from gas from a heater in the same room, the court's action in granting a new trial was not an abuse of discretion

Affirmed.

1. New Trial ⚿44(1)

In action for wrongful death of wife and for personal injury to plaintiff from asphyxiation in room at defendant's automobile court, trial judge who had permitted jury, contrary to statute, to take to jury room deposition of a witness who deposed that he had become sick from gas from heater in same room, did not abuse discretion in granting new trial to defendant. West's Ann.Code Civ.Proc., § 612.

2. Gas ⚿23

Under statute requiring venting of gas appliance designed to be vented as shown by presence of vent collar to which vent may be attached, use of unvented heater not designed to be vented is neither unlawful nor to be deemed negligence per se. Health and Safety Code, § 16900.

3. Appeal and Error ⚿1015(1)

Trial judge is familiar with evidence, witnesses and proceedings, and is in best position to determine whether, in view of all circumstances, justice demands retrial.

4. Appeal and Error ⚿867(2), 933(1), 977(3)

Presumptions on appeal from order granting new trial are in favor of order, and appellate court does not independently redetermine question but limits its review to inquiry whether there is any support for ruling, and order will be reversed only on strong showing of abuse of discretion.

5. New Trial ⚿70, 140(3)

In action for wrongful death of wife and for personal injury to plaintiff from asphyxiation in room at defendant's automobile court, evidence sustained order granting new trial on ground of irregularity of proceedings of court and jury and on ground of insufficiency of evidence to justify verdict.

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Lillie & Brant, Algerdas N. Cheleden, Los Angeles, and Richard M. Clare, Santa Maria, for appellant.

C. F. Jorz, Los Angeles, Marion A. Smith and Jack H. Glines, Santa Maria, for respondents.

DORAN, Justice.

The plaintiff herein, after a trial by jury, was awarded a verdict of $21,000 for the wrongful death of plaintiff's wife, together with the sum of $7,000 for personal injuries to plaintiff. The complaint alleges that the defendant, as owner of the Keystone Auto Court in Santa Maria, negligently maintained a gas heater therein, and that while Mr. and Mrs. Brandwein occupied a room in said auto court, both the wife and husband became asphyxiated by carbon monoxide from the heater, resulting in the wife's death and the husband's injuries. Joel David Brandwein was about 22 years of age; Renee Brandwein, the wife approximately 21.

Thereafter, on the defendants' motion, the trial court granted a new trial on two grounds, namely: (1) Irregularity of the proceedings of the court and jury, and (2) Insufficiency of evidence to justify the verdict. The present appeal is from the order granting defendants a new trial.

The record discloses evidence to the effect that the defendant had purchased the Keystone Auto Court on October 24, 1950; that on February 21, 1951, at about 11:30–12:00 p. m. in the evening, defendant showed Mr. and Mrs. Brandwein to Room 2 in said court, and informed plaintiffs that the gas heater was burning. The defendant testified that when "this room was turned over to Mr. Brandwein and his wife" both the front window and the bathroom window were open; that the next morning when Mr. and Mrs. Brandwein were found unconscious in the room, the windows "were shut tight", and the heater was still burning.

The gas heater in question was an unvented heater set in the wall, and carried the seal: "Complies with the National Safety Requirements, Approved, American Gas Association". Immediately after the accident the heater was inspected by Frank Brandon, general service foreman for Southern Counties Gas Company, who "found the heater to be in good adjustment; the flame height was proper for that type of a heater, and there were no gas leaks".

There was testimony by Dr. Missal who was called in to examine the asphyxiated persons, to the effect that "If there is sufficient oxygen in the room, you wouldn't get carbon monoxide poisoning"; also, that even in the case of a vented heater with an open flame, the flame will consume air in the room. Plaintiff denied doing anything to the heater, and did not open any windows or ascertain if any windows were open before retiring. Brandwein had had no previous experience with heaters of this type; and was unable to detect any odors emanating from the gas heater.

It is appellant's contention that the trial court abused its discretion in granting a new trial upon the ground of irregularity in the proceedings of court and jury, and that if any irregularity existed, no prejudicial error resulted. From the trial court's Memorandum of Opinion on sustaining defendants' motion for a new trial, it appears that "After the jury had been deliberating for some period of time the Bailiff * * * advised the Court that the jury desired all of the exhibits. Whereupon the Court ordered that the exhibits * * * be given to the jury and among the exhibits so handed to them * * * was Plaintiff's exhibit No. 11, the deposition of the said Phil Stefan". This procedure was contrary to the provisions of Section 612 of the Code of Civil Procedure permitting a jury to "take with them all papers which have been received as evidence in the cause, except depositions." (Respondents' italics.)

As observed in respondents' brief, "The testimony given by this witness was, if believed by the jury, extremely damaging to the defendant. In the deposition in question, Philip Steffan testified to stopping at defendant's auto court in February when Mr. and Mrs. Brandwein stopped there, and previous thereto, and occupied the same room; that Steffan became sick from gas escaping from the heater, and told the defendant that "somebody was going to get in trouble with this gas of yours"; that on another occasion Steffan refused to take that room because of the gas. This episode was denied by the defendant.

The trial court observed that "the question of liability and particularly the question of contributory negligence on the part of the plaintiff and the deceased wife, Renee Brandwein, were extremely close ones. In view of this fact the Court is convinced that it was prejudicial error to permit the jury to have this deposition in the jury room during its deliberations".

As stated in respondents' brief, "It is not difficult to conceive how the jury could, and no doubt did, give great weight to such written testimony when it was considered in the jury room. It was down in black and white and could be referred to again and again, whereas the testimony given in Court would escape their recollection. * * * Certainly it is probable that the jury did give the testimony of the witness Steffan undue weight and consideration when it was before them in the jury room in this manner".

[1] Appellant's argument that, at most, this procedure was mere harmless error and insufficient ground for the granting of a new trial, cannot be sustained. Permitting the jury to have this isolated portion of the evidence, contrary to the provisions of the statute, centered its attention on the Steffan testimony, stressing the importance of this one item and exalting it above all other evidence given at the trial. The obvious result of such procedure could well be that the verdict for plaintiff was based upon this deposition rather than upon a proper consideration of all evidence placed before the jury. The trial court, therefore, did not abuse its discretion in granting a new trial.

The other ground on which the trial court granted a new trial was that of insufficiency of evidence to justify the verdict. It is appellant's contention that there was "negligence as a matter of law upon the part of defendant" in view of "(1) The admissions of the defendant that the gas heater in question was defective, and (2) that said defect was a latent and dangerous one". Cited in support thereof is the defendant's testimony that "there was nothing in it for a vent pipe", and "Never has been". (Reporter's Transcript, p. 80.)

[2] The quoted testimony is, of course, only a small part of the evidence bearing on the matter of negligence and contributory negligence, and in any event does not establish negligence as a matter of law. As pointed out in respondents' brief, Section 16900 of the Health and Safety Code merely requires the venting of a gas appliance "which is designed to be a vented appliance, as shown by the presence of a vent collar to which a vent may be attached", and does not declare that the use of an unvented heater, not designed to be vented as in the present situation, is unlawful or to be deemed negligence per se. Moreover, the question of plaintiff's contributory negligence in retiring without either turning out the heater or leaving a window open, enters in the question of liability. The defendant testified that windows were open when plaintiff took over the room; in the morning the windows were found closed. An reference has previously been made to expert testimony that the gas heater was found to be in good condition with no gas leaks.

[3, 4] It is well established that "the trial judge is familiar with the evidence, witnesses and proceedings, and is in the best position to determine whether, in view of all the circumstances, justice demands a retrial". The presumptions on appeal are in favor of the order, and the appellate court does not independently redetermine the question. Review is limited to the inquiry whether there is any support for the ruling, and the order will be reversed only where there is a strong showing of abuse of discretion. Perry v. Fowler, 102 Cal.App.2d 808, 229 P.2d 46.

[5] In the instant case the evidence as to negligence and contributory negligence was in conflict, and for the reasons hereinbefore given, the granting of a new trial cannot be deemed an abuse of discretion nor without support in the record.

The order is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

133 Cal.App.2d 439

Frank BAUER, Plaintiff and Appellant,
v.
Marie OTIS and F. A. Hayes, Defendants and Respondents.
No. 16270.

District Court of Appeal, First District, Division 1, California.
June 7, 1955.
Rehearing Denied July 7, 1955.
Hearing Denied Aug. 3, 1955.

Malpractice action predicated upon alleged negligence in injecting drug into plaintiff's arm. The Superior Court, City and County of San Francisco, Robert McWilliams, J., entered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Bray J., held that trial court had erred in refusing defendant's requested res ipso loquitur instruction to be applied by jury if it determined that resulting injuries had not been hazard which could have been expected in particular medical procedure.

Judgment reversed.

1. Negligence 🔑121(2)

Conditions required for application of doctrine of "res ipsa loquitur" are that (a) There is a basis of experience, either common to the community or brought out in evidence, from which it may be reasonably concluded that accident is of kind which does not normally occur unless someone has been negligent; (b) accident was caused by agency or instrumentality within exclusive control of defendant (c) accident was not due to any voluntary action or contribution on part of plaintiff.

See publication Words and Phrases, for other judicial constructions and definitions of "Res Ipsa Loquitur".

2. Evidence ⚷20(1)

It is matter of common knowledge among laymen that injections in muscle of arm, as well as other portions of body, do not cause trouble unless unskillfully administered or unless there is something wrong with serum.

3. Physicians and Surgeons ⚷18(8)

Expert testimony is not indispensable to prove malpractice cases predicated upon negligent administration of injections.

4. Physicians and Surgeons ⚷18(9)

In malpractice action for alleged negligence in injecting drug into plaintiff's arm, evidence on issue of whether resulting injuries were hazard which could have been expected in particular medical procedure was for jury.

5. Physicians and Surgeons ⚷18(10)

In malpractice action predicated upon alleged negligence in injecting drug into plaintiff's arm, wherein jury question was presented as to whether injuries to plaintiff were hazard which could have been expected in particular medical procedure, it was error to refuse plaintiff's request for res ipsa loquitur instruction to allow doctrine to be applied if jury determined that hazard did not exist.

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Cooper, White & Cooper, George A. Helmer, San Francisco, for appellant.

Lamb, Hoge & Killion, San Francisco, for respondents.

BRAY, Justice.

Should proffered instructions on res ipsa loquitur have been given, is the sole question presented on this appeal by plaintiff from a judgment in favor of defendants in an action for malpractice brought against defendant Otis, a nurse, and defendant Hayes, a medical doctor.

Facts.

The complaint states two causes of action, one for negligence against both defendants, the other against Dr. Hayes alone for negligence in employing an unqualified nurse to administer the injection hereafter mentioned. Plaintiff was nonsuited on the second cause of action but does not appeal therefrom.

The lawsuit arises from an injection given plaintiff by Nurse Otis, which caused him serious injury. About May 23, 1950, plaintiff went to Dr. Hayes for treatment to his right leg, from which he was suffering severe pain. Dr. Hayes diagnosed the condition as neuritis and prescribed injections. That day the doctor gave him an injection in the right arm. On subsequent days plaintiff received similar injections, some given by the doctor and some by the latter's nurse, Otis. With the doctor's approval, plaintiff went to Calistoga to take mineral bath treatments. Failing to respond thereto, plaintiff returned to Dr. Hayes. During August and September, the doctor increased the frequency of the injections. October 12th, just before noon, plaintiff appeared at the doctor's office. According to him, Nurse Otis appeared excited. She had difficulty in inserting the needle in plaintiff's right arm. Finally she got the needle in. Plaintiff began to "holler" because of terrific pain which engulfed his entire arm. Never before had the injections caused such a severe, sharp pain. About a minute after the injection the pain went down to plaintiff's wrist, and his hand "dropped" (known as "wrist drop"). Plaintiff broke into a sweat. The nurse ordered him to soak his hand in hot water. Dr. Hayes phoned in about this time and the nurse explained plaintiff's situation. Shortly thereafter the doctor arrived and told plaintiff he would be all right in two hours. Plaintiff remained there until about 5:30 p. m. but despite hot packs and electrical treatments, was no better. For about ten days thereafter, plaintiff received daily treatments from the doctor but did not improve. Early in November plaintiff consulted Dr. Morrissey who at first gave him treatments similar to those given by Dr. Hayes. March 7, 1951, pursuant to Dr. Morrissey's advice he was operated on at about the same spot in which he had received the last injection. Plaintiff has shown some improvement, but three years after the operation he still has his arm in a brace and is unable to work. Plaintiff claims that never prior to the last injection had he complained of pain in his right arm. About September, 1951, he discovered that the pain in his leg was due to fallen arches. By the use of special shoes he has obtained relief.

Dr. Hayes admitted that the injections were given by Nurse Otis within the scope of her employment by him. The substance injected was a solution of vitamin B complex, having the trade name "Thex." The doctor returned to his office in response to the nurse's statement that plaintiff was in distress because of the injection. Plaintiff was complaining that he could not move his fingers satisfactorily and was suffering from hysteria produced by extreme pain. Plaintiff was either unable or unwilling to extend his wrist even after a sedative was given, and massage, diathermy and electrical treatments administered. Dr. Hayes had no definite recollection as to whether plaintiff had a wrist drop at that time, but the former's chart has no record of it, and therefore the doctor would assume that he did not, and attributed plaintiff's trouble to hysteria. When plaintiff first came to the office, he complained of trouble in both his right arm and his leg. Dr. Hayes diagnosed the condition as sciatic neuritis, complicated by debilitation (malnutrition). The normal practice is to make these injections in the deltoid muscle in the outer, upper portion of the arm.

Nurse Otis testified that she had made intramuscular injections "hundreds of times." On the occasion in question she inserted the needle in plaintiff's deltoid muscle. Plaintiff always complained when she gave him injections. As she began this injection (about ½ c.c. injected) plaintiff complained of pain and she stopped for a moment and pulled the needle back slightly ("which is not too unusual"). She asked plaintiff if it was better and on his replying affirmatively she again began injecting him (another ½ c.c. injected). He said that hurt him terribly. So she removed the needle (without injecting the remaining 1 c.c.), massaged the arm, and told plaintiff that as he complained too much she would not complete the injection.

Bearing upon the cause of plaintiff's injury (in addition to the facts above stated) and the proper method and effect of injections was the following testimony:

Dr. Morrissey, who operated on the arm, testified that he found a lesion of the right radial nerve, that is, an interruption in its function. The operation disclosed that the radial nerve was indurated, that is, incorporated in thickened scar tissue. Based upon the case history given him by plaintiff, it was Dr. Morrissey's opinion that the lesion occurred at the time of the injection. The injury was not caused by hysteria. "If the Thex was injected into the deltoid muscle it could not have caused the paralysis of the radial nerve." It is not common medical knowledge that the injection of any solution in the deltoid muscle may cause injury to the radial nerve.

Dr. Hayes testified that while under ordinary circumstances an administration of Thex will not cause a wrist drop, it is possible for the solution to travel to a different portion of the arm. Almost all solutions are known to be dangerous to nerves. If a volume of blood, caused by hemorrhage, joined the solution, it could travel to the nerve, surround it and cause the scar tissue found by Dr. Morrissey. This is a known danger in any injection. Thex is extremely irritating.

Dr. Ryan, called by defendants, testified that from a study of Dr. Morrissey's operation record, it can be definitely stated that the radial nerve had not been punctured or severed. Injections frequently cause hemorrhages which can cause liquid to gravitate to other portions of the arm, with the formation of scar tissue and pressure signs on the nerves as a result. In his opinion such a hemorrhage caused the scar tissue and injury to plaintiff's nerve. It is not improper practice to give an injection into the deltoid muscle tissue immediately surrounding the radial nerve.

Res Ipsa Loquitur.

"As a general rule, res ipsa loquitur is applicable where it appears that the accident is of such a nature that it can be said, in the light of past experience, that it *probably* was the result of negligence by someone and that the defendant is *probably* the person who is responsible. [Citation.]" Stanford v. Richmond Chase Co., 43 Cal.2d 287, 292, 272 P.2d 764, 766; injuries allegedly caused by negligent operation of a fork lift; emphasis added; Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, 442–443, 247 P.2d 344 (exploding bottle); La Porte v. Houston, 33 Cal.2d 167, 169, 199 P.2d 665 (lurching automobile); and Prosser on Torts, p. 297.

Of three older cases, Prosser writes, 37 Cal.L.Rev. 195: "* * * the California courts have fallen into the error of saying that the inference of negligence must be so compelling as to exclude all other inferences and leave no other acceptable cause for the accident. Of course this is wrong." Later cases have corrected this error, as Prosser says, p. 196: "The more recent decisions have recognized the error, and have held that the inference is not required to be an exclusive or compelling one. It is enough that the court cannot say that reasonable men could not draw it."

[1] The conditions required for the application of the doctrine are: (a) There is a basis of experience, either common to the community or brought out in evidence, from which it may reasonably be concluded that the accident is of a kind which does not normally occur unless someone has been negligent. (b) It must be caused by an agency or instrumentality within the exclusive control of the defendant. (c) It must not have been due to any voluntary action or contribution on the part of the plaintiff. See Prosser on Torts, p. 295; Ybarra v. Spangard, 25 Cal.2d 486, 489, 154 P.2d 687, 162 A.L.R. 1258.

[2, 3] Obviously in this case conditions (b) and (c) were present. The needle, syringe and Thex were in the exclusive control of defendants and plaintiff in no wise contributed to the injury. Was (a) present? We think it was. Immediately following the injection and as a result thereof, plaintiff received a "wrist drop." While injections and the use of Thex are primarily medical matters, it is a matter of common knowledge among laymen that injections in the muscles of the arm, as well as other portions of the body, do not cause trouble unless unskillfully done or there is something wrong with the serum. Needle injections of cold shots, penicillin, and many other serums have become commonplace today. Hardly a man, woman or child (even those of tender age) exists in this country who has not had injections of one kind or another. Many persons have had numerous injections. Right now, thousands of children have received, and it is planned that practically all children shall receive (and possibly most adults) injections of Salk polio vaccine. So the giving and receiving of injections and the lack of nerve injury therefrom ordinarily has become a matter of common knowledge. If something does go wrong it is a matter for explanation by the person causing the injury. In Cavero v. Franklin, etc., Benevolent Society, 36 Cal.2d 301, 223 P.2d 471, a child died after a tonsillectomy, due to the negligence of the anesthetist. Prior to surgery the child was healthy and normal with a slight temperature due to his infected tonsils and adenoids. Holding that it is common knowledge that anesthesia properly applied causes no injury, res ipsa loquitur was applied. In Thomsen v. Burgeson, 26 Cal.App.2d 235, 79 P.2d 136, in performing a tonsillectomy the doctor also removed the plaintiff's uvula and a portion of the palate. In applying the doctrine the court held that it was a matter of common knowledge that the removal of the other portions of the plaintiff's body was no part of a tonsillectomy. In Agnew v. City of Los Angeles, 1947, 82 Cal.App.2d 616, 619, 186 P.2d 450, it was held to be common knowledge that failure of a doctor to take x-rays in the event of a possible fracture is negligence. Certainly if expert testimony is not indispensable in cases involving improper use of anesthesia, improper tonsillectomies, failure to use x-rays, there can be no question but that it is likewise not indispensable

in cases involving injections. Or, put another way, if the layman has common knowledge of the ordinary and usual effects of properly used anesthesia, proper tonsillectomy surgery, and the necessity for x-rays in cases of fracture, he certainly has common knowledge of the ordinary and usual effects of injections in the muscles. Undoubtedly more persons, young and old, have had experience with injections than all those experiencing tonsillectomies and anesthesia put together.

See also the following cases where res ipsa loquitur was applied: Brown v. Shortlidge, 98 Cal.App. 352, 277 P. 134, gag used during tonsillectomy knocked out the plaintiff's tooth; Inderbitzen v. Lane Hospital, 124 Cal.App. 462, 12 P.2d 744, 13 P.2d 905, and Barham v. Widing, 210 Cal. 206, 291 P. 173, failure to sterilize hands or instruments; Ales v. Ryan, 8 Cal.2d 82, 64 P.2d 409; Bowers v. Olch, 120 Cal.App.2d 108, 260 P.2d 997, a sponge and a needle, respectively, left in a patient; Moore v. Steen, 102 Cal.App. 723, 283 P. 833, Timbrell v. Suburban Hospital, Inc., 4 Cal.2d 68, 47 P.2d 737, McCullough v. Langer, 23 Cal.App.2d 510, 73 P.2d 649, burns from x-ray, hot water bottle and red lamp; Dickow v. Cookinham, 123 Cal.App.2d 81, 266 P.2d 63, cast causing ulcer.

So far we have discussed the case without relying upon the expert testimony. Nurse Otis testified that it would not be proper to inject within a half an inch of the radial nerve, that injections outside of the deltoid muscle are "never done." Dr. Morrissey testified that had the Thex been injected into the deltoid muscle the injury could not have occurred and that it is not common medical knowledge that an injection into the deltoid muscle might cause injury to the radial nerve.

Dr. Hayes testified that the common place for injections is the deltoid muscle and that the radial nerve is somewhat removed from that area. True, Dr. Hayes and Dr. Ryan gave testimony that contradicted Dr. Morrissey as to common medical knowledge. But that merely created a conflict of testimony for the jury to resolve. The court in giving res ipsa loquitur instructions could have qualified them by instructing the jury that if it should find that common medical knowledge was contrary to common layman knowledge, namely, that the injury here could have resulted without negligence, then it must not apply the doctrine.

Not in point are cases holding the doctrine not applicable, like Huffman v. Lindquist, 37 Cal.2d 465, 234 P.2d 34, 29 A.L.R. 2d 485, where the doctor failed to diagnose the plaintiff's injury as a critical brain injury, and it was held that the question of negligence was one for expert testimony alone and not a matter of common knowledge; Farber v. Olkon, 40 Cal.2d 503, 254 P.2d 520, where the plaintiff, a mentally ill patient of a mental hospital, had his leg broken during shock treatment and where the court held that expert testimony established that the very purpose of such treatment was to throw the body into a convulsive state, and that the most frequent and usual hazard is fractures which occur notwithstanding all precautions; Engelking v. Carlson, 13 Cal.2d 216, 88 P.2d 695, where a foot drop was caused by the severance of a nerve during an operation on the plaintiff's knee and where expert testimony established that such a result was "'one of the difficulties of surgery.'" 13 Cal.2d at page 218, 88 P.2d at page 696.

Seneris v. Haas, Cal.App., 281 P.2d 278, cited by defendants, is not in point. There the plaintiff claimed that her spinal cord had been injured because of negligence in the administering of a spinal anesthetic. The court held that the doctrine of res ipsa loquitur was not applicable (1) because the evidence failed to raise an inference that the plaintiff's resulting condition was in any way connected with the spinal anesthetic, but on the contrary, raised the inference that the injury was "caused by some condition existing in the patient's system", 281 P.2d at page 284, and (2) because the uncontradicted medical evidence was that in injections for spinal anesthesia there is always the danger of the needle coming in contact with the spinal cord, no matter how carefully done. It quoted, 281 P.2d at page 284, with approval from Engelking v. Carlson, supra, 13 Cal.2d 216, 221, 88 P.2d 695: "'Here what was done lies outside the realm of the layman's experience. Medical evidence is required to show not only what occurred but how and why it occurred.'"

[4, 5] In those cases it was established by expert testimony that the resulting injuries were a hazard that could be expected in the particular medical procedure. In our case, the evidence as to whether such a hazard existed was conflicting. As we have pointed out, the jury should have been permitted to determine if the hazard existed, applying the doctrine of res ipsa loquitur if it did not.

The judgment is reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; EDMONDS and TRAYNOR, JJ., dissenting.

WEST KEY NUMBER SYSTEM

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133 Cal.App.2d 254

Hilbert RANGEL, a minor, by Hazelle Duncan, his Guardian ad litem, Plaintiff and Appellant,
v.
Joseph G. BADOLATO et al., Defendants,

Joseph G. Badolato and Oakland California Towel Co., Respondents.
Civ. 8493.

District Court of Appeal, Third District, Division 3, California.
May 25, 1955.

Hearing Denied July 20, 1955.

Action by pedestrian against driver and owner of truck for injuries sustained when struck by truck travelling in same direction as pedestrian who was walking down highway. The Superior Court, Sonoma County, Hilliard Comstock, J., entered judgment for defendant and pedestrian appealed. The District Court of Appeal, Finley, J. pro tem., held that trial court committed reversible error in granting defendants' requested instruction that person walking on highway had no right not to look or look carelessly for objects that may cause him injury, since there was no qualification placed upon pedestrian's duty to look conditioned upon pedestrian's actual position on highway at time he was struck or as to his exercise of ordinary prudence in not looking back in anticipation of danger.

Reversed.

Opinion, 281 P.2d 626, vacated.

1. Negligence 🔑4

Expression "ordinary care", relating to personal conduct as constituting negligence, refers to that degree of care which would be exercised at all times or at any particular time under existing conditions by the ordinarily prudent person, and it assumes definition as to a specific amount of care only when used in connection with some particular situation usually referred to as "under the circumstances".

See publication Words and Phrases, for other judicial constructions and definitions of "Ordinary Care".

2. Negligence 🔑4

If expression "ordinary care" relating to personal conduct as constituting negligence is to have any significance at all, the word "ordinary" cannot be modified by such words as "more" or "less".

3. Automobiles 🔑246(4, 31)

In action for injuries sustained by pedestrian who was struck by truck while walking down highway, trial court did not err in refusing to grant plaintiff's requested instruction, that both parties were chargeable only with exercise of ordinary care, but that greater amount of such care was required by driver of truck, since use of "such", which referred to "ordinary care", implied that driver was required to use something in the way of care over and above ordinary care, which was an inaccurate statement of law.

4. Evidence 🔑8

That the force of inertia of a heavy, fast-moving vehicle is greater than that of a comparatively light and slow-moving pedestrian and that the respectively ensuing potentialities of harm and devolving responsibilities vary accordingly is common knowledge.

5. Trial 🔑203(1)

An incorrect statement of law in an instruction to a jury is error, even though it may not be of sufficient moment to merit reversal, as is also failure to state to jury all those rules of law, particularly if submitted by parties as instructions, which must be deemed reasonably necessary to permit persons of ordinary intelligence to apply the law of the case to the evidence.

6. Trial 🔑203(1)

In action for injuries sustained by pedestrian who was struck by truck while walking down highway, where the usual and proper instructions were given on subject of ordinary care and obligations of respective parties thereunder, and such instructions were aided by instructions concerning duty of persons using highway, such instructions were adequate and no further or special instruction pertaining to the relative amounts of care required of parties was necessary.

7. Trial 🔑253(4), 296(3, 4)

In action for injuries sustained by pedestrian who was struck by truck while walking down highway, omisson of element of proximate cause from instruction that person who has choice of two ways, and who voluntarily chooses dangerous way, is contributorily negligent, made such instruction defective, but there was no prejudicial error where court fully advised jury on issues of contributory negligence and proximate cause.

8. Trial 🔑295(1), 296(1)

Although misstatement of an essential principle of law ordinarily is not cured by the giving of other instructions on subject, it is well settled that all instructions must be considered as a whole, and it does not always follow that giving of instruction deficient in a respect which is covered by other instructions, will always mislead jury and warrant reversal.

9. Trial 🔑295(1)

In reviewing instructions, appellate court must read the charge as a whole and give the instructions a reasonable construction from the standpoint of their probable effect upon the jury.

10. Automobiles 🔑246(58)

In action by pedestrian against driver and owner of truck for injuries sustained when struck by truck, traveling in same direction as pedestrian, who was walking down highway, where it was not questioned by either party that pedestrian was walking on right hand portion of highway and where the only question was whether pedestrian was on paved portion or on shoulder, trial court's instruction covering conduct of pedestrian, whether he was found to have been on roadway or shoulder, was sufficient. Vehicle Code, § 564.

11. Trial 🔑260(8)

In action for injuries sustained by pedestrian who was struck by truck while walking down highway, where "duty to see" rule was fully covered by instructions concerning defendant truck driver's duty to keep a vigilant lookout, trial court did not err in refusing to give plaintiffs requested instruction, that it is duty of driver of automobile, whose view is unobstructed, to see persons, walking on highway in front of automobile, since such instruction was unqualified as to elements of distance and exceptional circumstances.

12. Automobiles 🔑206

Pedestrian, walking on shoulder of highway, had right to assume, in absence of evidence to the contrary, that any driver using highway was exercising due care in so doing.

13. Appeal and Error 🔑1064(1)
Automobiles 🔑246(31)

In action by pedestrian against driver and owner of truck for injuries sustained when struck by a truck, traveling in same direction as pedestrian, who was walking down highway, trial court committed reversible error in granting defendants' requested instruction, that person walking on highway has no right not to look or look carelessly for objects that may cause him injury, where there was no qualification placed on this duty to look conditioned upon pedestrian's actual position on highway at time he was struck or exercise of ordinary care in not looking back in anticipation of danger.

Sutter, Elledge & Carter, Modesto, for appellant.

Keith, Creede & Sedgwick, San Francisco, Geary, Spridgen & Moskowitz, Santa Rosa, for respondents.

FINLEY, Justice pro tem.

This appeal is from a judgment entered upon the verdict of a jury in favor of defendants.

Plaintiff and appellant, a nineteen-year-old pedestrian, commenced this action through a guardian ad litem seeking damages for personal injuries suffered when struck by a delivery truck owned by defendant Oakland California Towel Co., a corporation, and driven by defendant Joseph Badolato. There were other defendants named, but as to them the action was dismissed.

The accident happened about 7 p. m. on October 5, 1951, when plaintiff, a sailor on a weekend pass from the Naval Net Depot at Tiburon, California, was walking with a friend down San Quentin Road in Marin County on his way to the Richmond-San Rafael Ferry. Both, dressed in the Navy uniform of dark blue with white caps, were walking on the right-hand side of the road expecting to catch a ride. At the same time defendant Badolato was also proceeding toward the ferry on the same road driving a truck belonging to defendant Oakland California Towel Co., when the right front fender of the truck collided with plaintiff.

At the point of collision, San Quentin Road is a two-lane road with asphalt surface 21 feet in width and having oiled shoulders three feet in width and outer gravel shoulders five feet wide.

The night was dark and clear. Plaintiff testified that he neither heard nor saw the truck prior to being hit. In a deposition taken prior to the trial, defendant Badolato stated that the first he saw of plaintiff was at the moment of impact when he saw the white cap. At the trial he testified that all he saw was plaintiff's white cap at the moment of impact, but he also testified that he saw the two sailors when he was about 15 or 20 feet away. Badolato further stated that he was traveling between 40 and 45 miles per hour, his lights were on "low beam", and his vision was in no way obscured, although an oncoming car was driving with its "high beam" lights on. He testified that as soon as he saw plaintiff he applied the brakes, swerved to the left, and his truck then swung back and forth across the highway, coming to rest in a ditch on the right-hand side of the road about 230 feet from the point of impact.

There is some question as to where plaintiff was when struck. Badolato testified by way of deposition that plaintiff and his companion were "not on the highway, they were on the shoulder * * * or near the shoulder", but further that they couldn't have been on the shoulder but were on the paved portion of the highway. At the trial he testified that plaintiff was on the paved portion of the road when struck. Plaintiff and his companion testified that plaintiff was on the gravel shoulder of the road. Two witnesses for defendant stated that plaintiff was on the paved portion of the road.

Upon these facts the defendants raised issues of contributory negligence and unavoidable accident. The jury returned a verdict for the defendants. After judgment on the verdict, plaintiff moved for a new trial, which motion was denied.

On appeal the only assignment of error is the giving of certain instructions and the refusal to give others.

Appellant first contends that it was error for the trial court to have refused to give the following instruction requested by plaintiff:

> "You are instructed that the plaintiff and defendant were both chargeable only with the exercise of ordinary care, but a greater amount of *such* care was required of the defendant at the time of the accident in question by reason of the fact that he was driving and operating an automobile, which is an instrumentality capable of inflicting serious and often fatal injuries upon others using the highway." (Emphasis added.)

Appellant's position is that said instruction states a rule of law applicable to the issues and evidence in the case, that the jury was not otherwise properly instructed with reference to the relative "amounts" of caution required of the driver of a motor vehicle and a pedestrian. It is argued that it was prejudicial error to refuse to so instruct, since there might have been a plaintiff's verdict upon the facts but that the jury was precluded from considering the facts in the light of this aspect of the law and was misled by the giving of the following instruction:

> "It is the duty of every person using a public highway, whether a pedestrian or the driver or operator of any kind of vehicle, to exercise ordinary care at all times to avoid placing himself or others in danger and to avoid a collision."

Respondents in answer contend that the refused instruction is unnecessary, archaic and misleading, and would have served only to confuse the jury, particularly in view of the fact that it was carefully instructed as to the definition of negligence in accordance with the standard of the reasonably prudent man and instructed as to the duty of the defendant driver to keep a vigilant lookout ahead. As to the instruction last above quoted, which was given by the court, respondents also point out that appellant submitted the identical instruction.

The most recent pronouncement of our Supreme Court on the question here involved appears in Cucinella v. Weston Biscuit Co., 42 Cal.2d 71, 265 P.2d 513. The court, 42 Cal.2d at page 80, 265 P.2d at page 519, after citing a long list of cases wherein instructions similar in language to the one here involved were approved, had this to say:

> "It is apparent that the intent of the instructions approved in the cited cases was to inform the jury that the elements of action constituting conduct which qualifies as ordinary care are those commensurable with the responsibility involved and depend upon the character of the instrumentality being used or the nature of the act which is being performed, all as related to the surrounding circumstances. If the particular instruction here requested by plaintiffs (No. 201–E) had consisted of only the first sentence thereof, which contains the expression 'amount of caution,' it perhaps would have been confusing to a jury. With the added explanation, however, set forth in the instruction, of the meaning of the quoted expression as related to the respective duties of driver and of pedestrian, the instruction as a whole correctly states the law and explains that what is meant by varying amounts of caution is that the elements of conduct entering into ordinary care or caution will vary and must be related to the particular circumstances involved, including the character of the act being performed."

Among the cases to which the court was referring in the language just quoted is Dawson v. Lalanne, 22 Cal.App.2d 314, 70 P.2d 1002. In that case plaintiff, a pedestrian, was struck by an automobile driven by defendant. A judgment entered upon the jury's verdict in favor of defendant was reversed on the ground that the court refused to give the same instruction as that quoted above, which is the instruction refused by the court here. In the Dawson case, however, the court, 22 Cal.App.2d at page 315, 70 P.2d 1002, in reasoning upon the question of the trial court's refusal to give the instruction, made this observation:

> "* * * The error in failing to give the instruction becomes more apparent when it is considered that the court gave at the request of the defendant the following instruction: 'No higher or greater *degree* of care was required of the defendant to avoid the accident than was required of the plaintiff. Each was required to exercise ordinary care under the conditions confronting him.' The refused instruction was not covered in any of the instructions given by the court." (Emphasis added.)

It does not seem that the reasoning in Dawson v. Lalanne, supra, concerning these instructions, is entirely accurate. Under the rule announced in Lasater v. Oakland Scavenger Co., 71 Cal.App.2d 217, 162 P.2d 486, 487, the last instruction hereinabove quoted from the Dawson case and disapproved there appears to be a correct statement of the law. A careful analysis of the instruction approved in the Dawson case, which is the identical one refused by the trial court in this case, and of which refusal appellant here complains, would indicate that it is not an entirely accurate statement of the law.

[1, 2] The expression "ordinary care" is in one sense a general, and in another sense a specific term. It refers to that degree of care which would be exercised at all times or at any particular time under existing conditions by the ordinarily prudent person. It assumes definition as to a specific amount of care only when used in connection with some particular situation usually referred to as "under the circumstances". But if the expression "ordinary care" is to have any significance at all, the word "ordinary" cannot be modified by such words as "more" or "less". Care is either of that degree which is ordinary under the circumstances or it is not. It may be more than ordinary or less than ordinary, but it cannot be more ordinary or less ordinary. If it is more or less than ordinary it thereupon ceases to be ordinary at all.

Unquestionably if the word *such* were to be deleted from the proposed instruction, there could be no question concerning its propriety as a correct statement of the law or its application to the facts of this case. But in its present form, the compelling interpretation of the language used therein is that the words "such care" refer to the composite expression "ordinary care" and not merely to the word "care" alone. Unless this be considered as the correct interpretation, then the word "such" is superfluous and has no meaning, for why would the simple word "care" be referred to as *such* care if it were being thought of only as a generic term? In English expression, and particularly in legal phraseology, use of the word "such" is an accepted method of referring back, but in so doing the reference is specific and refers to the exact subject matter theretofore named or described, which in this case would not be merely "care" but "ordinary care". If this interpretation be correct then in the questioned instruction appellant was asking the court to instruct the jury that a greater amount of "ordinary care" was required of defendant, and this would have been an inaccurate statement of the law and misleading.

It may be argued that even conceding the merits of the foregoing discussion, the idea sought to be conveyed to the jury would still have been obvious and that the members thereof would not have been misled by any such fine distinctions. But we cannot with confidence say that a mere inaccuracy of expression is unimportant and unworthy of consideration, for we are committed by a long line of decisions to the proposition that juries may be influenced by such technical inaccuracies. In Lasater v. Oakland Scavenger Co., supra, it was held that an instruction containing the expression "'a greater degree of care'" was erroneous because the word "degree" rather than the word "quantum" or "amount" was used to indicate the character of the variations in care. It is stated in the opinion, 71 Cal.App. 2d at page 221, 162 P.2d at page 487:

> "* * * The degree of care required of a person for his own safety is always the same, i. e. ordinary care, although in some circumstances the quantum or amount of care required to reach the degree of ordinary care is greater than in others. While neither courts nor lawyers have uniformly observed this distinction in terminology, it is a *substantial* one and well established in our law." (Emphasis added.) See also Barry v. Maddalena, 63 Cal. App.2d 302, 146 P.2d 974.

It would seem then, in view of the rule just quoted from Lasater v. Oakland Scavenger Co., supra, that the instruction disapproved in Dawson v. Lalanne, supra, and hereinbefore quoted, is a correct statement of the law and the instruction approved therein, which is the identical one refused by the trial court here, is not a correct statement. It is a little difficult to believe that the ordinary lay person, sitting as a juror, would, within the usual period of service, absorb enough from the proceedings and association to recognize such fine distinctions, but legally they are charged with this duty though their ability to perform may not always measure up to this responsibility.

[3] As stated, the expression "a greater amount of *such* care", meaning a greater amount of ordinary care is a technically inaccurate statement of the applicable rule of law. The inaccuracy may have meant but little to a jury, but a careful reading and analysis of the proposed instruction by one exposed to training in the law would seem to imply that the driver or operator of the automobile was required to use something in the way of care over and above the ordinary care with which the instruction first states that both plaintiff and defendant were chargeable. Such, of course, is not the law and since the instruction does not represent an accurate statement thereof, it was not error for the court to refuse to give it.

In Cucinella v. Weston Biscuit Co., supra, we also find this language 42 Cal.2d at pages 81–82, 265 P.2d at page 520:

> "* * * The fault in this case is not one of affirmative misstatement of any rule of law but of failure to explain more fully that in the application of the general rules of law which were correctly declared, the jury, as a matter of law, as well as factually in using common sense, good judgment and general knowledge, should recognize that the force of inertia of a heavy, fast moving vehicle is greater than that of a comparatively light and slow moving pedestrian and that the respectively ensuing potentialities of harm and devolving responsibilities vary accordingly."

[4–6] With this pronouncement in mind and also bearing in mind that the trial court in the case before us gave the commonly accepted definition of ordinary care, together with a proper definition of negligence, it would seem that if a jury is to be charged with the knowledge, which of course is common knowledge "that the force of inertia of a heavy, fast moving vehicle is greater than that of a comparatively light and slow moving pedestrian and that the respectively ensuing potentialities of harm and devolving responsibilities vary accordingly", that they here must be charged with ability to apply the given definitions of ordinary care and negligence to this knowledge which must result in the inevitable conclusion that ordinary care in the operation of a "heavy, fast moving vehicle" of necessity involves a greater amount or quantum of care than would be involved in the walking of a "comparatively light and slow moving pedestrian" on the highway.

An incorrect statement of law in an instruction to a jury is error, even though it may not be of sufficient moment to merit reversal, as is also failure to state to the jury all those rules of law, particularly if submitted by the parties as instructions, which must be deemed reasonably necessary to permit persons of ordinary intelligence to apply the law of the case to the evidence. Duncan v. J. H. Corder & Son, 18 Cal.App.2d 77, 62 P.2d 1387. But it would appear a bit inconsistent to assume that a jury can absorb, remember and apply all the definitions and rules with the occasional alternatives and distinctions contained in the ordinary set of instructions, taking perhaps the better part of an hour for the court to give, and then to say that they lack the simple intelligence to apply them, unless selected ones are emphasized and explained. Here the usual and proper instructions were given on the subject of ordinary care and the obligations of the respective parties thereunder. These, aided by the instruction concerning the duty of persons using a highway, were adequate and no further or special instruction pertaining to the relative amounts of care required of the parties was, under the circumstances of this case, necessary.

Appellant next contends that it was error for the court to have given the following instruction requested by defendant:

> "You are instructed that where a person having a choice of two ways, one of which is perfectly safe and the other of which is subject to risks and dangers, voluntarily chooses the dangerous way, and is injured, such person is guilty of contributory negligence and cannot recover damages against the defendant."

Appellant's most serious contention here is that the instruction is defective as omitting the element of proximate cause.

[7–9] There is no question that standing alone this instruction does omit the element of proximate cause, but it would seem from a consideration of other instructions given on this subject that no prejudicial error resulted from such omission. Although it is true that a misstatement of an essential principle of law ordinarily is not cured by the giving of other instructions on the subject, it is also well settled that all instructions must be considered as a whole, and it does not always follow that the giving of an instruction deficient in a respect which is covered by other instructions, will always mislead the jury and warrant a reversal.

> "In reviewing instructions, the appellate court must read the charge as a whole and give the instructions a reasonable construction from the standpoint of their probable effect upon the jury." Wells v. Lloyd, 21 Cal.2d 452, 458, 132 P.2d 471, 475; O'Connor v. City & County of San Francisco, 92 Cal.App.2d 626, 207 P.2d 638; Dennis v. Gonzales, 91 Cal.App.2d 203, 205 P.2d 55.

Here, prior to the giving of the questioned instruction, the court fully advised the jury upon the issues of contributory negligence and proximate cause. After the jury had retired, it returned to court and requested a re-reading of the instruction pertaining to proximate cause, at which time the court elaborated at length upon the subject. In view of this re-instruction with emphasis on proximate cause it is extremely doubtful that the failure to include it as an element of the questioned instruction misled the jury. It was not reread when the jury was returned to court. Other proper instructions explaining proximate cause in connection with the issue of contributory negligence were re-read and the very last statement by the court before the jury re-retired was as follows: "The element of proximate cause is involved either in the principal negligence or in the contributory negligence feature of this case. All right, you will retire again and attempt to arrive at a verdict." We find that under those circumstances there was not reversible error.

[10] Another criticism of this instruction stoutly urged by appellant is that it recognizes and instructs the jury regarding a choice of only two ways instead of a choice of four possible ways of walking along a highway. The proposition is stated by appellant as follows: "The instruction assumes that there were just two ways to proceed down the highway as a pedestrian. There were, in fact, four ways to proceed, on the left or right shoulder or on the left or right portion of the roadway proper. On the facts of the case and the instructions given, the jurors could have believed that the 'perfectly safe' way was close to the pedestrian's left-hand edge of the highway and that any other way was the 'dangerous way'. This is not, of course, the law because the law does not attempt to state upon which side of the *highway,* as distinguished from *roadway,* a pedestrian may walk."

We are unable to concede the logic of this argument. It is not questioned by either party that plaintiff was walking on the right-hand *portion* of the highway. The only question presented to the jury was whether he was walking on the paved portion or "roadway" or on the right shoulder. The trial court, as part of the instructions, read section 83 of the Vehicle Code to the jury which defines the term *"roadway"* as that portion of a highway, improved, designed or ordinarily used for vehicular travel, and *"highway"* as covering not only that portion used for vehicular traffic but also for pedestrian travel, or in other words the shoulder. The court then read section 564 of the Vehicle Code:

> "No pedestrian shall walk upon any roadway outside of a business or residence district otherwise than close to this left hand edge of the roadway."

Following this the jury was instructed that the place where the accident occurred was not in a business or residential district, and further that: "Section 564 of the California Vehicle Code 'only requires that a pedestrian walk upon the lefthand side of the *roadway,* and does not attempt to prescribe upon which side of the *highway* he may walk.'" (Emphasis added.) Also following was this instruction:

> "Conduct which is in violation of California Vehicle Code, Section 564, * * * read to you constitutes negligence per se. This means that if the evidence supports a finding, and you do find, that a person did so conduct himself, it requires a presumption that he was negligent. However, such presumption is not conclusive. It may be overcome by other evidence showing that under all the circumstances surrounding the event, the conduct in question was excusable, justifiable and such as might reasonably have been expected from a person of ordinary prudence. In this connection, you may assume that a person of ordinary prudence will reasonably endeavor to obey the law and will do so unless causes, not of his own intended making, induce him, without moral fault, to do otherwise.
>
> "However, in this action, *a violation of law is of no consequence unless it was a proximate cause of or contributed, in some degree as a proximate cause, to an injury* found by you to have been suffered by the plaintiff." (Emphasis added.)

It may be plainly seen from the above that the court very clearly told the jury that even though they found appellant to have been walking on the right-hand side of the "roadway" in violation of the statute this was of no consequence unless it proximately caused or contributed to appellant's injury.

We know of no reason why, when the evidence is undisputed that appellant was walking on the right-hand portion of the highway, the trial court should have been concerned with or charged with the duty of instructing the jury concerning possibilities existing on the other side of the highway. What the court said in effect was that where his presence on the right-hand portion of the highway was undisputed and where thereupon he had a choice of walking either on the "roadway" or on the shoulder he must be considered as having acted negligently if in violation of Vehicle Code, Section 564, he chose to walk on the "roadway" rather than on the shoulder. Aside from the fact that the instruction omits the element of proximate cause and describes any spot on earth as "perfectly safe" rather than "relatively safe" we cannot see that it is not a correct statement of the law.

[11] Appellant next contends that it was error for the trial court to have refused to give this instruction requested by the plaintiff:

> "It is the duty of a driver of an automobile when the view is unobstructed to see persons walking on the highway in front of the car."

As its reasons for refusing to so instruct, the court indicated that the principle had been covered elsewhere and that the proposed instruction was not sufficiently qualified with respect to distance, exceptional conditions, etc. It would appear that the court was correct, for the instruction contains no qualification as to distance or otherwise and this "duty to see" rule was fully and fairly covered by the instruction concerning defendant driver's duty "to keep a vigilant lookout ahead for other persons lawfully using the highway and to anticipate the presence of such persons" and his "duty under the law to keep his machine under control as would enable him, under the exercise of ordinary care, to avoid collision." There was no error in refusing to instruct in the unqualified language of plaintiff.

Finally, appellant contends that it was error for the trial court to give this instruction requested by defendant:

> "You are instructed that it is the duty of a person walking upon a highway to use ordinary care in looking for objects that may cause him injury and to see and heed that which, by such looking, may have been visible to him, in the exercise of ordinary care and caution. He had no right not to look or to look carelessly. To look carelessly or heedlessly is as negligent as not to look at all."

In support of this contention appellant alleges that said instruction is not a correct statement of the law applicable to the case and that to so instruct led to prejudicial error in view of the conflict in the evidence regarding plaintiff's physical position on the highway at the time of the accident.

We entertain no doubt whatever that this instruction is correct as a general statement of the law. But in cases involving collisions between pedestrians or vehicles traveling in the same direction, there has also grown up in our case law an exception to this general rule which renders the general rule misleading if given alone and without noting the exception. In the early case of Blackwell v. Renwick, 21 Cal. App. 131, 131 P. 94, decided in 1913, wherein plaintiff and his wife were walking along a car track near the center of the roadway along which there was a sidewalk provided for pedestrians, plaintiff was struck from the rear by an automobile traveling along the roadway in the same direction as plaintiff and his wife. Judgment in favor of plaintiff was sustained on appeal. At page 135 of 21 Cal.App., at page 96 of 131 P. of the opinion we find this language:

> "Neither can it be said as a matter of law that plaintiff was negligent in not looking back up the street to observe whether there were vehicles approaching before proceeding southerly. It cannot be said that, had he observed the approach of the automobile before he and his wife started to move in a southerly direction, they could not have reasonably and prudently started on their course along the very portion of the street traversed by them up to the time of the collision. *It certainly was not their duty to turn about constantly and repeatedly to observe the approach of possible vehicles from the rear* where the drivers of such vehicles could plainly observe them in time to give warning, or turn out and avoid a collision." (Emphasis added.)

This rule was approved and followed in Shannon v. Thomas, 57 Cal.App.2d 187, 134 P.2d 522, and was followed in Wright v. Ponitz, 44 Cal.App.2d 215, 112 P.2d 25, both of which were cases in which a party who was pushing an automobile on a public highway was struck from the rear. See also Bogan v. White, 137 Cal.App. 150, 30 P.2d 429; Nickell v. Rosenfield, 82 Cal. App. 369, 255 P. 760; and Ducat v. Goldner, 77 Cal.App.2d 332, 175 P.2d 914.

In Hatzakorzian v. Rucker-Fuller Desk Co., 197 Cal. 82, at page 95, 239 P. 709, at page 713, 41 A.L.R. 1027, decided in 1925, the court said:

> "'It is settled law that pedestrians have a right to travel anywhere upon a public highway, and it is, therefore, not negligence in them to do so. This is the common-law rule, and our Legislature has not changed or modified it. Raymond v. Hill, 168 Cal. 473, 482, 143 P. 743. Nor is a pedestrian under legal duty to look back or watch behind to see whether he or she is in danger of being struck or run down by any vehicle approaching him or her from the rear. Raymond v. Hill, supra; Devecchio v. Ricketts, 66 Cal. App. 334, 226 P. 11; Idemoto v. Scheidecker, 193 Cal. 653, 226 P. 922. Of course, pedestrians, as is true of every person who travels over the highways by whatsoever means or mode, must exercise reasonable or the due amount of care, considering the conditions existing as to the highways, for their own safety. If they fail in the exercise of such care and themselves thereby contribute proximately to the cause of any injury they may sustain at the hands of one having an equal right to use the highways, or if such failure is the sole cause of the damage they have suffered, then, of course, they have no ground upon which to base just complaint.'"

As noted, the Hatzakorzian case was decided in 1925. Since 1935, at least, when section 564 of the California Vehicle Code was enacted, it has not been the law as stated in the Hatzakorzian case that, "'* * * pedestrians have a right to travel anywhere upon a public highway, and it is, therefore, not negligence in them to do so.'" In the case at bar there was considerable conflict in the evidence as to just where on the "roadway" appellant was traveling at the time he was struck. As pointed out by appellant, and as discussed above, the terms "roadway" and "highway" are not synonymous. "Roadway" covers the part ordinarily used for vehicular travel. "Highway", on the other hand, includes the shoulders as well. Mecchi v. Lyon Van & Storage Co., 38 Cal.App.2d 674, 680, 102 P.2d 422, 104 P.2d 26; Summers v. Dominguez, 29 Cal.App.2d 308 at page 311, 84 P.2d 237. In the Summers case, 29 Cal.App.2d at page 312, 84 P.2d at page 239, we also find this language:

> "The statute [section 564 of the Vehicle Code] only requires that a pedestrian walk upon the left-hand side of the *roadway*, and does not attempt to prescribe upon which side of the *highway* he may walk." Emphasis added; See also Lesser v. McCullough, 90 Cal.App.2d 586, 590, 203 P.2d 832.

The latest pronouncement by our Supreme Court on the duty to look appears in the case of Francis v. City & County of San Francisco, 44 Cal.2d 335, 282 P.2d 496. That is an intersection crossing case, but in it the court points up the fact that the measure of the duty to look cannot be divorced from the facts of each individual case or from the standard of conduct of the ordinarily prudent person. Therein, 44 Cal.2d at page 341, at page 500 of 282 P.2d, the following quotation from Salomon v. Meyer, 1 Cal.2d 11, 15, 32 P.2d 631, is cited with approval:

> "'Whenever there is room for an honest difference of opinion between men of average intelligence, the question of whether the plaintiff was negligent in failing to look again in the direction from which the defendant's car was approaching is a question of fact for the jury and the finding of the triers of fact is conclusive. McQuigg v. Childs, 213 Cal. 661, 3 P.2d 309.'"

[12, 13] In the case at bar the jury was instructed regarding appellant that: "He had no right not to look or to look carelessly." There was no qualification placed upon this duty to look conditioned upon his actual position on the highway at the time he was struck. Appellant points out, and with substantial logic in his argument, that the jury might, with valid reason, have concluded from this instruction that appellant was under a duty to look back even though he were walking, as he testified, on the shoulder and not on the roadway. The instruction, he argues, could, under the circumstances, convey only one meaning to the jury, viz:, that he was under a legal duty to look back, regardless of where he was walking on the highway, which is not the law.

We are convinced of the merit of this argument. Without receding from our position that juries may not always be impressed with or understand the fine legalistic distinctions we sometimes draw, it seems obvious that if they gave any detectable consideration to this instruction, they could hardly have reached any conclusion other than that appellant, regardless of his position, was under a legal duty to look back and that a failure to do so would constitute contributory negligence on his part. This would seem to be the most reasonable conclusion to be drawn, even though the language charging that: "He has no right not to look or to look carelessly," is prefaced by the statement that: "* * * it is the duty of a person walking upon a highway to use ordinary care to look for objects that may cause him injury * * *." If appellant was actually walking on the shoulder at the time he was struck, rather than on the roadway, he would have had little reason to anticipate that an automobile whose driver was exercising due care in using the highway might "cause him injury." He had a right to assume, in the absence of some evidence to the contrary, that any driver using the highway was exercising due care in so doing.

In view of the evidence in this case, it seems at least as probable that the jury based its verdict on a finding of contributory negligence on the part of appellant as upon a finding of no negligence on the part of the defendant. Considering the conflict in the evidence as to just where appellant was walking at the time he was struck, there is no means of knowing whether the jury placed him upon the "roadway" or upon the shoulder. If upon the shoulder, and the verdict was based upon a finding of contributory negligence by reason of the fact that appellant failed to look back, or if upon the shoulder and in the exercise of ordinary prudence he had no occasion to anticipate danger from an approaching automobile and failed to look at all, the verdict would be erroneous. Since there is no means of knowing that the instruction as given, which we consider erroneous under the facts of the case, did not lead the jury into error, the verdict cannot be allowed to stand. O'Meara v. Swortfiguer, 191 Cal. 12, 214 P. 975; Oettinger v. Stewart, 24 Cal.2d 133, 148 P.2d 19, 156 A.L.R. 1221; Moss v. Stubbs, 111 Cal.App. 359, 295 P. 572, 296 P. 86; Thompson v. M. K. & T. Oil Co., 5 Cal.App.2d 117, 42 P.2d 374.

The judgment is reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

Hearing denied; SHENK and EDMONDS, JJ., dissenting.

133 Cal.App.2d 424

F. J. ROBINSON, an individual doing business under the fictitious name and style of Robinson Electric, Plaintiff and Appellant,

v.

Mike TANOVITZ, Manuel Tanovitz, and Rachel Tanovitz, doing and transacting business under the fictitious name and style of 20th Century Market, Ltd., Defendants and Respondents.

No. 16164.

District Court of Appeal. First District.
Division 1, California.
June 6, 1955.

Action was brought for reasonable value of electrical installations in store of defendants. The Superior Court of County of Contra Costa, Harold Jacoby, J., entered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Fred B. Wood, J., held that evidence supported findings that there was no express contract for payment of compensation to plaintiff by defendants and that plaintiff did not render services under such circumstances as would give rise to an obligation implied or imposed by law, to compensate him for reasonable value thereof.

Judgment affirmed.

1. Appeal and Error 🔑989

Though there was a conflict in much of the testimony, the District Court of Appeal was required to consider only that testimony which tended to support the findings and judgment.

2. Contracts 🔑28(3)
Work and Labor 🔑28(2)

Evidence supported findings in action to recover reasonable value of electrical installations in defendants' store that there was no express contract for payment of compensation by defendants to plaintiff, and that plaintiff did not render services under such circumstances as would give rise to an obligation, implied or imposed by law, to compensate plaintiff for reasonable value of electrical installations.

William A. Andrews, Sonoma, for appellant.

Francis W. Collins, Crockett, for respondents.

FRED B. WOOD, Justice.

Plaintiff sued the defendants for $3,200 as the reasonable value of certain electrical installations consisting of electrical wiring, outlets, lights, lighting fixtures and other electrical devices which he allegedly installed at a certain retail store pursuant to an oral contract with defendants who orally agreed to pay plaintiff the reasonable value for such installation and work. From a judgment that he take nothing, plaintiff appeals.

[1] He questions the sufficiency of the evidence. Although there is a conflict in much of the testimony, we must, of course, consider only that which tends to support the findings and the judgment.

[2] Our examination of the record convinces us that there is evidence which, together with the inferences which reasonably may be drawn from it, amply supports findings that there was no express contract for payment of compensation and that plaintiff did not render services under such circumstances as would give rise to an obligation, implied or imposed by law, to compensate him for the reasonable value thereof.

Plaintiff computed his $3,200 claim upon the basis of 10 percent of his estimate of the cost of the job, including equipment installed, materials used, and labor employed. There is evidence that plaintiff had been doing electrical work for defendants for pay in the Sonoma area; that upon this occasion when they asked him to do the installation work at their store at Rodeo he hesitated to undertake it, but an arrangement was worked out whereby an electrician by the name of Clark was engaged to do the work, using plaintiff's license, defendants paying as the work progressed all bills for equipment installed or materials used, keeping plaintiff's books on this job for him and advancing to him from time to time his payroll costs and writing up his payroll checks for his signature. Plaintiff testified that he made a number of trips to Rodeo to inspect the job during its progress but admitted that the matter of compensation to him was never discussed. The defendants testified that in view of these circumstances they at no time had any understanding or expectation of paying plaintiff in respect to this job and that he never billed them for it; that the job was completed in January, 1951, and though this suit was not filed until March, 1952, he never sent them a bill and never mentioned the subject of compensation; that on previous jobs he always billed them and they had paid; and that after this job was finished he did some electrical work for them on a separate job and presented them with a bill for it which they paid, but he never billed them for his services in relation to this job.

Plaintiff admitted upon the witness stand that he never had a conversation with Mike Tanovitz, or anyone, in Sonoma concerning his compensation as a contractor on this job; that there never was an agreement for payment to him; that he never told Mr. Tanovitz that the latter owed plaintiff money; and that he never presented a bill on this job.

This we deem a sufficient although not a complete summary of the supporting evidence.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

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133 Cal.App.2d 437

Alma PIERCE, Plaintiff and Respondent,

v.

Natalie M. KALMUS, Defendant and Appellant.

Civ. 20726.

District Court of Appeal, Second District, Division 1, California.

June 6, 1955.

Rehearing Denied July 5, 1955.

Action for the value of legal services rendered by plaintiff's assignors as defendant's attorneys in separate maintenance action against her husband and for costs and expenses advanced by assignors. From a judgment of the Superior Court of Los Angeles County, Frank G. Swain, J., for plaintiff, defendant appealed. The District Court of Appeal, Drapeau, J., held that defendant impliedly agreed to pay for her counsel's services and advances; no express agreement to pay therefor being necessary.

Judgment affirmed.

Attorney and Client 🔑133

A woman employing attorneys to bring separate maintenance action against her husband impliedly agreed to pay for such attorneys' legal services and costs and expenses advanced by them, so as to render her liable therefor to attorneys' assignee; no express agreement to pay therefor being necessary.

Shacknove & Goldman, Los Angeles, Ben F. Goldman, Jr., Los Angeles, of counsel, for appellant.

Maurice Schulman and Frank Alef, Los Angeles, for respondent.

DRAPEAU, Justice.

Plaintiff is the assignee of a claim for legal services, and for $929.95 costs and expenses advanced by the assignors. Pursuant to their employment, the attorneys spent six months on the case, made extensive investigations, prepared a complaint for separate maintenance and an order to show cause, and negotiated a compromise agreement with defendant's husband whereby he would pay her $20,000 a year for life, and would also give her a home of her own for life.

When counsel presented this agreement to defendant she refused to sign it, charged them with bad faith, and discharged them. Since then she has not paid anything on their bill, even for the money they advanced for her.

The trial court found and adjudged that defendant pay counsel fees, fixed at $10,000, and the advanced costs, $929.95. Defendant appeals from the judgment.

In support of her appeal she argues:

1. That the findings and the judgment are not supported by the evidence;

2. That where there was an express agreement between the parties that no payment was to be made there can be no implied agreement;

3. That where there is an agreement to pay out of a particular fund, there can be no recovery without proof that funds became available from such funds or source;

4. That an attorney cannot refuse to continue with a domestic relations matter and then seek to recover in quantum meruit for services rendered to the date of his withdrawal; and

5. That she had a right to dismiss counsel because of their insistence that she enter into what she considered an unfair and inequitable contract.

In Kalmus v. Kalmus, 103 Cal.App.2d 405, 230 P.2d 57, this Court had occasion to go carefully through the many ramifications of the litigation between this woman and her husband. These are set forth at length in the opinion in that case. Suffice it to say here that when she got through with her litigation she got nothing; and would have been better off if she had taken the compromise worked out for her by her attorneys in this case.

There is no merit in any of defendant's several defenses. Substantial evidence in the record abundantly sustains the findings of the trial court. There was an implied agreement on her part to pay for the services and advances of her counsel. No agreement in so many words is necessary in such circumstances. Neblett v. Getty, 20 Cal.App.2d 65, 66 P.2d 473. And there was substantial evidence to support the finding that there was no agreement by counsel that if they were not paid by defendant's husband they would get nothing.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

Barbara EMERY and Joyce Emery, minors, by and through their Guardian ad litem, Esther Louise Emery and Esther Louise Emery, Plaintiffs and Appellants,

v.

Buel E. EMERY, James Buel Emery, et al., Defendants and Respondents.

Civ. 16219.

District Court of Appeal, First District. Division 1, California.

May 27, 1955.

As Amended June 24, 1955.

Hearing Granted July 20, 1955.*

Action by unemancipated minor children against father and minor brother, and by mother against same defendants, for injuries sustained in automobile accident, and for medical expenses allegedly incurred by mother. The Superior Court, City and County of San Francisco, Herbert C. Kaufman, J., sustained general demurrer, and plaintiffs appealed. The District Court of Appeal, Fred B. Wood, J., held, inter alia, that under Idaho law unemancipated minor children could sue their father for injuries sustained in automobile accident allegedly caused by father's willful misconduct or reckless disregard of the rights of others.

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* Opinion vacated 289 P.2d 218.

Judgment reversed with directions.

1. Pleading 🔑204(2)

If a complaint is sustainable on any theory, it is not vulnerable to a general demurrer.

2. Automobiles 🔑229½

Action for injuries sustained in automobile acident in Idaho was governed by Idaho law.

3. Automobiles 🔑181(1)

"Reckless disregard" of rights of others, within Idaho guest statute, means an act or conduct destitute of heed or concern for consequences, especially foolishly heedless of danger, or headlong or rash; wanton disregard or conscious indifference to consequences, and it is not synonymous either with "conduct in reckless disregard of the safety of another" or with "willful misconduct". I.C. § 49–1001; Vehicle Code, § 403.

See publication Words and Phrases, for other judicial constructions and definitions of "Reckless Disregard".

4. Automobiles 🔑238(7)

Complaint by minor children against father and minor brother for injuries sustained in automobile accident in Idaho sufficiently pleaded reckless disregard of rights of others under Idaho guest statute. I.C. § 49–1001.

5. Automobiles 🔑181(7)

Excessive speed taken alone need not import willful misconduct, as used in California guest statute, but, under all surrounding circumstances of the case, it may do so. Vehicle Code, § 403.

6. Negligence 🔑112

A pleading of willful misconduct is sufficient where significant facts are pleaded with particularity and in detail and in addition to general allegations.

7. Parent and Child 🔑11

Under Idaho law, unemancipated minor children could sue their father for injuries sustained in automobile accident allegedly caused by father's willful misconduct or reckless disregard of the rights of others. I.C.A. § 49–1001.

8. Infants 🔑70

Under Idaho law, unemancipated minor children could sue their minor brother for willful misconduct of reckless disregard of rights of others allegedly causing injuries in automobile accident.

9. Husband and Wife 🔑4

Parent and Child 🔑3(1)

Under Idaho law, husband has, in general, the duty to support wife and minor children, even though wife may have earning capacity.

10. Husband and Wife 🔑248

Idaho is a community property state.

11. Husband and Wife 🔑260

Under Idaho law, a cause of action for personal injuries to either spouse is property of the community.

12. Husband and Wife 🔑265

Under Idaho law, husband is agent and trustee for marital community. I.C. § 32–912.

13. Husband and Wife 🔑270(5)

Under Idaho law, community cannot be sued nor judgment rendered against it without husband being made a party to suit.

14. Husband and Wife 🔑270(5)

Under Idaho law, husband is only necessary party plaintiff and may sue in one action to recover damages for wife's personal injuries and for expenses for medical attendance and hospital fees incurred by reason thereof.

15. Husband and Wife 🔑205(2)

Parent and Child 🔑11

Under Idaho law, mother of minor plaintiffs could not recover from her husband and her son for medical, hospital and other expenses for care and treatment of minor plaintiffs allegedly necessitated by automobile accident resulting from reckless disregard of rights of others on part of husband and son.

J. Oscar Goldstein, P. M. Barceloux, Burton J. Goldstein, Goldstein, Barceloux & Goldstein, Robert J. Cort, San Francisco, for plaintiffs and appellants.

Worthington, Park & Worthington, Ronsia W. Fields, San Francisco, for respondents.

FRED B. WOOD, Justice.

Barbara and Joyce Emery, minors, brought this action for personal injuries against their father, Buel, and their minor brother James. They allege that these injuries were sustained as the result of an automobile accident which occurred when they were riding as guests in a car owned by Buel and operated by James. Their mother, Esther, as the person who has the care, custody and control of the minor plaintiffs, joined as plaintiffs for recovery of moneys she, allegedly, is obligated to pay for medical, nursing, hospital and other care and treatment of the minor plaintiffs.

General demurrers to the original and the first amended complaints were sustained with leave to amend. Defendants' joint and individual demurrer to the second amended complaint was sustained without leave to amend. Thereafter judgment was rendered that plaintiffs take nothing and that defendants recover their costs. Plaintiffs have appealed.

[1] In such a case all that is required is that a plaintiff state facts entitling him to some type of relief. Boren v. State Personnel Board, 37 Cal.2d 634, 638, 234 P.2d 981. "If a complaint is sustainable on any theory it is not vulnerable to a general demurrer." Schumm, by Whyner v. Berg, 37 Cal.2d 174, 183, 231 P.2d 39, 43, 21 A.L.R.2d 1051.

Plaintiffs present the following questions: (1) Have Barbara and Joyce stated facts sufficient to constitute causes of action against the defendants, assuming that the latter are not immune from suit because of the family relationship? (2) If they have stated such causes of action may they as unemancipated minors maintain them against their father, Buel? (3) Similarly, may they maintain such causes of action against their brother James? (4) Has Esther stated causes of action against James her minor son and against Buel her husband?

[2] In view of the fact that the accident occurred in Idaho we must endeavor to find the answers which the Supreme Court of that state would give in response to these questions were they before it for consideration and decision. Shoemaker v. Floor, 1950, 117 Utah 434, 217 P.2d 382, 384; R. J. Reynolds Tobacco Co. v. Newby, 9 Cir., 1944, 145 F.2d 768; Davis v. Smith, D.C.E.D.Pa.1954, 126 F.Supp. 497, 504.

(1) *An Idaho statute declares the obligations of the owner or operator of a motor vehicle toward a person riding as his guest.* This it does in these terms: "No person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause for damages against such owner or operator for injuries, death or loss, in case of accident, unless such accident shall have been intentional on the part of the said owner or operator or caused by his intoxication or his reckless disregard of the rights of others." 9 Idaho Code of 1947, § 49–1001; Stats.1939, ch. 160, p. 285.

[3] "The term 'reckless disregard' as used in said section means an act or conduct destitute of heed or concern for consequences; especially foolishly heedless of danger, headlong rash; wanton disregard, or conscious indifference to consequences." Foberg v. Harrison, 1950, 71 Idaho 11, 225 P.2d 69, 71. See also Loomis v. Church, Idaho, 1954, 277 P.2d 561, 563.

[4] We entertain no doubt that the minor plantiffs stated facts which meet in full measure the requirements of this definition.[1]

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[1] In the instant case each minor plaintiff alleged: (1) plaintiff was a guest riding in an automobile driven by defendant James as agent and employee of defend-

This definition, while it denies the guest a remedy in the case of simple negligence, apparently is not synonymous with the definition of "conduct * * * in reckless disregard of the safety of another" as furnished by section 500 of the Restatement of the Law of Torts, nor with the concept of "wilful misconduct" as expressed in section 403 of the California Vehicle Code. Said section 500 reads as follows: "The actor's conduct is in reckless disregard of the safety of another if he intentionally does an act or fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize that the actor's conduct not only created an unreasonable risk of bodily harm to the other but also involves a high degree of probability that substantial harm will result to him."[2] We observe that the editor says of section 500: "The conduct described in this Section is often called 'wanton or wilful misconduct' both in statutes and judicial opinions." II Restatement of the Law of Torts, p. 1293. Professor Charles E. Carpenter, who prepared the California Annotations to this Restatement, cites a line of decisions interpretive of "wilful misconduct" as used in section 403 of the California Vehicle Code, which he states are in accord with the rule expressed in section 500 of the Restatement. See "California Annotations," pp. 275–276, 1940 Pocket Supplement to II Restatement of the Law of Torts.

The Idaho Supreme Court has indicated there is a difference between "reckless disregard," as used in its guest statute, and "wilful misconduct" as commonly used. See Dawson v. Salt Lake Hardware Co., 1943, 64 Idaho 666, 136 P.2d 733, 738; Hughes v. Hudelson, 1946, 67 Idaho 10, 169 P.2d 712, 716; Shoemaker v. Floor, 1950, 117 Utah 516, 217 P.2d 382, 384–385, supra. Although not coextensive with either of these other two concepts, "reckless disregard" as thus interpreted is included within each of them. This, apparently, was given direct recognition by the Supreme Court of Idaho in Mason v. Mootz, 1953, 73 Idaho 461, 253 P.2d 240. After pointing out various deficiencies in the evidence, the court concluded it was "wholly insufficient to support the claim of reckless disregard under the guest statute" and cited some 20 cases, including a number which relate to "willful misconduct." Of the latter, the court said: "We are aware that some of these cases construe a statute using the term 'willful misconduct' and that such term is to be distinguished from the wording of our statute. Dawson v. Salt

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ant Buel, its owner. (2) James was a minor of 17 years who had only been driving for a short time and was an unskilled and inexperienced driver and unaccustomed to driving during the times, in the places and under the circumstances which obtained; facts known to Buel. (3) James and Buel were guilty of wilful misconduct, which consisted of the following acts under the following circumstances; (a) Buel directed James to drive, knowing that James was sleepy and drowsy and had had no sleep for a long period in excess of 24 hours; (b) for many miles and a long period of time prior to the accident James drove at excessive rates of speed with the knowledge and consent of Buel; (c) Buel directed James to drive, knowing the facts stated in clause (2), above; (d) Buel knew the road was in a dangerous condition, in that it was only a 2-lane highway with dirt and gravel on either side; (e) James fell asleep at the wheel while the car was traveling at said high and excessive speed and lost control, causing the car to roll over; (f) all of the aforementioned wilful misconduct of the defendants took place with a complete disregard of and indifference to the great possibility of injuring the persons riding in the car and with full knowledge of the danger involved; and (g) as a proximate result of said wilful misconduct the automobile left the highway and rolled over, causing plaintiff severe, serious and permanent injuries.

[2] Section 500 is set in relief by § 282 of the Restatement of the Law of Torts: "In the Restatement of this Subject, negligence is any conduct, except conduct recklessly disregardful of an interest of others, which falls below the standard established by law for the protection of others against unreasonable risk of harm."

For an informative discussion of "Negligence contrasted with recklessness," see Comment *d* concerning § 282, and the Special Note appended to Comment *d*. II Restatement of the Law of Torts, pp. 739–740.

Lake Hardware Co., supra. However, the reasoning is applicable here." 253 P.2d at page 243.

Also it is hardly conceivable that the Legislature of Idaho intended to dispense with recovery in a case of "willful misconduct" while allowing recovery in a case of "reckless disregard" of others' rights, when the latter tokens a somewhat less culpable violation of duty than the former; especially, in view of the principle that statutes of this nature are viewed as not abolishing the right or the cause of action but as merely changing the nature and character of the proof required in each case, Barr v. Carroll, 128 Cal.App.2d 23, 27 et seq., 274 P.2d 717, and cases there cited.

[5] Accordingly, the fact is noted that the minor plaintiffs have stated facts which constitute "wilful misconduct" within the meaning of that term as used in section 403 of the California Vehicle Code.[3] We rely upon the principles enunciated in such cases as Meek v. Fowler, 3 Cal.2d 420, 426, 45 P.2d 194; Weber v. Pinyan, 9 Cal.2d 226, 230–238, 70 P.2d 183, 112 A.L.R. 407; Donnelly v. Southern Pacific Co., 18 Cal.2d 863, 869–870, 118 P.2d 465; Cope v. Davison, 30 Cal.2d 193, 196–200, 180 P.2d 873, 171 A.L.R. 667; Anderson v. Newkirch, 101 Cal.App.2d 171, 173, 225 P.2d 247. Excessive speed taken alone need not import wilful misconduct but under all of the surrounding circumstances of a case it may. Hallman v. Richards, 123 Cal.App.2d 274, 281, 266 P.2d 812; Anderson v. Newkirch, supra, 101 Cal.App.2d 171, 178–179, 225 P.2d 247, and cases there cited.

[6] Although there is authority for pleading wilful misconduct in fairly general terms, Gibson v. Easley, 138 Cal.App. 303, 313, 32 P.2d 983; Frisvold v. Leahy, 15 Cal.App.2d 752, 757, 60 P.2d 151, when the significant facts are pleaded with particularity and in detail in addition to the general allegations (as in the instant case) there can be no doubt that the pleading is sufficient. See Norton v. Puter, 138 Cal.App. 253, 256, 32 P.2d 172.

(2) *May Barbara and Joyce, as unemancipated minors, sue their father, Buel, for damages for personal injuries allegedly caused by his wilful misconduct?*

We are confronted with the principle announced in 1891 in Hewlett[4] v. George, 68 Miss. 703, 9 So. 885, 13 L.R.A. 682, that "so long as the parent is under obligation to care for, guide and control, and the child is under reciprocal obligation to aid and comfort and obey, no such action as this can be maintained. The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent." 9 So. at page 887. This was said, without qualification, in a case of false imprisonment, incarceration of a child in an insane asylum. It was followed in 1903 by McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664, 64 L.R.A. 991, cruel and inhuman treatment of a child by its stepmother with the consent of its father; and in 1905 by Roller v. Roller, 37 Wash. 242, 79 P. 788, 68 L.R.A. 893, the rape of a minor child by her father.

These three cases "set the stage and laid a foundation for a large body of decisions in numerous jurisdictions in the United States flatly denying any right of recovery to a child against a living parent under any circumstances. But in more recent years it would seem that the trend of judicial decisions and the thinking of legal writers has been toward amelioration and limitation of the rule, based upon a recognition that the Hewlett, McKelvey and Roller cases were wrongly decided." Davis v. Smith, D.C.E.D.Pa.1954, supra, 126 F.Supp. 497, 503.

Excellent reviews of the decisions, demonstrating this modern trend toward amelioration and limitation of the rule an·

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[3] In the absence of Idaho cases (at least none have come to our attention) we draw on California case law as persuasive authority.

[4] The plaintiff's name appears as "Hewellette" in 9 So. 885 but as "Hewlett" in 68 Miss. 703 and 13 L.R.A. 682.

nounced in the Hewlett case, are furnished by Dunlap v. Dunlap, 1930, 84 N.H. 352, 150 A. 905–915, 71 A.L.R. 1055; Cowgill v. Boock, 1950, 189 Or. 282, 218 P.2d 445, 448–453, 19 A.L.R.2d 405; Borst v. Borst, 1952, 41 Wash.2d 642, 251 P.2d 149–157, disapproving the doctrine as broadly stated in the Hewlett case and followed in the Roller, 1905, 37 Wash. 242, 79 P. 788, case; Davis v. Smith, 1954, supra, 126 F.Supp. 497, 502–508; Prosser on Torts, 905–908, sec. 99; McCurdy on "Torts Between Persons in Domestic Relation" 43 Harv.L.Rev. 1030, Parent and Child, at 1056–1082 (May, 1930); 79 U. of Pa.L.Rev. 80–84 (Nov. 1930); 26 Geo.L.J. 139 (1937–38); 18 B. U.L.Rev. 468 (1938); 5 Miami L.Qtrly. 328 (1950–51); 29 N.C.L.Rev. 214 (1950–51); 30 Ore.L.Rev. 86 (1950–51); 25 St. John's L.Rev. 118 (1950–51); 38 Com.L. Q. 462–470 (1953); 39 Va.L.Rev. 389–391 (1953); 29 N.Y.U.L.Rev. 1302–1305 (1954); 18 Albany L.Rev. 270 (1954); 23 Fordham L.Rev. 110 (1954); 7 Okla.L. Rev. 238 (1954); 19 A.L.R.2d 423–462, Annotation.[5]

No simple rule or pat formula has been evolved for ready application in each case. The situation does not lend itself to that. Certain principles have been developed, in the light of which the facts peculiar to each case may be considered and appraised in determining whether the suit should or should not be allowed. These principles we find well expressed by Judge Lord in Davis v. Smith, supra, 126 F.Supp. 497, 504, in these words: "The view of the more recent decisions and the modern legal authorities on the subject would appear to be that the rule of non-parental liability is to apply *only where the injuries occur while the parent is exercising his parental duty in the narrow sense.* Under this view the parent would not be liable for discipline or chastisement flowing from his duties as head of the family or for injuries resulting from disrepair or negligent defects in the family home. It is recognized that even within this scope wrongs may be done to the child. However, these wrongs may still have to be sacrificed to public policy in favor of protecting parental discipline in the home and preserving the family relationships. Although even some wrongs may be hidden by this immunity, public policy, as it exists today, should permit this limited immunity. But the immunity given to the parent is not one of right which he may demand, but is granted him only so long as he conducts himself properly as a parent and carries out the parental duties that society imposes upon him. The parental non-liability is given as a means of enabling the parent to discharge his duties in preserving the domestic tranquility. It should not shield the parent where the matter arises from a 'non-parental' occurrence, or where the parent commits an atrocious assault outraging the duties imposed upon him as a parent by society, or where either the parent or the child is dead and there is thus no tranquil relationship between them to preserve."

Consonant with these principles it appears that the "courts are in apparent agreement that where the child, while riding in the family automobile, is injured as a result of negligence on the part of the parent driver, no cause of action against the parent may be maintained." Borst v. Borst, supra, 1952, 41 Wash.2d 642, 251 P.2d 149, 152, citing some ten cases.

When the "family car" has not been involved the immunity rule has been less uniformly applied. In Borst v. Borst, supra, 1952, 41 Wash.2d 642, 251 P.2d 149, the child allegedly sustained injuries by reason of the father's negligence while operating a truck for business purposes. The court deemed this a tort committed by the parent while dealing with the child in a nonparental transaction and the mantle of immunity disappeared with the reason for it. For other cases, some in accord and some not in accord, with the Borst case, see pages 152–153 of 251 P.2d. Myers v. Tranquility Irr. Dist., 26 Cal.App.2d 385, 79 P.2d 419, is not in accord. Sign v. Signs,

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[5] For the sake of brevity we refer to these cases, texts, and notes for the exposition of the policy and trend in this field, which need not be repeated in detail here.

1952, 156 Ohio St. 566, 103 N.E.2d 743, is in accord with the Borst case.

Dunlap v. Dunlap, 1930, 84 N.H. 352, 150 A. 905, 71 A.L.R. 1055, involved a 16-year old boy who was working for his father during the summer vacation, receiving regular wages less the value of his board at home. The father carried employer's liability insurance, reported the boy as an employee, and paid insurance premiums in respect to him the same as in respect to the other workmen. Immunity was denied, the court concluding its discussion with these words: "The employment of the son was entered upon and continued under circumstances from which it could be found that the father intended to take on a full master's responsibility, and to release his parental control so far as necessary to attain that end. And it must be found that this suit has no tendency to disturb the family relations. Proof of either situation would remove the only substantial objection to the maintenance of the action." 150 A. at page 915.

Cases in which the death of the offending parent, marking it as it did a termination of the family relationship, was given as a reason, if not the only reason, for denying immunity, include Davis v. Smith, supra, 126 F.Supp. 497, 508; Mahnke v. Moore, 1951, 197 Md. 61, 77 A.2d 923; Welch v. Davis, 1951, 410 Ill. 130, 101 N.E.2d 547, 28 A.L.R.2d 656.

Illustrations of denial of immunity when the injury is caused by the intentional tort of the parent are furnished by Treschman v. Treschman, 1901, 28 Ind.App. 206, 61 N.E. 961; Dix v. Martin, 1913, 171 Mo.App. 266, 157 S.W. 133, 136; and Mahnke v. Moore, supra, 1951, 197 Md. 61, 77 A.2d 923.

Cases in which "wilful misconduct" is deemed a sufficient reason for denying immunity include Meyer v. Ritterbush, 1949, 196 Misc. 551, 92 N.Y.S.2d 595; Cowgill v. Boock, supra, 1950, 189 Or. 282, 218 P.2d 445, 19 A.L.R.2d 405; Wright v. Wright, 1952, 85 Ga.App. 721, 70 S.E.2d 152; Siembab v. Siembab, 1952, 202 Misc. 1053, 112 N.Y.S.2d 82. Significant are these remarks of the court in the Cowgill case: "We are concerned here with a case involving more than ordinary or gross negligence. It is one of wilful misconduct of the father whose wrongful act resulted in the untimely death of his young son. *The wrongful conduct of the father in driving the automobile while drunk is in no way referable to his duties as a parent. Indeed, in this case there was a clear abandonment of the parental duty.*" Page 450 of 218 P.2d; emphasis added.

In a number of cases of immunity because mere negligence was involved, the court has been careful to reserve the question whether immunity would be extended if an intentional tort or if wilful misconduct were involved. Baker v. Baker, Mo. Sup., 1953, 263 S.W.2d 29, the court observing that this case involved mere negligence and none of the exceptions which obtained in the Cowgill, Borst, or Dunlap cases; Ball v. Ball, Wyo., 1954, 269 P.2d 302, expounding Montana law, the court observed the absence of allegations of wilful or malicious tort; Levesque v. Levesque, 1954, 99 N.H. 147, 106 A.2d 563; Cannon v. Cannon, 1942, 287 N.Y. 425, 40 N.E.2d 236, "wilful misconduct" not a factor; Matarese v. Matarese, 1925, 47 R.I. 131, 131 A. 198, at page 200, 42 A.L.R. 1360, the court commented critically on the 1905 Washington case, 79 P. 788; Aboussie v. Aboussie, Tex.Civ.App., 1954, 270 S.W.2d 636, dictum that a child may sue its parent for a wilful or malicious personal tort; Brumfield v. Brumfield, 1953, 194 Va. 577, 74 S.E.2d 170, at page 174, court observing that no wilful or malicious act was involved "and we express no opinion on that question"; Securo v. Securo, 1931, 110 W.Va. 1, 156 S.E. 750, immunity rule approved insofar as it applies to mere carelessness or failure to exercise due diligence.

[7] We conclude that defendant Buel is not immune from suit in respect to the causes of action stated by Barbara and Joyce respectively, whether predicated upon "wilful misconduct" or upon "reckless disregard of the rights of others" as the latter term is used in the Idaho statute. We believe it reasonable to predict that the Supreme Court of Idaho will so hold when the question comes before it for consider-

ation and decision, because this view of the law is in harmony with the modern trend and our reading of Idaho's decisions convinces us that those decisions are in harmony with that trend. For example, when formulating our decision in Christiana v. Rose, 1950, 100 Cal.App.2d 46, 222 P.2d 891, concerning the right of a married woman living apart from her husband to sue a third person for the death of their child who was in her custody, we drew inspiration and support from Idaho's decision in Lorang v. Hays, 1949, 69 Idaho 440, 209 P.2d 733.

[8] (3) *It seems clear that Barbara and Joyce may maintain suit against their brother James* for wilful misconduct or for reckless disregard of the rights of others as the latter term is used in the Idaho statute.

There is here involved no history of immunity from suit based upon the family as an institution, such as there is in the parent-child relationship. There is, therefore, all the greater reason to hold that a minor child is not immune from suit for a minor sister's injuries allegedly caused by his wilful misconduct or reckless disregard of the rights of others. It was held in Rozell v. Rozell, 1939, 281 N.Y. 106, 22 N.E.2d 254, that a suit by a 12-year old boy against his 16-year old sister for injuries sustained while riding in an automobile negligently operated by her was maintainable. It is a well reasoned decision and contains a good review of the pertinent case law on the subject. See also annotation in 123 A.L.R. 1020.

(4) *Has Esther stated a cause of action against James, her minor son, and against Buel, her husband?* [6]

Esther seeks recoupment for the moneys she alleges she spent and will be obligated to pay for hospitalization, physicians and surgeons, X-rays, drugs, medical care, nursing and other miscellaneous expenses for the care and treatment of the minor plaintiffs occasioned by their alleged injuries.

Insofar as her action against the son is concerned there might be no immunity stemming from the parent-child relationship, but there is a serious question whether or not she has the right to sue either the son or the father for the consequential damages which she pleads.

[9] Although she alleges she has the custody of Barbara and Joyce and is responsible for their support and medical care, she does not allege facts tending to show that anything but the normal family relationship obtains, e. g., she does not allege that she is living separate and apart from her husband and that the sole custody of the children has been awarded her. In addition, although the accident allegedly occurred in June, 1952, in neither her original complaint (filed April 9, 1953), nor in her first amended complaint (filed August 3, 1953), nor in her second and last amended complaint (filed October 15, 1953) does she state that she has paid any of these expenses; instead, she refers to them as "incurred and necessarily to be incurred * * * in sums which are not now known to this plaintiff." Such a pleading does not appear to render inapplicable to this phase of the case the principle well established in Idaho that in general the duty to support the wife and minor children generally rests upon the husband and father. It is not primarily her duty to support him and the children. The fact that she has an earning capacity (none is alleged here) does not relieve him of his duty. See Hampshire v. Hampshire, 1950, 70 Idaho 522, 223 P.2d 950, 951, 953, 21 A.L.R.2d 1159; Heslip v. Heslip, 1953, 74 Idaho 368, 262 P.2d 999, 1001. So, it would seem, Esther is suing James and Buel for expenditures which in a legal sense would be primarily Buel's obligation, not hers, to make. That seems incongruous at the very least.

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6. The complaint alleges that Esther is the mother of the minor plaintiffs; that they are daughters of defendant Buel and that the defendant James is the son of Buel but does not allege that she is married to Buel nor does she allege that James is her son. However, counsel for the respective parties orally and in writing have discussed the issues upon the assumption that Esther and Buel are husband and wife and that she and James are mother and son.

[10, 11] Idaho is a community property state. This calls for consideration of the community property aspect of a right of action for consequential damages stemming from the injury of a minor child. It appears well established in Idaho that a cause of action for personal injuries to either spouse is property of the community. See cases collected in 35 A.L.R.2d 1199, section 4 at 1219–1223. Consequential damages for injuries to their minor children would seem to be in the same category. It is so in California. Flores v. Brown, 39 Cal.2d 622, 630, 248 P.2d 922. We have not found an Idaho case directly in point. Checketts v. Bowman, 1950, 70 Idaho 463, 220 P.2d 682, was an action by husband and wife for damages for the death of their minor child but there was no discussion of the nature of the cause of action (whether community property or not), nor of the capacity of either or both to sue.

[12–14] Viewing as community property the cause of action here involved, we are confronted with the fact that the husband has management and control of the community property except the earnings of the wife for her personal services. Idaho Code, 1947, § 32–912. This provision makes him the agent and trustee for the marital community. Morgan v. Firestone Tire & Rubber Co., 1948, 68 Idaho 506, 201 P.2d 976, 981. It follows that the community can not be sued nor can judgment be rendered against it without the husband being made a party to the suit. First Nat. Bank of Sandpoint v. Samuels, 1933, 53 Idaho 780, 27 P.2d 959. Because he has management and control of the community property, the husband is the only necessary party plaintiff and may sue in one action to recover damages for the wife's personal injuries *and for expenses for medical attendance and hospital fees incurred* by reason thereof. Labonte v. Davidson, 1918, 31 Idaho 644, 175 P. 588, 589–590. It would seem logically to follow that the same would be true of a suit for consequential damages resulting from injuries to their minor children.

[15] For the reasons indicated, it seems reasonable to conclude that Esther has not pleaded facts sufficient to constitute a cause of action in her favor against Buel or against James for the medical, hospital, and other expenses for the care and treatment of the minor plaintiffs.[7]

We conclude that the trial court correctly sustained the demurrer to Esther's alleged cause of action for consequential damages and committed no abuse of discretion in denying permission to amend that count a third time; that it was error to sustain the demurrers to the causes of action respectively stated by Barbara and Joyce; and that, therefore, the judgment must be reversed.

The judgment is reversed with directions to take such further steps and proceedings in the action as will not be inconsistent with the views herein expressed. Defendants James and Buel Emery will recover their appeal costs from plaintiff Esther; plaintiffs Barbara and Joyce will recover their appeal costs from James and Buel.

PETERS, P. J., and BRAY, J., concur.

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[7] In their concluding memorandum plaintiffs state that in view of their inability to furnish direct authorities in support of Esther's claims against Buel and James, and if this court does not find that she has pleaded a cause of action, "then, in that event, we [plaintiffs] are content to have this court disregard her third cause of action pleaded in the complaint."

We might treat that statement as an abandonment of the third cause of action, in the contingency indicated, but for the fact that it seems coupled with a statement by the plaintiffs that as they view the law "the pleading can at least be enlarged under the first two causes of action to cover all disbursements and costs," a question not before us upon this appeal and as to which we express no opinion.

133 Cal.App.2d 242

Marshall ABBOT and Frances Abbott, Plaintiffs and Appellants,

v.

Dr. Philip H. STEVENS, Defendant and Respondent.

Civ. 20570.

District Court of Appeal, Second District, Division 3, California.

May 25, 1955.

Action was brought by borrowers against lender to recover interest, bonus, and penalty for alleged usury. The Superior Court of Los Angeles County, Philbrick McCoy, J., entered judgment sustaining a demurrer to the fourth amended complaint, and the borrowers appealed. The District Court of Appeal, Ashburn, J. pro tem., held that provision in note, which fixed interest at maximum rate, that borrower was required to pay 180 days' unearned interest for privilege of prepaying note, was not usurious.

Judgment affirmed.

1. Fraud 🔑12

Alleged oral promise of lender not to enforce provision in note requiring borrower to pay 180 days' unearned interest for privilege of prepaying note being directly at variance with terms of note, could not afford a basis for an action in deceit.

2. Evidence 🔑434(8)

Parol evidence of fraud to establish invalidity of written instrument induced by promise made without any intention of performing it, is only permissible in case of a promise to do some additional act, which was not covered by terms of contract, and such evidence is not admissible in case of a promise directly at variance with terms of written instrument.

3. Fraud 🔑25

Fraudulent representations, which work no damage, cannot give rise to an action at law.

4. Fraud 🔑47

An allegation of a definite amount of damages is essential to stating a cause of action for fraud.

5. Fraud 🔑25

Payment of a lawful exaction cannot constitute a legal injury which will give rise to an action for fraud

6. Usury 🔑42

Provision in note, which fixed interest at maximum rate, that borrower was required to pay 180 days' unearned interest for privilege of prepaying note, was not usurious.

7. Usury 🔑42

Where excessive interest is caused by a contingency under control of the lender, or not under the control of the borrower, the transaction is usurious, but it is not usurious when the contingency is under the borrower's control.

8. Usury 🔑77

A contract, which in its inception is unaffected by usury, can never be invalidated by any subsequent usurious transaction.

9. Usury 🔑115

The parol evidence rule cannot impede inquiry into question whether transaction is usurious.

10. Usury 🔑15

The usurious character of a transaction is determined by amount agreed, at time of making of loan, to be paid.

11. Usury 🔑15

The usurious character of a contract is not determined by amount of interest borrower has paid thereon, but by amount of interest he has agreed to pay on his indebtedness.

12. Usury 🔑15

Borrower may not have paid a dollar of interest on his indebtedness, yet, if contract calls for a greater rate of interest than that permitted by statute, transaction is usurious, and no interest can be collected thereon.

13. Usury 🔑12

To infect a transaction with taint of usury, there must exist the corrupt purpose on one side to lend money at usurious interest and on the other side to borrow on usurious terms dictated by the lender.

14. Usury ⚿12

Rule that to infect a transaction with taint of usury there must exist a corrupt purpose, does not apply to a loan that is plainly usurious as a matter of law, and in such case intent is presumed, implied, or just ignored.

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Wm. J. Clark and Marshall Abbott, Los Angeles, for appellants.

Low & Stone, Beverly Hills, By Leonard Low, Beverly Hills, for respondent.

ASHBURN, Justice pro tem.

Demurrer to plaintiffs' fourth amended complaint having been sustained, they, according to appellants' opening brief, "refused to plead further." The judgment recites that counsel for plaintiffs stated "that plaintiffs had either pleaded a good cause of action or could not plead one." Plaintiffs having appealed, their counsel say that the "sole question to be decided therefore is whether said pleading as amended states a cause of action." They treat the action as one for damages for fraud and for recovery of interest, bonus and penalty for usury.

The complaint alleges that plaintiffs borrowed from defendant on September 12, 1952, the sum of $30,000 upon their promissory note secured by trust deed. The note carries interest at 10 per cent per annum payable monthly. The term of the note is three years. It confers this option upon the borrowers: "Privilege is hereby reserved of paying this Note in full prior to maturity by payment of principal, accrued interest, and 180 days unearned interest as a pre-payment privilege." Plaintiffs allege that they sought and defendant knew they wanted a loan for one year and no longer; that he promised them that if they would promptly make the prescribed payments for a period of one year or such lesser period as he should prescribe he would accept the principal amount and waive the payment of any bonus; he also represented that the bonus provision was inserted only with the intention that it should be effective if plaintiffs were dilatory in their payments and that as a matter of business practice he never did insist, and in this instance would not insist, upon payment of the bonus. It is also alleged that defendant then intended not to perform said promise and that the other representations were false; that plaintiffs believed said promises and statements and were thereby induced to accept the three year loan instead of the one desired, for a year or less. (There were other alleged false representations to the effect that defendant was loaning his mother's money and acting as her agent; that she insisted on loans for three years or more; that he had authority to terminate the loan before maturity and without exacting a bonus and that he had been doing so. But, as the note and trust deed were taken in defendant's own name and the acts complained of were performed by him personally, these alleged false representations are not material.) By way of branding the transaction as usurious plaintiffs further allege that the insistence upon a three year note and trust deed was merely a device "to procure a note and Trust Deed for a longer period than plaintiffs required, and for a longer period than it was intended by either party that the loan should remain unpaid, and said device being resorted to for the purpose of pretending to require a bonus for the release of said loan." Also that plaintiffs "did not require a loan for a longer term than one year, and did not intend to use the money for any longer term, as the defendants at all times well knew * * * to the end that defendants [plaintiffs] would submit to paying said bonus rather than two years additional interest." Again: "That all of the acts and things done by said defendant were done pursuant to an intent on his part to charge and collect more than 12%[1] per annum for the use of money and all of the promises and representations were made in pursuance of such intent." But it is also alleged that defendant intended and expected that plaintiffs would believe and rely on his promise with respect to the bonus and that they did do so; that otherwise they would not have executed the note and trust deed. It is not alleged that plaintiffs ever agreed or expected or intended to pay the bonus; it is alleged that they still relied upon the promise to waive it when they negotiated a new loan, probably in May 1953.

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[1] The maximum lawful rate is 10 per cent per annum. French v. Mortgage Guarantee Co., 16 Cal.2d 26, 34, 104 P. 2d 655, 130 A.L.R. 67.

Plaintiffs paid the prescribed interest in monthly sums to and including May 19, 1953. About two months before that date they offered to pay the note and about May 20, 1953, defendant advised that he wished this done; plaintiffs, relying upon the promise not to exact the bonus, negotiated a new loan with which to discharge this one; thereupon "after the said payments had been concluded"[2] they tendered to defendant the principal of $30,000 and demanded cancellation of the note and satisfaction of the trust deed, but he refused to do so unless plaintiffs paid him $1,500 as a bonus (the stipulated amount); thereupon they paid the principal, interest and bonus on June 1, 1953; they then received their note and a reconveyance under the trust deed. The complaint prays for recovery of $3,675 as the amount of interest and bonus paid, plus $4,500 as treble the amount of bonus; no mention of damages for fraud. And the averments approach no closer to a claim of damage than the allegation that plaintiffs negotiated a new loan and "that in so doing they incurred expense and in so doing they placed themselves in a position where unless the loan from defendant was cancelled they would be compelled to pay interest on two loans and thereby to pay far more than the ten percent on the amount of the loan from defendant."

This complaint does not disclose a right to recover for fraud, as it alleges no actionable deceit and contains no averment of damage.

[1, 2] The loan was for a specified term of three years and plaintiffs were given an option to pay it before maturity upon payment of a bonus of 180 days' unearned interest; without the bonus payment there could arise no right to pay the note before maturity. Defendant, with no intention of performing, promised to accept payment of principal without requiring a bonus if plaintiffs would promptly make their payments (interest) "for a period within one year, or such lesser period as he should require." In other words it was a promise that he would not enforce one of the terms of the contract. Such a promise, directly at variance with the terms of the writing, cannot afford a basis for an action in deceit. This rule is established by Bank of America, etc., Ass'n, v. Pendergrass, 4 Cal.2d 258, 264, 48 P.2d 659. And it is succinctly stated in Newmark v. H and H Products Mfg. Co., 128 Cal.App.2d 35, 37, 274 P.2d 702, 703, "Parol evidence of fraud to establish[ed] the invalidity of a written instrument induced by a promise made without any intention of performing it is only permissible in the case of a promise to do some additional act which was not covered by the terms of the contract and such evidence is not admissible in the case of a promise directly at variance with the terms of the written instrument. (Simmons v. Cal. Institute of Technology, 34 Cal.2d 264, 274 [9], 209 P.2d 581; Bank of America, etc., v. Pendergrass, 4 Cal.2d 258, 263, 48 P.2d 659; Partanian v. Flodine, 95 Cal.App.2d Supp. 931, 934, 213 P.2d 790; Cobbs v. Cobbs, 53 Cal.App.2d 780, 784 et seq., 128 P.2d 373; W. Ross Campbell Co. v. Sears, Roebuck & Co., 136 Cal.App. 765, 769[5], 29 P.2d 910.)"

[3-5] Fraudulent representations which work no damage cannot give rise to an action at law, 12 Cal.Jur. § 39, p. 765, and an allegation of a definite amount of damage is essential to stating a cause of action. Munson v. Fishburn, 183 Cal. 206, 220, 190 P. 808; Maynes v. Angeles Mesa Land Co., 10 Cal.2d 587, 590, 76 P.2d 109; Tsang v. Kan, 78 Cal.App.2d 275, 281, 177 P.2d 630; 12 Cal.Jur. § 69, p. 813. The only specific damage alleged at bar is the payment of the bonus, and that could not serve the desired purpose unless it was usurious; payment

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[2] Literally this allegation refers to a time after payment in full of principal and bonus; but it obviously was meant to refer to interest payments through May 19, 1953.

of a lawful exaction cannot constitute a legal injury.

[6, 7] The note was not usurious on its face. Although it provided for interest at the maximum rate, the payment of a bonus in addition thereto and as a consideration for the lender's relinquishing the loan before maturity rested entirely with the debtor; and in that situation a provision for or collection of a bonus is not usurious. "Where the excessive interest is caused by a contingency under the lender's control, or not under the borrower's control, the transaction is usurious; otherwise when the contingency is under the borrower's control." Penziner v. West American Finance Co., 133 Cal.App. 578, 590, 24 P.2d 501, 506. This rule is firmly established in this state. French v. Mortgage Guarantee Co., 16 Cal.2d 26, 31, 104 P.2d 655, 130 A.L.R. 67; Grall v. San Diego Bldg. & Loan Ass'n, 127 Cal.App. 250, 254–256, 15 P.2d 797.

[8] The mere presence of such an option to prepay does not make the note usurious. And it is equally clear under the authorities that "A contract which in its inception is unaffected by usury can never be invalidated by any subsequent usurious transaction." Goldenzwig v. Shaddock, 31 Cal.App.2d 719, 722, 88 P.2d 933, 934. To same effect are French v. Mortgage Guarantee Co., supra; Knoll v. Schleussner, 112 Cal.App.2d 876, 881, 247 P.2d 370; Sharp v. Mortgage Security Corp., 215 Cal. 287, 290, 9 P.2d 819; Grall v. San Diego Bldg. & Loan Ass'n, supra; McCarty v. Mellinkoff, 118 Cal.App. 11, 4 P.2d 595; In re Zemansky, D.C., 39 F.Supp. 628, 630. It follows that it is immaterial whether plaintiffs acted voluntarily or under some economic pressure in making the bonus payment in June 1953.

[9] In effect counsel for appellants argue that the line of reasoning just expressed is confined to the terms of the writing; that courts should and do look through form to substance when usury is the issue; that, whatever may be the appearance of the transaction its usurious nature will be declared if it in fact exists; and, specifically, that the parol evidence rule does not apply to the usury issue and hence the Bank of America, etc., v. Pendergrass line of cases, supra, is inapplicable. It is true that the parol evidence rule cannot impede such an inquiry. Terry Trading Corp. v. Barsky, 210 Cal. 428, 433, 292 P. 474; Ewalt v. Mortgage Securities, Inc., 129 Cal.App. 559, 564, 19 P.2d 60; Baker v. Butcher, 106 Cal.App. 358, 363, 289 P. 236; Van Noy v. Goldberg, 98 Cal.App. 604, 608, 277 P. 538; 55 Am.Jur. § 166, p. 439; 82 A.L.R. 1199, 1206, annotation; 104 A.L.R. 1261, annotation. And this means that if there was an oral agreement between these litigants that the loan should run but one year and that plaintiffs should, upon liquidating it, also pay the 180 days' unearned interest (over and above the specified 10 per cent), the loan would be usurious, though innocent on its face. But we do not have that situation at bar. The complaint does disclose that defendant intended that the bonus be paid but it also shows that plaintiffs never agreed so to do and never expected or intended to pay it. For they believed and relied upon defendant's promise.

[10–14] The usurious character of a transaction is determined by the amount agreed to be paid, agreed at the time of making the loan. "The usurious character of the contract is not determined by the amount of interest the borrower has paid thereon, but by the amount of interest he has agreed to pay on his said indebtedness. He may not have paid a dollar of interest on his indebtedness, yet, if the contract calls for a greater rate of interest than that permitted by the statute, the transaction is usurious, and no interest can be collected thereon." Westman v. Dye, 214 Cal. 28, 39, 4 P.2d 134, 138. To the same effect are Grall v. San Diego Bldg. & Loan Ass'n, supra, 127 Cal.App. 250, 257, 15 P.2d 797; Goldenzwig v. Shaddock, supra, 31 Cal.App.2d 719, 723, 88 P.2d 933. This is but another way of saying, as in Rose v. Wheeler, 140 Cal.App. 217, 224, 35 P.2d 220, 223: "To infect a transaction with the taint of usury, there must exist the corrupt purpose on one side to lend money at usurious interest and on the other side to borrow on usurious terms dictated by the lender." Parenthetically we observe that this rule does not apply to a loan that is plainly usurious as matter of law; in such case intent is presumed, implied or just ignored. Wood v. Angeles Mesa Land Co., 120 Cal.App. 313, 324, 7 P.2d 748; Martin v. Kuchler, 212 Cal. 536, 539, 299 P. 52; O. A. Graybeal Co. v. Cook, 111 Cal.App. 518, 528–529, 295 P. 1088.

We return to the discussion of the extrinsic facts alleged in the complaint. They take us behind the face of the note and into the question of what was the real transaction between the parties,—was it usurious? In such case mutual intent is important,—not necessarily intent to violate the law, but intent to do acts which result in such violation. 55 Am.Jur., § 33, p. 348, says: "The principle has been laid down by many authorities that to constitute usury there must exist an intent, concurred in by the borrower as well as the lender, that the lender is to take more than the legal rate of interest for the sum loaned. However, if the contract on its face imports usury, the necessary intent will be implied; if the usury is not apparent from the contract itself, the intent must be gathered from the circumstances of the case. The intent actually to get excessive interest, as a controlling element, is the intent as it existed as of the time when the agreement was made." The authorities are not uniform concerning the necessity of a concurring intent on the part of the borrower, see 66 C.J. § 66, p. 176; 6 Williston on Contracts (Rev.Ed.) § 1698, p. 4809, but it seems apparent that, in a situation such as presented at bar, the intent must be a mutual one. There can be no basis for an implied agreement except mutual intent; and without an agreement to pay usury there is no justification for going behind the writing. Whether viewed from the standpoint of agreement or intent, the result is the same. Plaintiffs did not agree to pay the bonus and they did not intend to do so. The loan not being usurious in its inception, subsequent events could not render it violative of the statute.

No other points require discussion.

Judgment affirmed.

SHINN, P. J., and VALLÉE, J., concur.

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133 Cal.App.2d 338

Joe G. BRACKER, doing business under the fictitious firm name and style of Bracker Vegetables Sales Company and Harry Robinson, doing business under the fictitious firm name and style of Quality Tomato Company, Plaintiffs and Respondents,

v.

AMERICAN NATIONAL FOOD, Inc. (substituted as party defendant in place of defendant American Fruit Growers, Inc., a Delaware corporation), Defendant and Appellant.

Civ. 20561.

District Court of Appeal, Second District, Division 1, California.

May 31, 1955.

Rehearing Denied June 20, 1955.

Hearing Denied July 27, 1955.

Action by buyer against seller for breach of warranty as to quality of four carloads of tomatoes. The Superior Court, Los Angeles County, Robert H. Scott, J., entered judgment for buyer and seller appealed. The District Court of Appeal, White, P. J., held that evidence admitted as to amount of damages found to have been suffered by buyer was not prejudicial to seller and supported findings of trial court.

Affirmed

1. Pleading 🔑408

Where defendant made affirmative defense in his answer that complaint did not state facts sufficient to constitute cause of action, said defense was not waived by defendant's failure to demur.

2. Pleading 🔑187

Affirmative defense stating that complaint did not state facts sufficient to constitute cause of action had same force as general demurrer to complaint

3. Pleading 🔑204(2)

In ruling upon general demurrer, effect must be given to every allegation in complaint; and demurrer must be overruled if complaint states, or from its averments it can be reasonably inferred, that plaintiff has a cause of action against defendant on any theory.

4. Pleading 🔑205(2)

Averment of improper or wrong measure of damages, or demand or prayer for items of damages not warranted by facts alleged is not ground for general demurrer.

5. Pleading ⚷204(2)

Where only defect in complaint was that one paragraph was incorrect and insufficient allegation of damage, court did not err in overruling demurrer and in proceeding to trial on the complaint.

6. Compromise and Settlement ⚷16(2)

In action by buyer against seller for breach of warranty as to quality of five carloads of tomatoes, settlement of damages as to one carload did not preclude recovery of damages on buyer's claims respecting tomatoes in other four cars.

7. Evidence ⚷13

Court will take judicial notice of fact that fruit once matured does not later become immature.

8. Sales ⚷441(4)

In action by buyer against seller for breach of warranty as to quality of four carloads of tomatoes, evidence that 50% of tomatoes were immature, green and never would ripen, that if more than 30% of tomatoes were immature they would not be salable in buyer's area, and that they were not able to be sold for any price, supported finding of no value.

9. Sales ⚷441(1)

In action by buyer against seller for breach of warranty as to quality of four carloads of tomatoes, evidence supported court's finding that "Blue Goose" was seller's label and was known to tomato trade as indicating tomatoes grading "85% or more U.S. No. ones".

10. Appeal and Error ⚷1052(5)

In action by buyer against seller for breach of warranty as to quality of four carloads of tomatoes, admission of evidence of telephone conversation between parties which was to effect that tomatoes were to be "85% or more U.S. No. ones" and which took place prior to broker's written memorandum which provided tomatoes were to be "Blue Goose" label, did not prejudice seller, in view of court's finding that tomatoes under that label were known to tomato trade as tomatoes of 85% or more U.S. No. ones.

11. Sales ⚷442(1)

In action by buyer against seller for breach of warranty as to quality of four carloads of tomatoes, measure of damages to be applied was part of substantive rights of contracting parties and was governed by law of state where contract was made. West's Ann.Civ. Code, § 1646.

12. Evidence ⚷35

Courts of California take judicial notice of laws of Missouri. West's Ann.Code Civ.Proc. § 1875.

13. Sales ⚷442(2)

Buyer who retains goods delivered to him may recover as general damages the difference between the actual value of article at time of sale and what its value would have been had it been as warranted.

14. Sales ⚷439

In action by buyer against seller for breach of warranty as to quality of four carloads of tomatoes, in absence of evidence of actual value of tomatoes at arrival point, it could be inferred that they had been worth price paid to seller.

15. Appeal and Error ⚷1050(1)

In action by buyer against seller for breach of warranty as to quality of four carloads of tomatoes wherein trial court found that sale of tomatoes outside buyer's area was in mitigation of buyer's loss, error, if any, in admission of evidence as to such sales was not prejudicial.

◆

Wadsworth & Fraser, Los Angeles, Charles E. McClung, San Francisco, for appellant.

Eugene L. Wolver, Los Angeles, for respondent.

WHITE, Presiding Justice.

Defendant, American National Foods, Inc., has appealed from a judgment awarding plaintiffs $5,327.95 damages for breach of warranty as to the quality of four carloads of tomatoes sold through a Kansas City broker while in transit from Tracy, California, to Kansas City, Missouri.

Appellant urges as its first ground for reversal that judgment should have been for appellant on the first affirmative defense alleged in the answer, to-wit "that the complaint does not state facts sufficient to constitute a cause of action".

[1] As urged by appellant, said defense was not waived by its failure to demur. Wilson v. Sharp, 42 Cal.2d 675, 268 P.2d 1062. However, the only defect in the complaint specified by appellant, either at the trial, or upon this appeal, is that paragraph X thereof is an incorrect and insufficient allegation of damage. Said paragraph X alleges "That in truth and in fact said cars were not all of the same quality nor did they grade said '85%', as aforesaid, and that by reason of the quality of such tomatoes in said cars, plaintiffs' loss consisting of the purchase price, freight and inspection, in excess of the sums received for such cars, amounts to $7,685.46, to plaintiffs' damage in such sum."

[2–5] Said affirmative defense has the same force as a general demurrer to the complaint. As stated in Beason v. Griff, 127 Cal.App.2d 382, 387, 274 P.2d 47, 50, "In ruling upon a general demurrer, effect must be given to every allegation in the complaint; and the demurrer must be overruled if the complaint states, or from its averments it can be reasonably inferred, that plaintiff has a cause of action against defendant on any theory. (Citations.) The averment of an improper or wrong measure of damages, or the demand or prayer for items of damage not warranted by the facts alleged is not a ground for general demurrer. (Citations.)" The court did not err in proceeding to trial on the complaint in the instant action.

Respondents, as joint adventurers, bought five cars of tomatoes from appellant, through Jack Good, the manager of appellant's agent, Graham Cooksie & Company. The deal was made on October 28, 1952, by telephone conversations between respondent Robinson and Jack Good. Both were in Kansas City. Jack Good "represented, stated and warranted that said five cars of tomatoes were then in transit and that each and all of said cars were packed under the label * * * 'Blue Goose', and that each and all of said cars were of the same quality and that each of said cars would grade '85%' of quality number One in accordance with the standard of the United States Department of Agriculture, applicable to tomatoes in interstate Commerce". Respondents relied upon said warranty and were thereby induced to purchase and pay for said tomatoes. Said warranty and the label "Blue Goose" were "descriptions of merchandise" in said cars.

Prior to the consummation of said sale, seller knew that respondents' "purpose in buying and acquiring said five cars of tomatoes was for resale and that plaintiffs were relying upon said defendant's skill and judgment in the picking, packing and shipping of said five cars and that none of said cars nor the contents thereof had been viewed or examined or otherwise seen by or on behalf of the plaintiffs or either of them."

Four of said cars did not grade 85% of quality number one in accordance with the standard of the United States Department of Agriculture, but each graded 80% or less thereof.

By reason of said grade and by reason of the fact that a material part of the tomatoes therein were immature and would not thereafter ripen, "said cars and the tomatoes therein were unsalable and unmerchantable and had no market value or reasonable value whatsoever".

The said offer, representation, statement, warranty, acceptance and purchase were all made in Kansas City, Missouri. The tomatoes were picked, packed and shipped from the Tracy area in the State of California and the sale was made requiring plaintiffs to pay the freight.

The following is a correct tabulation of the purchase price, freight, total cost, recoupment and loss:

Car No.	Sales Price	Freight	Total Costs	Recoupment	Loss
PFE 98495	1773.25	470.66	2243.91	470.66	1773.25
PFE 93829	1706.25	470.66	2176.91	1394.03	782.88
PFE 90356	1473.10	470.66	1943.76	569.44	1374.32
PFE 44465	1397.50	0	1397.50	0	1397.50

Plaintiffs have been damaged in the sum of $5,327.95.

Plaintiffs immediately after ascertaining the aforesaid facts and breaches of warranty notified the defendant thereof and "any failure on the part of plaintiffs as to the giving of any such notice or breach of warranty was waived" by the defendants' predecessor, American Fruit Growers, Inc.

After plaintiff's acceptance of said offer defendant, through its said agent, prepared five "brokers standard memorandums of sale", one for each car then sold, and mailed one copy of each to the seller and one of each to respondent Robinson. Said brokers' forms "were made and delivered subsequent to the completion of said sales and did not contain the entire agreement between the parties, particularly as to the warranty of grade or quality hereinbefore set forth", and the term "Blue Goose" set forth therein indicates a quality of 85% or more Number One tomatoes in accordance with the standard of the U. S. Department of Agriculture, and at all times mentioned in said complaint said term "Blue Goose" was a descriptive name well known in the tomato trade to indicate such grade and quality.

Any inspection had by the plaintiffs upon receipt or delivery of said cars was a partial inspection and was not complete or sufficient to preclude plaintiffs from asserting the aforesaid claims for breach of warranties or damages for the same.

Plaintiffs caused said five cars to be iced but such ice did not retard the ripening of said tomatoes in said cars or have any adverse effect upon the condition of said tomatoes.

[6] Respondents' claim for damages in connection with Car No. PFE 61634 and the tomatoes therein has been settled; and respondents are not precluded by such settlement from recovering the damages sought and awarded in the instant action upon their claims respecting the tomatoes in the other four cars listed above.

Briefly, the foregoing epitomizes the findings and conclusions of the trial court.

[7, 8] Appellant urges that the findings are not supported by the evidence in only two particulars, to-wit:

(1) There is no evidence supporting the amount of damages found to have been suffered by respondents; and

(2) There is no evidence that the tomatoes delivered "had no market value or reasonable value whatsoever". The first item will be discussed later in connection with the consideration of the measure of damages. There is testimony in the record, based upon inspection after arrival at Kansas City, to the effect that three of the cars when shipped contained 30 to 40% immature green tomatoes, and the fourth car 60%; and other testimony to the effect that about 50% of the tomatoes in the four cars were immature green, or "picked too soon", and "would never ripen". True, the witnesses so testifying did not view the tomatoes when picked and packed, or immediately upon the arrival of the cars in Kansas City, but, as was done by the court below, this court takes judicial notice of the fact that fruit once mature does not later become immature. Without conflict the evidence is that tomatoes are generally picked green for shipment east; that generally they are ripening when they reach the eastern market; that although green when picked they must be mature or they will not ripen; and that tomatoes picked at the proper time are called "mature green". There is also evidence that cars containing "30% or more of immature tomatoes" are "never salable" in the Kansas City area, and could not have been sold there at any price at the time of the arrival of the four cars involved in the instant action. Such testimony supports the finding of "no value".

Appellant's next specification of error is that their objections to the introduction of testimony concerning an express warranty of quality made by telephone prior to the preparation and mailing of the broker's standard memorandum of sale should not have been overruled. In this connection it is appellant's contention that the broker's form, prepared and signed by the broker only, is the entire written contract between seller and buyers, that it supersedes their previous telephone agreement, and that it cannot be varied by parol evidence. The first paragraph of said memorandum is as follows:

"When the terms of sale have been agreed upon the broker shall fill out this Standard Memorandum of Sale in triplicate, sending one copy to the seller, one to the buyer and retaining the third copy for his own file. Unless the seller or the buyer makes immediate objection upon receipt of his copy of this Standard Memorandum of Sale, showing that contract was made contrary to authority given the Broker, he shall be conclusively presumed to agree that the terms of sale as set forth herein are fully correctly stated."

[9, 10] One of these forms was used to show the sale of each rolling car, and the commodity sold was designated in each as "Blue Goose Westside Tomatoes". The evidence claimed by appellant to have been erroneously admitted consisted of testimony regarding telephone conversations in which said cars were represented and warranted to contain tomatoes which would grade "85% or more U. S. No. Ones." Assuming, but not deciding, that in accordance with said broker's memorandum, buyer "shall be conclusively presumed to agree that the terms of sale as set forth herein are fully correctly stated", such testimony could not have prejudiced the rights of appellant in the instant action. The court's finding that "Blue Goose" was appellant's own label and was known generally to the tomato trade as indicating tomatoes grading "85% or more of U. S. No. Ones" was fully supported by evidence properly received. Gibson v. De La Salle Institute, 66 Cal.App.2d 609, 629, 152 P.2d 774; Long Brothers v. J. K. Armsby Co., 43 Mo.App. 253, 266, 269. Since the written memorandum specified "Blue Goose" tomatoes, appellant could not have been prejudiced by the admission of testimony regarding such telephone warranties.

Appellant contends that "The judgment must be reversed because the court below applied an erroneous measure of damages and there is no evidence in the record upon which damages could be properly computed. Moreover, by applying an erroneous measure of damages, the court below failed to find on the material elements from which damage could be properly computed."

[11, 12] The measure of damages to be applied in the instant action is a part of the substantive rights of the contracting parties and is governed by the law of Missouri. Civil Code, sec. 1646; 15 C.J.S., Conflict of Laws, page 956; 11 Am.Jur. 425; Restatement of Conflicts of Law, secs. 372 and 413. The courts of California take judicial notice of the laws of Missouri. Code of Civil Procedure, sec. 1875; In re McVickers, 29 Cal.2d 264, 272, 176 P.2d 40.

[13, 14] A buyer who retains the goods delivered to him may recover as general damages "the difference between the actual value of the article at the time of sale and what its value would have been had it been as warranted." Meyer Furnace & Supply Co. v. Greenwell, Mo.App., 297 S.W. 197, 198; 46 Am.Jur. 864. It is undisputed that said four cars of tomatoes cost respondents the sum of $6,350.10 paid to appellants and $1,411.98 freight, a total of $7,762.08. In the absence of other evidence of the actual value of "Blue Goose" tomatoes at the time of arrival in Kansas City, it may reasonably be inferred that such tomatoes would have been worth the price so paid, $7,762.08. If, as assumed by appellant in its argument, the "bottom had dropped out of the market" while said tomatoes were in transit, then appellant could have produced evidence to that effect. There is none in the record.

[15] Appellant assigns as prejudicial error the introduction over its objection of evidence of the sale of said tomatoes at various times and places other than Kansas City. As found by the court, such sales were in mitigation of respondents' loss. If the record contained no such evidence, respondents' judgment should have been for the whole amount paid by them, $7,762.08, the only value shown for the goods sold as of the time and place of sale, since the goods actually delivered as of said time and place of delivery were found to be of no value. Consequently, the errors in connection with the admission of such evidence, if any, were not prejudicial.

Appellant complains that the restriction of their cross examination to the five cars actually involved in the action was prejudicial error, particularly regarding car No. 41704. The question appearing in the record is: "Will you state when car 41704 arrived in Kansas City?" The objection that it was "incompetent, irrelevant and immaterial" was sustained. We have searched the transcript and do not find therein any offer of proof of any facts regarding said car No. 41704.

We will not here detail appellant's other specifications of error in the admission and rejection of evidence, since careful consideration thereof discloses that appellants were not prejudiced.

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

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133 Cal.App.2d 354

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Alfred MUSUMECI, Defendant and Appellant.

Cr. 5329.

District Court of Appeal, Second District, Division 1, California.

May 31, 1955.

Defendant was convicted of a sex offense. The Superior Court, Los Angeles County, Joe Raycraft, J., rendered judgment and denied motion for new trial, and defendant appealed. The District Court of Appeal, White, P. J., held that requiring defendant to answer question whether he was a sex deviant, and the giving of instruction that his testimony was admitted for sole purpose of showing criminal disposition or propensity was prejudicial error and resulted in miscarriage of justice.

Order reversed and cause remanded.

1. Criminal Law 🔑369(1), 372(1)

Evidence of other offenses is inadmissible either as tending to show disposition on part of accused to commit offenses charged or as corroborative of testimony directed to proof of specific offense charged.

2. Criminal Law 🔑369(2), 372(1)

Evidence is admissible when it tends logically, naturally and by reasonable inference to establish any fact material for people or to overcome any material matters sought to be proved by defense, irrespective whether it embraces commission of another crime, whether other crime be similar in kind, or whether it be part of a single design, but such evidence is never admissible when it merely shows criminal disposition.

3. Criminal Law 🔑372(1)

Proof of other crimes cannot be shown to establish depravity of an accused or his criminal propensities or resultant likelihood or predisposition to commit crime charged.

4. Criminal Law 🔑372(1)

Testimony tending only to prove inclination of an accused toward crime, thereby rendering more probable his guilt of charge for which he is on trial, is inadmissible.

5. Criminal Law 🔑1137(3)

As a general rule, when an instruction is given at request of an accused, he cannot find fault with court for complying with his request.

6. Criminal Law 🔑1137(3)

In prosecution for sex offense, wherein there was admitted evidence that defendant was a sex pervert, defendant could complain of instruction to effect that this evidence was admitted solely to prove criminal disposition or propensity, even though defendant had requested this instruction, where prosecution had offered no instruction limiting scope of evidence, defendant was seeking to minimize prejudicial effect of evidence, and there appeared no wilful intent to mislead court.

7. Criminal Law ⚿562

Courts look with disfavor upon a complaint made long after the event in question.

8. Criminal Law ⚿633(1)

Whether guilty or innocent, defendant is entitled to have his case fairly tried according to established rules of law.

9. Criminal Law ⚿1169(2)

Where, in prosecution for sex offense, defendant's objection to one police officer's testimony that defendant had admitted that he was a sex deviant was overruled, defendant's failure to object to second officer's testimony to same effect did not render unprejudicial the admission of similar evidence from another source.

10. Criminal Law ⚿372(1), 783(1), 1186(4)

In prosecution for sex offense, requiring defendant to answer question whether he was a sex deviant, and the giving of instruction that this testimony was admitted for sole purpose of showing criminal disposition or propensity was prejudicial error and resulted in miscarriage of justice. Pen.Code, § 288; West's Ann.Const. art. 6, § 4½.

11. Criminal Law ⚿1186(4)

"Miscarriage of justice" within constitutional provision that conviction may be affirmed despite error where there is no miscarriage of justice does not merely mean that a guilty man has escaped or that an innocent man has been convicted, and refers to cases where acquittal or conviction has resulted from some form of trial in which essential rights of people or of the defendant were disregarded or denied. West's Ann.Const. art. 6, § 4½.

See publication Words and Phrases, for other judicial constructions and definitions of "Miscarriage of Justice".

12. Criminal Law ⚿1186(4)

Where reviewing court is unable to say whether defendant would or would not have been convicted, but for error of trial court, it must direct a reversal. West's Ann.Const. art. 6, § 4½.

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Albert C. S. Ramsey, Long Beach, for appellant.

Edmund G. Brown, Atty. Gen., Jay L. Shavelson, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was accused of violating Section 288 of the Penal Code in that he committed a lewd and lascivious act upon the body and private parts of a child 13-years of age, with the intent of arousing and gratifying the sexual desires of himself and the child.

Following the entry of a plea of not guilty, the cause proceeded to trial before a jury which returned a verdict of guilty as charged in the information.

By stipulation the issue of sexual psychopathy was submitted on doctors' reports, and the court found defendant to be a probable sexual psychopath and ordered him committed to the Department of Mental Hygiene for a period not to exceed 90 days for placement at the Metropolitan State Hospital. Said hospital having reported that defendant was a sexual psychopath capable of benefiting from treatment at a State mental institution, the court found him to be a sexual psychopath and committed him to the Department of Mental Hygiene for placement at the Atascadero State Hospital for an indeterminate period.

Motion for a new trial was denied, and from the order of denial thereof, defendant prosecutes this appeal.

The factual background surrounding this prosecution as reflected by the record discloses that the victim of defendant's alleged misconduct was his stepdaughter, who was living with her mother and defendant. The prosecutrix testified that one day in June, 1953, defendant was called home from the restaurant operated by himself and his wife to fix a faucet. That after repairing the faucet, and after the departure of a neighbor, defendant asked the witness to kiss him. She refused, but the defendant nevertheless, did kiss her, then asked her forgiveness and left the house. That about a week later, while she was lounging on the couch watching television, defendant was sitting in a rocking chair in the same room. The latter's wife was asleep in the adjoining bedroom. Defendant asked the witness, who was dressed in play shorts and sweater, whether he could kiss her legs. She said "No" and walked away.

About a week thereafter the witness was again watching television with defendant when the incident alleged in the information occurred. Concerning this occasion, the prosecutrix testified:

"* * * Al (defendant), he asked me, he said, can I kiss your legs and I said, No, sir, and he says, Why. I didn't say nothing. He got up from the rocking chair and he came over and kissed them. Then after he kissed them I tried to get away from him. He kept on moving up towards the center of my legs." That defendant was kneeling down, with his knees on the floor; that he spread her legs apart, raised up her play shorts and "put his mouth on my private parts". That while this act was taking place, defendant's wife, mother of the victim, opened the door leading into the bedroom. That thereupon, defendant "moved back, real quick, back to his chair where he was seated before". When asked whether her mother said anything the witness replied, "She said, can't you guys turn the television down lower, and I got up and I turned it down lower, and then I went to the bathroom."

The prosecuting witness further testified that on a subsequent occasion defendant told her he wished to show her the things an employee named Bob did to boys. The witness stated that she was not interested and told defendant to let her alone.

Defendant later came to her bedroom on two occasions. The first time, he stated he was sorry for what he had done, and asked her forgiveness. The second time, he asked her to "give in to me." She said "No" and asked defendant to let her alone. That defendant then said, "* * * I don't know why I do these things. Some guys cannot have control over theirselves. I don't know why I do these things. I hope you'll be forgiving of me, * * *".

On another occasion, defendant asked the prosecutrix to take off her shorts and she refused.

At other times, defendant kissed her on the lips and about the neck.

That while she was ironing or working around the house, defendant on several occasions would touch her private parts or any part of her body he could reach. That defendant would say, "Excuse me. Pardon me."

When the prosecutrix made complaint to the police she telephoned defendant from the police station. A police officer who listened in on this conversation testified as follows:

"A. I heard Anita talking to some one on the other end of the line, and I heard her say, 'No, I don't want to go home after what you did to me.' Then later I listened to part of the conversation and I heard the defendant say, 'have you told anybody about it yet,' and Anita answered, 'No,' and then the defendant said, 'if you'll forget it, I'll forget it.'"

Another police officer testified as follows:

"A. I asked the defendant if he touched Anita in any way, and he said, on two occasions. On one occasion he had a little too much to drink and kissed the victim on the lips in the kitchen. On another occasion he said he boosted her up to a light fixture to put the bulb in, and when he let her down his hand accidentally slid up between her legs, and touched her private parts."

Defendant also told police he had been addicted to abnormal sex practices over a period of years and that he had been to a doctor for treatment, but had not been helped.

Defendant also told another police officer that he had had a sex problem for approximately 30 years and had been to a doctor about it.

On cross-examination, the complainant testified that prior to the time she became 12 years old, defendant would give her good night kisses in the presence of her mother, on the limbs, nose, forehead "or something like that." The first kiss on her lips occurred after she was 12 and while they were alone in the house.

She testified she was afraid of her stepfather. That about a year ago their home had burned down, due to an accident on her part, and she became suspicious of him and others who had questioned her regarding this.

She also admitted that she waited eight months before she told anyone about defendant's claimed misconduct with her. She assigned as reasons for this long delay a woman by the name of Aileen Castellon who worked at the cafe, had frequently "baby sat" with her. Aileen and her stepfather had had an argument about the operation of the cafe. Anita had telephoned her mother for permission to go out during the evening and her mother had refused permission. The girl felt that she never was permitted to go out any place and thought she was abused. She thereupon became angry at her mother and decided to tell Aileen what her stepfather had done.

The prosecutrix admitted that just prior to the time she told her friend Aileen of defendant's purported conduct she had been advised that she was going to be sent away to school at San Marina Hall, but claimed she was "pretty happy" about going to the school.

When shown a letter she had written to a girl friend Shirley, the prosecutrix first declared the letter was not in her handwriting. Finally admitting that the signature, if not the body of the letter, was in her handwriting, the prosecutrix testified that she had written a letter but had destroyed it. That this letter contained the statement that her stepfather had given her liquor which was untrue, as was the statement about his permitting her to have "weeds". While denying certain derogatory and vile statements contained in the letter regarding her mother, the witness admitted that she hated her mother and had written the statements in anger. Then, notwithstanding her vigorous denials of writing the aforesaid letter, the complainant suddenly admitted she did. She stated that the letter and the charges therein contained were "a bunch of lies". The witness also admitted that her statement to the officers that the defendant had exposed himself and his private parts to her was false. She admitted that she told an untruth when she complained to her mother that her uncle had attempted to attack her and was equally untruthful when she reported to the police that some sailors were "trying to get in at her" at the duplex where she was living in Long Beach.

When asked, "You didn't stop to think whether you are lying or telling the truth to this jury, have you?", the prosecutrix replied, "Well, sir, I guess not".

As a witness in his own behalf, defendant testified that he at no time touched the prosecutrix with any lustful or lascivious intent. He stated that on the occasion he had come home to fix the faucet he had merely accomplished the task, watched television and returned to his place of business. He testified that he had spanked Anita several times and on one occasion had felt remorseful for having done so and had grabbed her and kissed her, seeking forgiveness.

Defendant testified that once when Anita was working in the kitchen, he had put his arms about her and told her he was sorry for hitting her. That he had never kissed Anita on the legs or asked her permission to do so. He denied having put his hands under Anita's shorts or having pushed aside her underpants or putting his face on her private parts. He denied having asked her to let him show her what "Bob did to boys" and denied having asked her "to give in" to him or engage in any sexual act. He testified that Anita was angry with him after the whippings and that there was dissension in the home relating to Anita's going away to school. He stated that he had told his wife, in Anita's presence, to "smack" Anita across the mouth whenever she "talked back" to her. Defendant stated that he had reprimanded Anita about smoking and going out with boys.

He testified that he had once boosted Anita up to repair a light fixture and that she had slipped and he had accidentally touched her privates in attempting to break her fall.

Defendant stated that when Anita called him from the police station and he apologized to her and asked her whether she had told anyone "about it", he had been referring to the whippings and not to any act of a sexual nature.

Defendant testified that he had quarreled with a female business associate named Aileen and that Anita had admitted in his presence that she had been induced by Aileen to make the accusations in the instant case.

On cross-examination defendant was interrogated concerning his aforesaid conversations with police officers concerning his "sex problem", following which interrogation the district attorney asked defendant, "You are a sex pervert, aren't you?" An objection was interposed when the following transpired:

> "The Court: Objection over-ruled. You may answer if you understand it.
>
> "A. (The Witness): What do you mean on that?
>
> "Q. Your particular form of sex perversion is putting your mouth—
>
> "Mr. Ramsey (Defendant's attorney): Just a minute—
>
> "Mr. Cochran (Deputy District Attorney): May I finish the question?
>
> "Mr. Ramsey: I know what the question is going to be. I would like to be heard before the question is asked.
>
> "Mr. Cochran: He asked me what I meant by a sex pervert.
>
> "The Witness: I know what a sex pervert means, but what type of sex pervert are you talking about?
>
> "Mr. Cochran: That's what I want you to explain, to tell you in my question."

Following a colloquy between court and counsel, defendant's objection was again overruled, and the following ensued:

> "Mr. Cochran: I will ask you this question squarely, Mr. Musumeci, is it not a fact that your particular type of sex perversion is the desire on your part, that you have not been able to overcome, to put your mouth on the sexual organs of a female person?"

Defendant's counsel interposed a further objection, the jury was excused, and the court heard argument, terminating with the declaration of the district attorney, "We have a right to elicit from him that he has a predeliction for the sex perversion of putting his mouth to the female private parts. * * * We are entitled to prove anything that will discredit the testimony of the defendant or minimize it, and it is relevant and it is admissible. The fact it is prejudicial is beside the point."

Upon return of the jury, the record reveals the following:

> "The Court: Objection over-ruled. The witness is instructed to answer the question.
>
> "The Witness: Will you read that again?
>
> "(Question re-read.)
>
> "A. Want me to answer that?
>
> "The Court: Yes.
>
> "A. Yes."

Defendant's wife testified that on the day that the act alleged in the information was committed, she had been resting in her bedroom and that when she came to the living room, the door was not closed as Anita had testified, and that she, defendant's wife, had turned off the television and not Anita. She further testified that when she entered the room Anita and her stepfather were sitting in different places.

[1] In urging a reversal of the order denying his motion for a new trial, appellant relies upon the general rule that where an accused is charged with a specific offense, evidence of other offenses is inadmissible either as tending to show a disposition on the part of the accused to commit such offenses or as corroborative of the testimony directed to the proof of the specific offense for which he is on trial.

[2, 3] While it is true that evidence in a criminal case is admissible when it tends logically, naturally and by reasonable inference, to establish any fact material for the people, or to overcome any material

matter sought to be proved by the defense, whether it embraces the commission of another crime or does not, whether the other crime be similar in kind or not, or whether it be part of a single design or not, nevertheless, such extraneous proof is never admissible when it shows merely criminal disposition. Proof of other crimes cannot be shown to establish the depravity of an accused or his criminal propensities or the resultant likelihood or predisposition to commit the crime charged.

That such was the purpose of the challenged questions herein is evidenced by the following instruction given by the Court to the jury:

"The People have elicited testimony in this case concerning the character of the defendant and his sexual characteristics. *Such evidence was offered and admitted solely to prove a criminal disposition or propensity on the part of the defendant to have committed the act charged in the complaint. In other words, the evidence that the defendant is a sexual deviant was placed before you for the purpose of your consideration of whether or not a person of such nature and habits would have been more likely than some other person to have done the act charged in this complaint.*" (Emphasis added.)

The conclusion is inescapable that the challenged testimony was placed before the jury for the sole purpose of leading them to believe that it was more probable that the defendant was guilty of the crime charged in the information because he was possessed of a sexual problem. That therefore, appellant was the sort of person who would be inclined and willing to commit the criminal act charged against him. In fact, by the foregoing instruction, the jury was so admonished.

[4] Whatever may be the exceptions to the general rule, it is firmly established in our law that testimony tending only to prove inclination of an accused toward crime, thereby rendering more probable his guilt of the charge for which he is on trial is inadmissible. People v. Albertson, 23 Cal.2d 550, 576, 577, 145 P.2d 7.

Respondent contends that the questioned testimony was admissible to corroborate portions of the testimony of the prosecutrix and to show the intent with which certain collateral acts were committed. However, this argument loses force when recourse is had to the above-quoted instructions wherein the jury was unequivocally advised that they were to consider such evidence only to arrive at a determination of "whether or not a person of such nature and habits would have been more likely than some other person to have done the act charged in this complaint". The case of People v. Peete, 28 Cal.2d 306, 314, 315, 169 P.2d 924, 929, strongly relied upon by respondent, specifically states that such evidence may under certain conditions be admissible, but never "when it shows merely criminal disposition * * *".

[5, 6] Respondent however contends that the aforesaid instruction was submitted by appellant, and that he should not now be heard to complain of error committed by the trial court where he himself invited such error. It is true that the general rule is that when an instruction is given at the request of an accused he cannot find fault with the court for complying with his request. People v. Curtis, 36 Cal.App.2d 306, 321, 98 P.2d 228; People v. Bartol, 24 Cal.App. 659, 664, 142 P. 510. However, under the circumstances here present, we are not disposed to invoke the rule. When the admission of the questioned testimony was under consideration by the court, the district attorney, in urging its admissibility, said, "We have a right to elicit from him that he has a predeliction for the sex perversion of putting his mouth to the female private parts * * * We are entitled to prove anything that will discredit the testimony of the defendant or minimize it, and it is revelant and admissible. The fact that it is prejudicial is beside the point." Since it was error to admit the evidence in the first place, and since the prosecution offered no instruction limiting the scope of the jury's right to consider it for all purposes affecting the guilt of appellant of the charge preferred against him, appellant's counsel

undoubtedly seeking to minimize the prejudicial effect of such evidence, offered the instruction in question. That the trial judge gave mature consideration to the instruction is evidenced by the fact that in his own handwriting he changed the language thereof. We perceive no wilful intent to mislead the court and in our opinion, the court regarded it as a correct statement of the law and the reasons for admitting the testimony here complained of.

As stated by respondent, the act alleged in the information was such that guilty intent is obviously and conclusively inferable from the very commission of the act; thus there can be no issue as to intent, but only as to whether the act was actually committed by appellant upon the person of the prosecutrix.

As heretofore pointed out, the vice of admitting the testimony concerning appellant's predeliction for sex perversion, lies in the fact that the jury was permitted to consider it in determining "whether or not a person of such nature and habits would have been more likely than some other person to have done *the act charged in this complaint*." (Emphasis added.)

[7, 8] Respondent admits that, "It may be conceded that if the People's case rested solely on the credibility of the prosecutrix, any substantial error committed by the Trial Court is likely to have been prejudicial because her credibility was seriously shaken on cross-examination." Indeed, the prosecutrix was thoroughly impeached on cross-examination. She made no complaint against appellant until more than eight months after the occurrence and then, only on the eve of her being sent away to a school against her will. Although her mother came into the room at the time she testified the act charged in the information was committed she made no mention of the occurrence. Courts look with disfavor upon a complaint made long after the event in question. People v. Vaughan, 131 Cal.App. 265, 268, 269, 271, 21 P.2d 438; People v. Lambert, 120 Cal. 170, 173, 174, 52 P. 307; People v. Corey, 8 Cal.App. 720, 724, 97 P. 907. She admitted to falsely accusing other men, including her uncle, of sexual misconduct toward her. These and other phases of the testimony of the prosecutrix greatly weakened the probative value of her accusation. We do not refer to these matters for the purpose of arriving at a conclusion that the story of the prosecutrix as to the offense charged ought not to be believed by the jury, but for the purpose of emphasizing the duty imposed upon us to carefully scrutinize the claimed errors appearing in the record. "Whether guilty or innocent, the appellant was entitled to have his case fairly tried according to the established rules of law, and as said by a learned judge, 'Though unfair means may happen to result in doing justice to the prisoner in the particular case, yet justice so attained, is unjust and dangerous to the whole community.' Hurd v. People, 25 Mich. 405. The doctrine that respect for the law cannot be inspired by withholding the protection of the law is one which recognizes no exceptions." People v. Braun, 31 Cal. App.2d 593, 603, 88 P.2d 728, 732.

[9] Respondent insists that the evidence complained of was not prejudicial because the jury had already been informed through the testimony of police officers that appellant had told them that "he had had a sex problem for approximately thirty years". Respondent urges that appellant did not object to the introduction of such testimony, but the record reflects that when the first officer testified an objection was interposed and overruled. Manifestly an objection to the testimony in that regard by the second officer would be pointless. And, if such testimony was offered as a prelude to the introduction of the later damaging and prejudicial evidence then it too was inadmissible. It bore no relevancy to the charge for which appellant was on trial. In the conversations related earlier in the trial by the officers there was neither an admission nor confession of wrongdoing.

The real question presented here is, *Has the accused had a fair trial?* In reviewing the overall picture painted by the evidentiary features of this case and the rulings of the court, it seems clear to us that if the jury attached the slightest weight to the highly prejudicial and incompetent evidence heretofore adverted to, it would be sufficient to turn the scales. As was said by the Supreme Court in the recent case of People v. Cahan, 44 Cal.2d 434, 282 P.2d 905, 912, "Thus, no matter how guilty a defendant might be or how outrageous his crime, he must not be deprived of a fair trial, and any action, official or otherwise, that would have that effect would not be tolerated."

[10–12] That the questioned testimony was highly prejudicial there can be little doubt. To entertain a contrary view is to ignore human experience, the propensities and passions of people, the course of nature, and common sense. We cannot agree that the saving grace of Section 4½, Article VI, of the State Constitution should come to the rescue of this conviction. As was stated by this court in People v. Gilliland, 39 Cal.App.2d 250, 264, 265, 103 P.2d 179, 186:

"We do not understand section 4½ of article VI of the Constitution as intended to mean that merely because the evidence may legally be able to stand up under the weight of the judgment, that is sufficient reason in all cases for refusing to set aside the judgment. People v. Davis, 210 Cal. 540, 556, 293 P. 32. The phrase 'miscarriage of justice' as used in the constitutional provision has no hard or fast definition, and as was said in People v. Wilson, 23 Cal.App. 513, 138 P. 971, 975, 'does not merely mean that a guilty man has escaped, or that an innocent man has been convicted. It is equally applicable to cases where the acquittal or the conviction has resulted from some form of trial in which the essential rights of the people or of the defendant were disregarded or denied. The right of the accused in a given case to a fair trial, conducted substantially according to law, is at the same time the right of all inhabitants of the country to protection against procedure which might at some time illegally deprive them of life or liberty. "It is an essential part of justice that the question of guilt or innocence shall be determined by an orderly legal procedure, in which the substantial rights belonging to defendants shall be respected"'.

"If a defendant cannot be fairly convicted, he should not be convicted at all; to hold otherwise would be to provide ways and means for the conviction of the innocent. It cannot be gainsaid that you cannot inspire or preserve respect for the law by withholding its protection from those accused of crime. While deviation from the prescribed rules of law governing trials may result in justice for the particular defendant who is before the bar, it is dangerous to the community and its citizens. As was said by Chief Justice Hughes of the United States Supreme Court not so long ago, 'In our system, the individual finds security in his rights because he is entitled to the protection of tribunals that represent the capacity of the community for impartial judgment as free as possible from the passion of the moment and the demands of interest or privilege.' When, as here, we are unable to say 'whether appellants would or would not have been convicted but for the errors of the court,' we must direct a reversal. People v. Degnen, 70 Cal.App. 567, 234 P. 129, 145."

In Powell v. State of Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527, it was held that when a defendant is denied that fair and impartial trial guaranteed by law, such procedure amounts to a denial of due process of law.

We feel justified in again calling attention to the remarks of the court in People v. Black, 73 Cal.App. 13, 43, 238 P. 374, 387, as follows:

"* * * we feel impelled to direct the attention of district attorneys and trial judges to the frequent occasion which is thrust upon us to save judgments of conviction by means of the provisions of section 4½ of article 6 of the Constitution. It seems evident that the prosecutors of the state, and possibly that the trial judges, are conducting criminal cases with an eye to the saving grace of the section. It should be manifest that such a course is improper. In the performance of their respective duties incident to trials, the existence of the section is of no concern to those officers. That part of the organic law of the state is of interest, so far as its application is concerned, if we except proceedings on motion for a new trial (see People v. Tomsky, 20 Cal.App. 672, 130 P. 184) only to the courts of review. District attorneys and trial judges should conduct the trial of criminal cases exactly as if the section did not exist. Such a course, if faithfully and diligently pursued, will lessen the number of appeals, will shorten the time necessary for the consideration of appeals which are taken, will lessen the number of retrials by superior courts, and will conduce to the general dispatch of business in both trial and appellate courts."

The order denying defendant's motion for a new trial is reversed and the cause remanded for a new trial.

DORAN and DRAPEAU, JJ., concur.

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133 Cal.App.2d 277

In the Matter of the GUARDIANSHIP of Baby AVILES, a Minor.

Armeda S. AVILES, Petitioner and Appellant,

v.

Arthur Ray HICKERSON and Mary Nancy Hickerson, Cross-Petitioners and Respondents.

Civ. 4970.

District Court of Appeal, Fourth District, California.

May 25, 1955.

Proceeding in the matter of the guardianship of an infant, wherein paternal grandmother of infant filed a petition for appointment as guardian, and wherein nonrelatives, who had received possession of infant with consent of its mother four days after birth, filed a petition for appointment as guardians. The Superior Court of Kern County, Norman F. Main, J., entered judgment in favor of nonrelatives, and paternal grandmother appealed. The District Court of Appeal, Mussell, J., held that evidence sustained finding that it was for the best interests of the infant that custody be awarded to nonrelatives, and that Superior Court did not abuse its discretion in appointing nonrelatives as guardians.

Judgment affirmed.

1. Appeal and Error 🔑1011(1)

Trial court's finding on conflicting evidence was binding on District Court of Appeal and could not be disturbed.

2. Guardian and Ward 🔑10

Section of the Probate Code dealing with order of right to guardianship of a minor, must be read in conformity with and is limited by preceding section providing that in appointing a general guardian of a minor, court is to be guided by what appears to be for the best interest of the child in respect to its temporal, mental and moral welfare. Probate Code, §§ 1406, 1407.

3. Guardian and Ward 🔑10

In selecting guardian chief concern of courts is the welfare of the child. Probate Code, §§ 1406, 1407.

4. Guardian and Ward 🔑10

Wishes of parent should be considered in appointing a guardian for infant, but they are not necessarily controlling and do not outweigh what the court considers the best interest of the infant. Probate Code, §§ 1406, 1407.

5. Guardian and Ward 🔑13(4)

In guardianship proceedings, evidence sustained trial court's finding that it was to the best interests of infant in respect to her temporal, mental, and moral welfare that care, custody, and control be awarded to nonrelatives, who had taken the infant four days after its birth, with consent of the mother, rather than to maternal grandmother. Probate Code, §§ 1406, 1407.

6. Guardian and Ward 🔑10

Where evidence sustained trial court's finding that it was to the best interests of the infant that custody be awarded to nonrelatives, who, with mother's consent, had taken the infant four days after its birth, court did not abuse its discretion in appointing nonrelatives guardians, rather than paternal grandmother, whom father desired to have custody of infant. Probate Code, §§ 1406, 1407.

◆

Frye & Yudelson, North Hollywood, for appellant.

Burum & Young, Bakersfield, for respondents.

MUSSELL, Justice.

On April 5, 1954, Armeda S. Aviles filed in the superior court of Kern county a petition for appointment as guardian of the minor child here involved. On April 13, 1954, Arthur Ray Hickerson and Mary Nancy Hickerson, his wife, who then had custody of said child, filed in the same court a petition in which it is alleged, among other things, that Armeda S. Aviles is unable to properly care for said child and that it is to the best interests of said child that she remain with petitioners. The prayer of said petition is that the petitioners be appointed as joint guardians of the person of said minor.

Both petitions were heard at the same time and the trial court found that petitioner Armeda S. Aviles, the paternal grandmother of said child is personally a fit person to have the custody of said minor, but that the home of said petitioner is not a fit or proper place to keep, care for or raise said minor, and said home is unlikely to become a fit or proper place to keep, care for or raise said minor in the future; that "It is to the best interests of said minor in respect to her temporal, mental and moral welfare that the care, custody and control of said minor be awarded to petitioners Arthur H. Hickerson and Mary Nancy Hickerson." Petitioner Armeda S. Aviles appeals from the order and judgment appointing the Hickersons as such guardians.

The question presented by appellant is whether the trial court abused its discretion in appointing the Hickersons, who are not related to said child, as guardians, in preference to Armeda S. Aviles, who is a relative and claims to be entitled to preference under the provisions of section 1407 of the Probate Code.

The child involved was born on February 3, 1954, in a maternity home in Bakersfield. Four days later, with the consent of the mother, Rae Rita Aviles, the baby was taken by Mr. and Mrs. Hickerson to their home and has remained in their custody. Rae Rita Aviles and her husband, Leo A. Aviles, the father of the child involved, were married in 1951. They have three children, Jay Lee, aged two years; John, aged one year; and the child involved, who has been named Cynthia by the Hickersons. Immediately prior to the time when the third child was born, Rae and her two children lived with her mother. Her husband, Leo A. Aviles, had been convicted of armed robbery and was in the custody of and confined by the Youth Authority. The arrangements under which the Hickersons took the baby from the maternity home apparently were made by the physician in attendance at the time of the birth of said child and were made with Rae's knowledge and consent. It was contemplated by the doctor and Mrs. Aviles that the Hickersons would commence proceedings for the adoption of said child.

It was stipulated at the trial that the Hickersons are fit and proper persons to have the custody of the child and evidence was introduced showing they had been married seven years; that they have no other children and can have none of their own; that Mrs. Hickerson does not work outside of the home but devotes her full time to household duties and caring for the child; that she is twenty-five years of age and her husband's age is 32 years; that his total earnings for 1953 were in excess of $6,000 and that he and his wife are buying their own home.

There was substantial evidence that appellant's home was not a fit or proper place to keep and raise the child; that her son, Leo, who was convicted of armed robbery, would, after his release by the Youth Authority, return to her home to live; that said son has never had a steady job; that prior to his said conviction and after reaching the age of twelve or thirteen years, he had been in trouble several times; that his brother, Johnnie, who spent most of his time at the home, had at one time been arrested "in connection with marijuana"; that Ronnie, an adopted son, aged ten years, living in the home, had been in trouble several times for stealing; that the home was not kept clean; that profane language often was used in the presence of Ronnie and other children; that there were numerous arguments among the members of the family; that appellant "worked out" from 4:00 o'clock in the afternoon until midnight, five days each week; that her husband worked during the day from 7:30 a. m. to 4:30 p. m. and that unless appellant quit her job (which she promised to do) there would be no one at home to care for the child.

[1] There was testimony contrary to the foregoing evidence relative to the condition of appellant's home, the language used therein, and the conduct of the adopted son, Ronnie. However, such testimony merely created a conflict and the trial court's finding that appellant's home is not a fit or proper place to keep, care for and raise said minor is binding on us and cannot be here disturbed.

[2] Appellant argues that she is entitled to be appointed as guardian by reason of the fact she is a relative of said child. Section 1407 of the Probate Code, upon which she relies, provides:

> "*Order of right to guardianship.* Of persons equally entitled in other respects to the guardianship of a minor, preference is to be given as follows:
>
> "(1) To a parent;
>
> "(2) To one who was indicated by the wishes of a deceased parent;
>
> "(3) To one who already stands in the position of a trustee of a fund to be applied to the child's support;
>
> "(4) To a relative;
>
> "(5) If the child has already been declared to be a ward of the juvenile court, to the probation officer of said court."

This section must be read in conformity with and is limited by the previous section (1406) which provides in part:

> "*Rules for appointment.* In appointing a general guardian of a minor, the court is to be guided by what appears to be for the best interest of the child in respect to its temporal and mental and moral welfare".

[3] These sections of the code have been construed in connection with the question of the rights of parents to appointment as guardian in preference to strangers and it has been held that in guardianship proceedings the parents of a legitimate child have preference over a nonparent and the custody shall not be given to a nonparent unless the parent is found unfit. Guardianship of Smith, 42 Cal.2d 91, 92, 265 P.2d 888, 37 A.L.R.2d 867; Stewart v. Stewart, 41 Cal.2d 447, 452, 260 P.2d 44; Roche v. Roche, 25 Cal.2d 141, 144, 152 P.2d 999. However, our attention has not been directed to any decisions holding that unfitness of a relative must be found before a stranger may be appointed as guardian. As was said in Robertson v. Robertson, 72 Cal.App.2d 129, 135, 164 P.2d 52, 56:

> "The chief concern of the courts is the welfare of the child, which is the paramount consideration by which they are to be guided in awarding the custody of the child."

In Guardianship of Smith, supra [42 Cal.2d 91, 265 P.2d 891], in his concurring opinion, Mr. Justice Traynor states that the heart of the problem is how the best interests of the child are to be served and that "The court's statutory duty to be 'guided by what appears to be for the best interests of the child in respect to its temporal and mental and moral welfare', Probate Code, § 1406, encompasses the view that the child's welfare is part of the responsibility of a fit parent."

And as was said in Guardianship of Boulad, 90 Cal.App.2d 135, 138, 202 P.2d 562, 564: "'The paramount consideration in determining the custody of a child is the welfare of the child.'" In 13 Cal.Jur. 155, Section 14, it is said that where neither parent is claiming the right, however, the preference to which any other applicant for appointment may be entitled must yield to the paramount consideration—the interest and welfare of the child.

[4] In the instant case the parents of the child are not seeking appointment. The father, Leo A. Aviles, has consented to the petition of Armeda S. Aviles, and the mother, Rae Aviles, has consented to the appointment of the Hickersons. However, as was held in Re Guardianship of Walsh, 100 Cal.App.2d 194, 196, 223 P.2d 322, 324, 22 A.L.R.2d 689: "The wishes of a parent should be considered in appointing a guardian, but they are not necessarily controlling and do not outweigh what the court considers the best interest of the minor. (Citations.)"

[5] There was substantial evidence herein from which the trial court may well have concluded as between the petitions, that the home facilities which the Hickersons were able to provide and the personal care and attention which they were able to give the child were more suitable to the welfare of the child than the home of the appellant, and that the Hickersons were the more able to properly care for the child. The finding of the trial court that it is to the best interests of said minor in respect to her temporal, mental and moral welfare that the care, custody and control of said minor be awarded to the Hickersons is supported by substantial evidence.

[6] In In re Coughlin's Guardianship, 101 Cal.App.2d 727, 731, 226 P.2d 46, 49, this court held:

> "It is true, as pointed out by counsel for appellant, that the legislature has prescribed certain guides under which the courts should act in awarding custody of minor children. Sec. 138, Civ. Code; Secs. 1406–1408, Probate Code. In this connection counsel cites several cases in support of his argument, such as In re Green, 192 Cal. 714, 221 P. 903; Washburn v. Washburn, 49 Cal. App.2d 581, 122 P.2d 96; and Juri v. Juri, 69 Cal.App.2d 773, 160 P.2d 73. The true rule in this respect is set forth in Crater v. Crater, 135 Cal. 633, 635, 67 P. 1049. It is there stated that the controlling force in directing the custody of minor children includes the conduct of the parties, the morals of the parents, their financial condition, the age of the children, and the devotion of either parent to the children's best interests and good, and that the court's legal discretion in exercising such power, and the conclusion reached by it, will not be disturbed upon appeal unless it clearly appears that its discretion has been abused."

No abuse of discretion here appears.

Appellant argues that the transaction through which the Hickersons came into possession of the child was illegal. However, the issue here is whether the court abused its discretion in appointing the Hickersons as guardians and the manner and means by which the child was delivered to them is not determinative of that issue.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

133 Cal.App.2d 296

CAL-ORE LUMBER SALES, a partnership, composed of W. E. Baker, C. B. Graves, Wallace Baker, and H. G. Graves, Plaintiffs and Respondents,

v.

Floyd RUSSELL, doing business under the style and name of United Box & Lumber Company; Floyd Russell, Individually, Defendants and Appellants.

District Court of Appeal, Third District,
California.
May 26, 1955.

Action for lumber sold and delivered. Buyer moved to change venue to county of his residence. The Superior Court, Shasta County, Albert F. Ross, J., denied motion. Buyer appealed. The District Court of Appeal, Schottky, J., held that although there had been some general discussion in county where action was commenced about purchase of lumber, there had been no definite offer to purchase any definite amount, and since shipment was made to buyer f.o.b. a town in a third county, contract was made in that third county, and buyer was entitled to have action tried in county of his residence.

Order reversed with directions.

1. Venue ⚷21

The general rule is that a defendant is entitled to have action tried in the county of his residence, and the right of the plaintiff to have action tried elsewhere is an exceptional right which must find its justification in the terms of some statute. West's Ann.Code Civ.Proc. § 395.

2. Venue ⚷7

Where there was no special contract in writing as to place of performance of contract for sale of lumber, if contract of sale was not made in county where action was brought, sellers had not brought themselves within any exception to general rule that defendant is entitled to have case tried in county of defendant's residence. West's Ann.Code Civ.Proc. § 395.

3. Venue ⚷72

On a motion for change of venue, a common count states only conclusions of law and not probative facts.

4. Appeal and Error ⚷1011(1)

Where upon a motion for change of venue the evidence is conflicting, the ruling of the trial court will not be disturbed.

5. Venue ⚷22(1)

Where there was general discussion in county where action for lumber sold and delivered was brought, about purchase of lumber, but there was no definite offer to purchase, and lumber was shipped to buyers f.o.b. a town in a third county, contract for sale of lumber was completed in that third county, and buyers were entitled to have action tried in county of their residence and principal place of business. West's Ann.Civ.Code, §§ 1721 et seq., 1739, rule 5; West's Ann.Code Civ.Proc. § 395.

◆

James W. Harvey, San Francisco, Dorothy Handy, San Francisco, of counsel, for appellant.

John A. Spann and Jack Halpin, Jr., Redding, for respondents.

SCHOTTKY, Justice.

This is an appeal from an order denying appellants' motion for a change of venue.

Respondents commenced an action against appellants in Shasta County in the form of a common count, the complaint alleging "That on August 7, 1953, and August 21, 1953, defendants became indebted to plaintiffs on an open book account for 341,615 board feet of 6/4 dry ponderosa pine, rough box, for the total agreed price of $23,640.83, sold and delivered to defendants at their special instance and request;" and "That said obligation was incurred and to be performed in the County of Shasta, State of California."

Appellants moved to change the place of trial to the City and County of San Francisco, basing their motion on the following grounds:

(1) That the superior court of the state of California, in and for the county of Shasta, is not a proper court for the trial of this action for the following reasons: (a) that at the time of the commencement of the action none of the defendants resided in Shasta County; (b) that none of the defendants contracted to perform the obligation sued upon in Shasta County, or entered into the alleged contract in said county, or incurred the obligation sued upon in said county; (c) that there is no special contract in writing for the performance of the alleged obligation in said county; and (d) that plaintiffs never sold or delivered any lumber at all to defendants, or any of them, in said county of Shasta.

(2) That the superior court of the state of California, in and for the City and County of San Francisco, is a proper court for the trial of this action because at the time of the commencement of the action defendant, Floyd Russell, was, and still is, a resident of said city and county.

In his affidavit in support of the motion appellant Floyd Russell alleges that he is a resident of San Francisco, does business under the name of United Box & Lumber Company and maintains an office in San Francisco, but does not have an office for the transaction of such business in the county of Shasta; that the other defendants, sued under fictitious names, are fictitious in fact as well as in name; and that none of the defendants resided in Shasta County at the time of the commencement of the action, and alleges further:

> "That if any cause of action exists in this action against defendants, or any of them, the same arose in the City of Richfield, County of Tehama, State of California; that none of the lumber alleged to have been sold and delivered by plaintiffs to defendants was ever sold and delivered, or sold or delivered, to defendants, or any of them, in the County of Shasta, and in this regard affiant further states that all sales and all deliveries of lumber, if any, were made by plaintiffs to defendants, at the City of Richfield, County of Tehama. * * *
>
> "That none of the defendants at any time agreed to pay to plaintiffs at their offices or place of business in Shasta County, or anywhere else in said county, the sum of $23,640.83, or any sum or sums whatsoever.
>
> "That none of the defendants ever entered into any contract with the plaintiffs in the County of Shasta, * * * for the sale, purchase, or delivery of lumber alleged in the complaint.
>
> "That none of the defendants agreed to perform the obligations sued upon in Shasta County."

In opposition to the motion plaintiffs filed the affidavit of its sales manager, Mr. Haynes, which states:

> "That during the early part of 1953 your affiant had discussions with defendant Floyd Russell regarding sales of lumber; that sometime in late April or early May, 1953, defendant Floyd Russell together with Ted Marion, deceased, visited your affiant in the office of Cal-Ore Lumber Sales in the County of Shasta, State of California; that during this visit defendant Floyd Russell and Ted Marion, deceased, ordered dry lumber from your affiant acting as the agent of Cal-Ore Lumber Sales; that on May 25, 1953 a confirming copy of this order was received by your affiant through the mail at the office of Cal-Ore Lumber Sales in the County of Shasta. * * *
>
> "That affiant caused to have shipped to defendants quantities of lumber from time to time in order to fill the sales mentioned above.
>
> "That during the late April or early May visit to Redding of defendant Floyd Russell and Ted Marion, deceased, it was agreed between your affiant and defendant Floyd Russell that payment for the lumber ordered from the Cal-Ore Lumber Sales was to be made at the office of Cal-Ore Lumber Sales in the County of Shasta. * * *
>
> "That on July 31, 1953 payment for one shipment of dry lumber sent defendants on their order was made to Cal-Ore Lumber Sales at its office in the County of Shasta. * * *
>
> "That all negotiations, agreements, contracts, and sales on which the cause of action sued on by plaintiff is based, were made in the County of Shasta. * * *"

Subsequently, in opposition to the Haynes affidavit, appellant Russell filed another affidavit, in which he states:

> "That as to any purchases from plaintiffs with which affiant had anything to do in any capacity whatsoever, the sellers were to ship the goods to, and deliver the goods at a particular place, namely, Richfield, Tehama County, California, and also the sellers were to pay the freight or other cost of transportation to said particular place, Richfield, Tehama County, California.
>
> "That any lumber that was delivered by plaintiffs on any order with which said affiant had anything to do was shipped f. o. b. Richfield and delivered at Richfield, Tehama County, California.
>
> "That the confirming copy of an oral order which Fred Haynes states he received as an agent of plaintiffs on

May 25, 1953, was not signed by affiant, either as an individual doing business under the style and name of United Box & Lumber Company or as Floyd Russell, individually, in which capacities only your affiant has been named and served in the above-entitled action; that your affiant is the only defendant served in said action.

"That none of the lumber alleged in plaintiffs' complaint to have been sold and delivered by plaintiffs to defendants was ever sold and delivered, or sold or delivered, to defendants, or any of them, in the County of Shasta. That it was always required that all said lumber so alleged to have been sold or delivered be delivered f. o. b. at Richfield, Tehama County, California.

"That affiant never agreed that payment for any lumber ordered from plaintiffs was to be made at the office of plaintiffs in Shasta County. That there is no special contract in writing by which affiant agreed to pay the purported obligation in Shasta County."

Respondents filed a further affidavit by Mr. Haynes which added little to the affidavit previously filed by respondents, but which stated that at the time appellant Russell and Ted Marion visited affiant at respondents' office in Shasta County "Floyd Russell asked your affiant if Cal-Ore Lumber Sales could secure dry lumber to be shipped to the United Box and Lumber Company in Tehama County; that your affiant informed Floyd Russell that Cal-Ore Lumber Sales could obtain dry lumber; that Floyd Russell requested your affiant to ship all the dry lumber Cal-Ore Lumber Sales could obtain to the United Box and Lumber Company in Tehama County; that your affiant promised Floyd Russell that Cal-Ore Lumber Sales would ship dry lumber to the United Box and Lumber Company until Floyd Russell requested shipment stopped; that Floyd Russell asked that the price be cleared with Floyd Russell but that otherwise shipment be made as soon as lumber became available. That subsequently, under the terms of the agreement made between Floyd Russell and your affiant, lumber was shipped to United Box and Lumber Company."

As grounds for a reversal of the order denying their motion to change the place of trial to the City and County of San Francisco, appellants contend (1) that the general rule applies which demands that an action be tried in the county where defendant resides, in that plaintiffs have failed to bring themselves within an exception to said rule; (2) that, on a motion for a change of venue, allegations of a common count are conclusions and not facts, and that plaintiffs' affidavit failed to set forth sufficient facts to bring them within an exception to the general rule regarding venue; and (3) that there is no evidence to support the trial court's finding that defendants "contracted to perform the obligation sued upon in Shasta County," and that therefore as a matter of law they are entitled to a change of venue.

[1] Section 395 of the Code of Civil Procedure, so far as is pertinent here, provides: "* * * When a defendant has contracted to perform an obligation in a particular county, either the county where such obligation is to be performed, or in which the contract in fact was entered into, or the county in which the defendant, or any such defendant, resides at the commencement of the action, shall be a proper county for the trial of an action founded on such obligation, and the county in which such obligation is incurred shall be deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary. * * *" The general rule is that a defendant is entitled to have actions tried in the county of his residence. The right of the plaintiff to have the action tried elsewhere is the exceptional right, and must find its justification in the terms of some statute.

Unless the plaintiff can bring himself within some exception the defendant has a right to have the action tried in the county of his residence. Goossen v. Clifton, 75 Cal.App.2d 44, 47–48, 170 P.2d 104.

Commenting on the quoted part of section 395, the court, in Armstrong v. Smith, 49 Cal.App.2d 528, at page 531, 122 P.2d 115, at page 117, said:

"If it were provided only that when a defendant has contracted to perform an obligation in some particular county, the county in which it is to be performed, or the county in which the contract was entered into, or the county in which the defendant resides, shall be a proper county for the trial of an action upon an obligation growing out of the contract, no difficulty would be presented. In such a case either one of the three counties mentioned would be a proper county for the trial of such an action.

"But the legislature did not stop there. It added a limitation, and the limitation which it added is this: 'the county in which such obligation is incurred shall be deemed to be the county in which it is to be performed.' The effect of the limitation is to cut down the number of counties in which an action may properly be tried to two, namely, the county in which the defendant resides, and the county in which the contract was made.

"Having set up the limitation, the legislature created an exception to it, providing that *if it be specially contracted in writing as to the county of performance, such county is also a proper county for the trial of an action. Under conditions where the exception is effective, the number of proper counties goes back to three.*

"* * * The express condition of the statute is that *unless there is a special contract in writing to the contrary the county in which the obligation is incurred is the venue of an action arising out of it.* What the legislature has in substance said is that all actions arising on contract shall be tried in the county in which the defendant resides, or in which the contract was made, unless the defendant has contracted specially and in writing as to the county in which his obligation is to be performed, in which event such county is also a proper county for the trial of the action." (Emphasis added.)

[2] In the instant case there was no special contract in writing as to the place of performance, and the question which we must determine is: Where was the contract made? If it was made in Shasta County, the order appealed from is correct. If it was not made in Shasta County then respondents have not brought themselves within any exception to the general rule that the defendant is entitled to have the case tried in the county of defendant's residence, and the order appealed from must be reversed.

[3] The complaint was in the form of a common count alleging that appellants became indebted to respondents upon an open book account and the obligation was incurred in Shasta County. It is well settled that on a motion for change of venue a common count states only conclusions of law and not probative facts. As stated by the trial court "the complaint only states a cause of action without indicating venue," and we must therefore analyze the affidavits filed by respondents in opposition to the motion, the substance of which we have hereinbefore set forth.

It appears from said affidavits that appellant Floyd Russell visited the office of respondents in Shasta County and asked if respondents could secure dry lumber to be shipped to appellants in Tehama County; that respondents' sales-manager replied in the affirmative and appellant Russell requested respondents to ship all the dry lumber they could obtain, the price be cleared with him but that otherwise shipment be made as soon as available; that a confirming order was received through the mail at respondents' office in Shasta County; that at the time of the aforesaid visit it was agreed that payment for the lumber was to be made at respondents' office in Shasta County.

Appellants, in attacking the finding of the court that the parties entered into the contract in Shasta County, argue that respondents' affidavits show no more than that an offer to purchase was made by appellants in Shasta County, that there was no acceptance until the ordered goods were shipped, that in a normal situation the place of shipment would be the place where the contract was entered into, but that in the instant case the lumber was shipped f. o. b. at Richfield in Tehama County, which would put the place of last act necessary to complete the contract in Tehama County. Respondents do not deny that the lumber was shipped f. o. b. Richfield, but point to the allegations in the Haynes affidavit that "all negotiations, agreements, contracts, and sales on which the cause of action sued on by plaintiff is based were made in the County of Shasta."

[4, 5] While it is true that where upon a motion for change of venue the evidence is conflicting the ruling of the trial court will not be disturbed, we are of the opinion that there is no substantial evidence to support the ruling of the trial court that the contract was entered into in Shasta County. We believe that it is clear from the record that while there was some general discussion in Shasta County about the purchase of lumber, there was no definite offer to purchase any definite amount or any agreement as to size or price. At most appellants expressed a desire to buy some dry lumber and respondents were willing to sell them some. Shipment was to be made to appellants f. o. b. Richfield after the price was cleared with appellant Russell, which would mean that there would have to be some further discussion as to sizes and price prior to shipment. The confirming order referred to in respondents' affidavit was mailed from appellants' San Francisco office to respondents' office in Shasta County. It is clear from the record that there were a number of shipments of lumber and that the place of delivery was f. o. b. Richfield in Tehama County.

The Uniform Sales Act, which has been adopted by California, Civ.Code, § 1721 et seq., provides that if the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon, unless a different intention appears. Civil Code, section 1739, Rule 5, provides: "If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon."

In 12 Cal.Jur.2d 387, it is said: "* * * The place where it [the contract] actually becomes complete is the place where it is made. And its consummation is at the place where the last act necessary to complete its validity is performed."

Again in 46 Am.Jur. at 602, it is noted there that under the Uniform Sales Act, where the goods are subject to the section quoted, unless the delivery f. o. b. is made complete per the order, no title passes.

Under these rules it would appear that there could be no obligation until the last act has been completed. In such a case the authorities have stated that the place of the contract is where the last act is to be performed. In this case both parties agree that the lumber was to be delivered f. o. b. to Tehama County. Thus the title to the goods did not pass to the appellants until the goods were there received, and at that time the last act was done, constituting Tehama County as the place of the contract.

Our conclusion is that the court erred in holding that the contract was made in Shasta County because there was no binding obligation upon appellants until the lumber was shipped f. o. b. Richfield in Tehama County. Appellants were therefore entitled to have the action tried in the City and County of San Francisco, the place of their residence and principal place of business.

The order is reversed with directions to the trial court to grant the motion.

VAN DYKE, P. J., and PEEK, J., concur.

133 Cal.App.2d 283

Mabel DURKIN, Plaintiff,
v.
Thomas J. DURKIN and American Trust Company, Defendants.

AMERICAN TRUST COMPANY, Cross-Complainant,
v.
Mabel DURKIN, Thomas J. Durkin, Robert Gregory, State Board of Equalization, State of California, Peter Milan and Lew Irvine, L. A. Cavalier, and Rollen F. Campbell, Cross-Defendants.

STATE of California, acting by and through the State Board of Equalization, Cross-Complainant, Cross-Defendant and Appellant,
v.
AMERICAN TRUST COMPANY, Mabel Durkin, Thomas J. Durkin, Robert Gregory, Peter Milan and Lew Irvine, L. A. Cavalier, and Rollen F. Campbell, Cross-Defendants.

Rollen F. CAMPBELL, Cross-Complainant, Cross-Defendant and Respondent,
v.
STATE of California, acting by and through the State Board of Equalization, American Trust Company, Mabel Durkin, Thomas J. Durkin, Robert Gregory, Peter Milan and Lew Irvine, and L. A. Cavalier, Cross-Defendants.

Robert C. GREGORY, Cross-Complainant, Cross-Defendant, and Respondent,
v.
Mabel DURKIN, Thomas Durkin, State of California, acting by and through the State Board of Equalization, Peter Milan and Lew Irvine, L. A. Cavalier, and Rollen F. Campbell, Cross-Defendants,

Peter Milan and Lew Irvine, Cross-Defendants and Respondents.

Civ. 16246.

District Court of Appeal, First District,
Division 1, California.

May 26, 1955.

Hearing Denied July 20, 1955.

Action involving relative priorities of certain creditors of insolvent automobile dealer. The Superior Court, San Mateo County, Edmund Scott, J., found the priorities. The State appealed. The District Court of Appeal, Fred B. Wood, J., held that where certain creditors had attached insolvent's bank accounts, obtained judgment, and issued writ of execution, lien obtained by levy of writ of execution expired one year after issuance of writ, and second levy was ineffective because property was then in custodia legis, and statute declaring that an attachment of garnishment on personal property shall, unless sooner released or discharged, cease to be of any force at expiration of three years after issuance of writ of attachment, is not an affirmative statement that garnishment shall endure for three years, but merely a statement that it shall not endure longer than three years.

Judgment affirmed in part and reversed in part with directions.

1. Licenses 🔑31

The statute providing that amounts required to be paid as sales and use taxes shall be satisfied first whenever the taxpayer is insolvent, gives state, when it has failed to obtain lien, first call over other creditors who likewise do not have liens of any kind, but it does not mean that the amounts of these taxes, whether perfected into liens or not, must be satisfied ahead of claims of all other creditors whether general lienholders or assignees. Revenue and Taxation Code, §§ 6701, 6702, 6711–6715, 6736–6739, 6756–6759, 6776–6778, 6796–6799.

2. Licenses 🔑31

In statute providing that amounts required to be paid by any person as sales and use taxes shall be satisfied first whenever the person is insolvent, exceptions expressed in last two sentences of statute as to recorded liens and claims of personal services, were merely by way of illustration, and not as a complete enumeration of exceptions. Revenue and Taxation Code, § 6756.

3. Sales 🔑475

Dealer's reserve account, of funds withheld by bank out of purchase price of sales contract the bank acquired from automobile dealer, which was credited to dealer's account, but held as security for performance of his guarantee that buyer of automobile would pay contract in full, was not an "open book account" as that term was used in statute requiring recordation of notice of the assignment of such accounts, and assignment of reserve account by dealer to his creditor was perfected although not recorded. West's Ann.Civ. Code, §§ 955, 3017–3029.

See publication Words and Phrases, for other judicial constructions and definitions of "Open Book Account".

4. Account, Action on 🔑2

An outstanding and "open account" is an unsettled debt arising from items of work and labor, goods sold and delivered, and other open transactions not reduced to writing, and subject to future settlement and adjustment, and is usually disclosed by the account books of the owner of the demand, and does not include express contracts or obligations which have been reduced to writing, such as bonds, bills of exchange or promissory notes. West's Ann. Civ.Code, § 3017.

See publication Words and Phrases, for other judicial constructions and definitions of "Open Account".

5. Account, Action on 🔑2

An express contract, which defines duties and liabilities of the parties, whether it be oral or written, is not as a rule an open account. West's Ann.Civ.Code, §§ 955, 3017–3029.

6. Execution 🔑55

Levy of writ of execution by creditors of insolvent automobile dealer, upon accounts of dealer held by bank, were ineffective when property was in custodia legis in interpleader action.

7. Interpleader 🔑21

In a proceeding in interpleader, monies in question do not come into legal custody until actually paid into court upon an order of the court therefor.

8. Attachment 🔑184
Garnishment 🔑106

Statute providing that an attachment or garnishment of personal property shall, unless sooner released or discharged, cease to be of any force or effect after expiration of three years after issuance of writ, is not an affirmative statement that a garnishment shall endure for three years unless sooner released or discharged, but is a statement that it shall not endure longer than three years, and lien of an attachment on personal property merges and terminates in the lien of the execution levy. West's Ann.Code Civ.Proc. §§ 542b, 688.

9. Licenses 🔑31

Where creditors of insolvent automobile dealer attached dealer's accounts with bank, obtained judgment, and levied writ of execution upon bank, lien obtained by first levy expired one year after issuance of writ, and did not continue in force for three years during life of lien of attachment, and lien acquired by state on warrants for unpaid sales and use taxes, was prior. West's Ann.Civ.Code, §§ 3017–3029; Revenue and Taxation Code, § 6776; West's Ann. Code Civ.Proc. §§ 542b, 688.

10. Appeal and Error 🔑878(6)

Creditor who did not appeal from judgment determining relative priorities of creditors of insolvent automobile dealer, could not urge that evidence was scanty as to debtor's insolvency and could not claim that court erred in denying him interest and attorney's fees.

◆

Edmund G. Brown, Atty. Gen., James E. Sabine, Asst. Atty. Gen., Ernest P. Goodman, Eugene B. Jacobs, Deputy Attys. Gen., for appellant.

Cosgrove, Molinari & Tinney, Robert A. Dobbins, San Francisco, for respondents Milan and Irvine.

Cosgriff, Carr, McClellan & Ingersoll, Luther B. Carr, Burlingame, for respondent Gregory.

Burress Karmel, Burlingame, for respondent Campbell.

FRED B. WOOD, Justice.

This action involves the relative priorities of certain creditors of an insolvent automobile dealer; particularly, their relative liens upon two bank accounts of his, a "Dealer's Reserve" and a "Special Holdback Account." The bank interpleaded and paid the moneys in both accounts into court.

The trial court found their priorities as follows: *First,* Robert Gregory, to the extent of $2,250 of the moneys derived from the "Dealer's Reserve Account," by voluntary assignment of the debtor; *Second,* Rollen F. Campbell, in the amount of $1,504.30 and costs, by attachment followed by judgment and levy of execution upon the moneys of both accounts; *Third,* Peter Milan and Lew Irvine, in the amount of $278.63 plus costs and interest, by attachment followed by judgment and levy of execution upon the moneys of both accounts; *Fourth,* the state, a lien upon the moneys of both accounts in the amount of $2,470.07, plus interest and costs, for unpaid sales and use taxes, predicated upon warrants issued and served in 1951–53 under authority of section 6776 of the Revenue and Taxation Code. The assignment to Gregory was made and the liens of the others were acquired during the insolvency of the debtor.

The state has appealed. It claims (1) the taxes should be satisfied ahead of other creditors' claims in view of the preferences accorded by section 6756, Revenue and Taxation Code; (2) Gregory's assignment was ineffective as against the tax liens for the additional reason that notice of assignment was not filed as required by sections 3017–3029, Civil Code; (3) any liens of Milan and Irvine expired (pursuant to § 688, Code Civ.Proc.) one year after issuance of their first writ of execution, subordinating their claim to the lien created by the issuance, meanwhile, of warrants issued by the state.

(1) *The State's contention that the taxes should be satisfied ahead of these other creditors* is predicated upon its interpretation of section 6756[1] of the Revenue and Taxation Code. The state asserts that the provision that the "amounts required to be paid" as sales or use taxes "shall be satisfied first" when the debtor is insolvent means what it literally says: The amounts of these taxes (whether perfected into liens or not), must be satisfied ahead of the claims of all other creditors (whether general creditors, lienholders, or assignees) save only the two types of claims expressly excepted at the end of the section (prior recorded liens and preferred labor claims).

However much we might be persuaded by the state's analysis of the text and the legislative history of section 6756 if this were a matter of first impression, it happens that the question has been answered adversely to the state's contention in two District Court of Appeal decisions which the Supreme Court refused to disturb, denying as it did a petition for a hearing in each case. We refer to People v. Biscailuz (2d Dist., Div. 3, 1950), 95 Cal.App.2d 635, 640–643, 213 P.2d 753, and People v. Biscailuz, (2d Dist., Div. 2, 1951), 107 Cal.App.2d 71, 73, 236 P.2d 591, interpreting similar, virtually identical, provisions of section 46 of the Unemployment Insurance Act, now sections 1701 and 1702 of the Unemployment Insurance Code. Under these circumstances we are not inclined to undertake a reexamination of the question, see Masonic Mines Ass'n v. Superior Court, 136 Cal. App. 298, 300, 28 P.2d 691; Clover v. Jackson, 81 Cal.App. 55, 59, 253 P. 187; Bridges v. Fisk, 53 Cal.App. 117, 122, 200 P. 71; People v. Whitaker, 68 Cal.App. 7, 11, 228 P. 376; 13 Cal.Jur.2d 685, section 145. Contra, People v. Brunwin, 2 Cal.App.2d 287, 294, 37 P.2d 1072, especially in view of the fact that the interpretation made in the Biscailuz cases does no violence to the language of the statute, indeed seems no less reasonable an interpretation of its provisions than the view here urged by the state.

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[1] "§ 6756. The amounts required to be paid by any person under this part [sales and use taxes] together with interest and penalties shall be satisfied first in any of the following cases:

"(a) Whenever the person is insolvent.

"(b) Whenever the person makes a voluntary assignment of his assets.

"(c) Whenever the estate of the person in the hands of executors, administrators, or heirs is insufficient to pay all the debts due from the deceased.

"(d) Whenever the estate and effects of an absconding, concealed, or absent person required to pay any amount under this part are levied upon by process of law.

"This section does not give the State a preference over any recorded lien which attached prior to the date when the amounts required to be paid became a lien.

"The preference given to the State by this section shall be subordinate to the preferences given to claims for personal services by Sections 1204 and 1206 of the Code of Civil Procedure."

[1] That interpretation is best expressed in the words used by the court in the first Biscailuz case: "The priority conferred by section 46(a) would appear to be intended to apply in cases of insolvency where the State would otherwise be required to share upon an equal footing with general creditors of the employer." At page 642 of 95 Cal.App.2d, at page 759 of 213 P.2d. That is the fair intendment of the words "amounts required to be paid by any person under this part * * * shall be satisfied first * * *: Whenever the person is insolvent." It gives the state, when it has failed to obtain a lien, first call over other creditors who likewise do not have liens of any kind. It leaves our lien laws unimpaired and undisturbed in their operation; indeed, it should require clear and unmistakable language to evince an intent to override those laws. It comports, also, with the common law concept of the sovereign's right of priority in the case of an insolvent debtor.[2] Also, as pointed out by the court in that case, such an interpretation did not leave the state hampered or curtailed as to remedies. It had various procedures available, some quite expeditious, for exacting security or obtaining and perfecting liens. The same observation applies in our case. (See Rev. & Tax. Code, §§ 6701, 6702, 6711–6715, 6736–6739, 6757–6759, 6776–6778, and 6796–6799.)

Yet, the state urges us to disregard the Biscailuz decision as of no value: "The failure of the court * * * to discuss or give any effect to the last two paragraphs of the priority section [relating to prior recorded liens and preferred labor claims] deprives the opinion of value as a precedent * * *" A.O.B., p. 17. That, we think is an unnecessarily severe stricture. Mere failure to mention a clause of a statute construed does not necessarily signify it was not considered, especially where, as here, that clause does not indisputably have the clearly unequivocal and pivotally significant meaning which the state would ascribe to it. That meaning, thus ascribed, is that the specific exception of prior recorded liens and preferred labor claims conclusively demonstrates a deliberate legislative intent to bar, as exceptions, all other liens and interests of other creditors and thus characterizes the main clause of section 6756 (the tax "shall be satisfied first" whenever the taxpayer is insolvent), as putting the state's claim ahead of all other creditors except preferred labor claimants and the holders of prior recorded liens.

[2] Upon the contrary, it is just as easy and just as logical to read those last two sentences as cautionary and illustrative, not narrowly restrictive and exclusionary, in purpose and nature. It is a quite common device in any written instrument, after stating a general proposition, to give an illustration or two of what it does or does not include. For example, section 6359 of the Revenue and Taxation Code exempts from the sale and use taxes "the storage, use, or other consumption in this State of *food products for human consumption.*" (Emphasis added.) Then follow four sentences. Two declare that "Food products" include certain things. Two declare that "Food products" do not include various specified items. Certainly, no one would claim that these explanatory lists of inclusions and exclusions furnish the full measure and scope of the expression "food products for human consumption." For some of the case law on this subject, see Oil Workers International Union v. Superior Court, 103 Cal.App.2d 512, 571, 230 P.2d 71. It is

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[2] The state in its closing brief, p. 4, describes the sovereign's priority as follows: "At common law the sovereign had a priority of payment out of the assets of an insolvent debtor as against all persons not having antecedent liens; in other words, the sovereign was entitled to a preference over private creditors whose claims stood on the same footing as those of the state (23 Am.Jur. 823)," and adds: "The court in the first Biscailuz case reached a result which provided substantially the same priority for the State as prevailed in relation to the English Crown," while correctly pointing out that the court did not rest its decision upon the common law concept of the sovereign priority.

a fair inference, therefore, that when it wrote in the exceptions expressed in the last two sentences of section 6756, the Legislature did so merely by way of illustration, not at all as a complete enumeration of exceptions.

For the reasons stated, we do not undertake a detailed analysis and reappraisal of the provisions of section 6756. We accept the interpretation made by the court in the first Biscailuz case and applied by the trial court in the instant case.

(2) *Was the dealer's assignment to Gregory of a portion of the "Dealer's Reserve Account" effective as against the state in view of the failure to record notice of the assignment pursuant to sections 3017–3029 of the Civil Code?*

On November 3, 1949, Robert Gregory loaned Durkin approximately $2,250 to purchase an automobile for resale. Durkin being unable to repay, in writing assigned to Gregory $2,250 of his "Dealer's Reserve Account" held by the bank that financed his sales. On the same day, this assignment was presented to and in writing accepted by the bank.

[3] The principal question is whether or not the "Dealer's Reserve Account" was an "account" as defined in section 3017. If not, recordation of notice was not required for perfecting the assignment. The trial court held that such recordation was not required.

The "Dealer's Reserve Account" was created and governed by contract between the dealer and the bank which held the account. The dealer financed many of his sales by means of conditional sales contracts between him and his customers. Each contract specified the unpaid balance and the interest rate. He sold or assigned many of these contracts to the bank pursuant to the terms of an "Automobile Repurchase Agreement"[3] which provided for the withholding by the bank of a determinable amount whenever it purchased a contract and the placing of that amount to the credit of the dealer in a "Dealer's Reserve Account." As each new conditional sales contract was sold to the bank, the balance credited to the dealer in this account rose; as car buyers defaulted on their contracts, or as car buyers paid off early, the balance fell. In effect, it would seem, the bank held out a portion of the purchase price of each sales contract it acquired from the dealer, set that amount up on its books to his credit, and held it as security for the performance of his guaranty that the obligor on the sales contract would pay in full.

"The 'Dealer's Reserve' account feature of the Repurchase Agreement," says the state, "is merely a security arrangement for the protection of the bank." The state does not claim that the automobile repurchase agreement or the assignment of any conditional sales contract pursuant to the provisions of that agreement, was defective in the slightest degree. This apparently is in tacit recognition of the fact that the provisions of the agreement entered into and became a part of the terms of the transfer

[3] The salient features of this agreement may be summarized as follows: (a) The bank could refuse to purchase any unacceptable conditional sales contract; (b) after purchase of a contract the bank would have the right to make collections and receive payments directly from the buyer; (c) the dealer guaranteed each contract sold to the bank; (d) the bank would purchase the contracts at a rate (called a "discount rate") to be determined from time to time by the dealer and the bank; (e) upon purchase of a contract by the bank, the agreed discount rate would be applied to the balance on the contract to determine the amount to be received by the bank and the dealer would be immediately paid said balance; (f) if the rate of interest under the contract was higher than the discount rate, the excess owed and to be paid by the buyer over the amount financed and the discount rate was entered on the books of the bank as a credit to the dealer and entitled "Dealer's Reserve Account"; (g) the amounts thus credited in this account were not paid immediately to the dealer by the bank but were retained as security for the performance by the dealer of his obligation to the bank, as guarantor of the conditional sales contracts sold to the bank; (h) the sums in this account could not exceed 5 percent of the total conditional sales contract balance outstanding unless the bank was of the opinion that the dealer's credit standing or financial responsibility was impaired.

of each conditional sales contract and that each such transfer was perfected against third persons by assignment from the dealer to the bank without notice to the contract obligor, as sanctioned by section 955[4] of the Civil Code, plus the fact that an "account" which was represented by an "instrument for the payment of money" was not within the purview of sections 3017–3029 of the Civil Code.

The assignment of a $2,250 interest in this "Dealer's Reserve Account" was perfected as against third persons by written assignment from the dealer to Gregory and notice to the bank, unless this is an "account" as defined in subdivision (1) of section 3017 of the Civil Code: "*'Account'* means an open book account, mutual account, or account stated, due or to become due, carried in the regular course of business and not represented by a judgment, note, draft, acceptance, or other instrument for the payment of money; it includes rights under an unperformed contract for work, goods or services which in the regular course will result in an open book account." As amended by Stats.1945, ch. 295, p. 756.

The state claims that the "Dealer's Reserve Account" was an "open book account" as that term was used in section 3017; hence, that the assignment to Gregory of an interest therein without the filing required by section 3019 was ineffective, at least as against the state.

[4] This "Dealer's Reserve Account" does not bear the earmarks of an "open book account" in the traditional sense of that term. The following definition has been quoted with approval: "'The expression "outstanding and open account" has a well-defined and well-understood meaning. In legal and commercial transactions it is an unsettled debt arising from items of work and labor, goods sold and delivered, and other open transactions, not reduced to writing, and subject to future settlement and adjustment. It is usually disclosed by the account books of the owner of the demand, and does not include express contracts or obligations which have been reduced in writing, such as bonds, bills of exchange, or promissory notes.'" 1 Ruling Case Law 207; quoted with approval in Mercantile Trust Co. v. Doe, 26 Cal.App. 246, 253–254, 146 P. 692, 694; People v. California Safe Deposit, etc., Co., 41 Cal. App. 727, 733, 183 P. 289; Fresno Credit Bureau v. Batteate, 102 Cal.App.2d 545, 547, 227 P.2d 851.

[5] An express contract, which defines the duties and liabilities of the parties, whether it be oral or written, is not, as a rule, an open account. Lee v. DeForest, 22 Cal.App.2d 351, 360, 71 P.2d 285; Cleaveland v. Inter-City Parcel Service, 22 Cal.App.2d 574, 581, 72 P.2d 179; Tillson v. Peters, 41 Cal.App.2d 671, 677, 107 P.2d 434.

"Sums which become due under an express contract (such as rent under a lease) are not ordinarily treated by the parties as items of an open account. [Citations.] If they are not so considered by the parties, one party cannot evade the bar of the statute of limitations by pleading an open, mutual, current account or book account. [Citation.] However, rent may by mutual understanding of the parties become an item in an open account; in such a case the cause of action is upon the account, not under the lease. [Citation.]" Parker v.

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[4] "The transfer of a contract of conditional sale shall be deemed perfected against third persons when such contract has been indorsed or assigned in writing and delivered to the transferee, whether or not notice of such assignment has been given to the obligor * * *." Civ.Code, § 955; Stats.1941, ch. 1025, p. 2655.

Prior to the enactment of section 955 in 1941 the rules applicable to the assignment of a non-negotiable chose in action governed the assignment of a conditional sales contract, see C. I. T. Corporation v. Glennan, 137 Cal.App. 636, 638–639, 31 P.2d 430.

Those rules until modified by the 1943 addition of sections 3017–3029 to the Civil Code required notice to the debtor in order to perfect an assignment against a subsequent assignee for value without notice, Smitton v. McCullough, 182 Cal. 530, 535, 189 P. 686; 3 Cal.Jur. 283–284, § 35; 17 S.C.L.R. 303; 41 C.L.R. 333, 335.

Shell Oil Co., 29 Cal.2d 503, 507, 175 P.2d 838, 841.

It is not clear that in our case the transactions of the dealer and the bank pursuant to the provisions of the Automobile Repurchase Agreement could be kept in such a manner as to constitute an "Open book account." Even if that were feasible, there is an absence of evidence in the record before us concerning what books they kept, what entries they made in those books, and whether they treated such entries as items of an open book account. Accordingly, this record furnishes no basis for us, a reviewing court, to disturb the findings of the trial court and hold, as a matter of law, that the dealer and the bank did record their transactions in such fashion that they could and did treat this as an open book account.

We conclude that the "Dealer's Reserve Account" was not an open book account as the latter term is used in section 3017 and that the assignment to Gregory became effective upon notification of the bank, without filing pursuant to section 3019.

Added support for this conclusion is furnished by the history of legislative enactments and judicial decisions affecting nonnotification financing of accounts receivable. A brief description of that method of financing is furnished by Vernon X. Miller in 22 Marquette Law Rev. 28; "An assignment of accounts receivable is a popular security device. The lender agrees to extend credit to the borrower and he demands security. The borrower agrees to pledge the accounts on his books to secure a loan. He furnishes the creditor with a formal list of the accounts. He agrees to furnish additional lists at specified times in the future. It is assumed by both that if the debtor does not pay when the loan matures, the creditor can reach the accounts. Apparently the debtor can carry on business as usual and the credit is protected against the debtor's insolvency." More detailed descriptions of this method of financing are furnished by Maximilian Koessler in "Assignment of Accounts Receivable," 33 C.L.R., 40 at 56 et seq., and by Prochnow and Foulke in "Practical Bank Credit," 2d edition, p. 424 et seq. Nonnotification of the customer-debtor of the assignment of his account appears for various reasons to be a much desired and favored feature of this method of financing. 17 S.C.L.R. 303; 33 C.L.R. 46, 59–61; 38 C.L.R. 308.

This was the type of accounts receivable financing which was involved in In re Quaker City Sheet Metal Co., 3 Cir. 1942, 129 F.2d 894, affirmed in Corn Exchange Nat. Bank & Trust Co. v. Klauder (March, 1943), 318 U.S. 434, 63 S.Ct. 679, 680, 87 L.Ed. 884. The Quaker City company being in need of working capital arranged with the Corn Exchange Bank to advance money from time to time for payroll and other needs "on concurrently made assignments of accounts receivable." As it happened, some of these assignments were made less than four months before the filing of an involuntary petition in bankruptcy. Because this transaction occurred in Pennsylvania and Pennsylvania law required notification of the customer-debtor before the assignment became complete as against subsequent assignees for value, the court held that the questioned assignments to the bank were ineffective as against the trustee in bankruptcy in view of the provisions of section 60, sub. a of the Bankruptcy Act as amended by the Chandler Act of June 22, 1938, 52 Stats. 840, 869–870, 11 U.S.C.A. § 96, sub. a.

This decision gave impetus to the urge for state legislation designed to foster nonnotification financing of accounts receivable in a manner that would obviate the results of the decision. The legislation took various forms in different states. Some required recordation of the assignment or of the intention to assign, some required book marking, some made the assignment effective as of its date without recording or book marking. A brief description of this movement and its purpose appears in the Handbook of the National Conference of Commissioners on Uniform State Laws (1944) at pp. 172–189. A more extended discussion appears in "Assignment of Accounts Receivable," supra, 33 C.L.R. 46–113.

There is no doubt that chapter 766 of the California Statutes of 1943, page 2542, adding sections 3017–3029 to the code (described in its title as "An act * * * relating to the assignment of accounts receivable and providing for the giving of notice thereof"), was designed to facilitate nonnotification financing of accounts receivable by substituting the filing requirements of section 3019 for the former requirement that each customer-debtor be notified of the assignment. See 38 C.L.R. 308–309; 17 S.C.L. 303, 306. In our case, the dealer and the bank had no need for such a remedy. Here the "accounts receivable," being in the form of conditional sales contracts, were readily transferable without notice to the customer-debtor. There was no occasion to impose filing requirements to facilitate nonnotification financing of such accounts. Similarly, there was no occasion, in furtherance of such financing, to impose filing requirements upon the manufacturer, merchant or dealer whenever he chose to convey an interest in credits accruing to him from the bank that financed these accounts for him, because there was no conceivable reason, in fact or in fancy, for not notifying the debtor-bank as was immediately done in the instant case.

(3) *Do the evidence and the findings support the legal conclusion that Peter Milan and Lew Irvine acquired liens upon the "Dealer's Reserve Account" and the "Special Holdback Account"*[5] *which are traceable into the funds which the bank paid into court?*

In an action brought by Peter Milan and Lew Irvine against Durkin, a writ of attachment was issued and served upon the bank on November 2, 1950, thus creating a lien in their favor in both accounts.

They obtained judgment in that action and a writ of execution was issued and served January 8, 1951, on the bank. Nothing further happened until March 2, 1953, when a new writ of execution was issued and on March 4th served upon the county treasurer who made return that the funds were in custodia legis.

Meanwhile, pursuant to the bank's cross-complaint in interpleader the court on May 26, 1952, ordered the bank to deposit with the clerk of the court the sum of $4,924.52.[6] The deposit was made and on June 12, 1952, the court dismissed the bank from the action, free from liability.

Meanwhile, also, the state acquired its lien on both accounts by warrants issued pursuant to section 6776, Revenue and Taxation Code. These warrants were issued for a single period of tax liability but from time to time so as to include accruing interest, adjustments for payments received, and for renewal purposes. Issued August 1 and October 10, 1951, and January 14, 1952, they were respectively served August 7 and October 18, 1951, and January 17, 1952.

From this it appears that the lien which Milan and Irvine obtained by levy of the writ of execution expired on January 8, 1952, one year after the issuance of the writ, Code Civ.Proc. § 688; Puissegur v. Yarborough, 29 Cal.2d 409, 175 P.2d 830.

[6, 7] The levy which was made on March 4, 1953, was ineffective because the property was then in custodia legis. Milan and Irvine concede that the property was in custodia legis at that time. They contend, however, that the property was taken into legal custody before their execution lien expired. They are mistaken. In a proceeding in interpleader the moneys in question do not come into legal custody until actually paid into court upon an order of court therefor. Van Orden v. Anderson, 122 Cal.App. 132, 141, 9 P.2d 572; Union Bank & Trust Co. v. Los Angeles County, 2 Cal.App.2d 600, 609, 38 P.2d 442. Here that did not occur until after the expira-

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[5] The "Special Holdback Account" was established by the bank to the credit of Durkin as additional security for the guarantee by him of the conditional sales contracts sold to the bank. The sums represented by this account were withheld from the amounts which were paid in cash to Durkin at the time of the sale of a conditional sales contract to the bank. The percentage which was withheld on each contract was agreed upon between Durkin and the bank.

[6] Of this sum, $4,741.99 represented the balance in the "Dealer's Reserve Account"; $182.53, the balance in the "Special Holdback Account."

tion of the one year period following issuance of the writ of execution.

[8, 9] These respondents further contend that their attachment continued in force for three years and thus continued the life of their lien until after the property entered legal custody. They rely upon section 542b of the Code of Civil Procedure which declares that an attachment or garnishment on personal property "shall, unless sooner released or discharged, cease to be of any force or effect and the property levied on be released from the operation of such attachment or garnishment, at the expiration of three years after the issuance of the writ of attachment under which said levy was made * * *." This, we observe, is not an affirmative statement that a garnishment shall endure for three years unless sooner released or discharged. It is a statement that it shall not endure longer than three years. This is consistent with the traditional concept that the lien of an attachment is merged in the lien of the judgment in the case of real property or with the lien of a writ of execution in the case of personal property. See discussion in Bagley v. Ward, 37 Cal. 121, 131, as to real property; and in Balzano v. Traeger, 93 Cal.App. 640, 643–644, 270 P. 249, as to personal property. No California decision deciding this precise question has come to our attention. In Puissegur v. Yarborough, supra, 29 Cal.2d 409, 412, 175 P.2d 830, the three-year period against the attachment as well as the one-year period against the execution levy had run. The same was true in Jones & Son v. Independence Indemnity Co., 52 Cal.App.2d 374, 378, 126 P.2d 463. In New York the question has been decided. There, it is definitely settled that the lien of an attachment upon personal property merges and terminates in the lien of the execution levy. Castriotis v. Guaranty Trust Co., 29 N.Y. 74, 127 N.E. 900, 902; Marks v. Equitable Life Assur. Soc., 109 App.Div. 675, 96 N.Y.S. 551, 552; and earlier cases cited in each.

Accordingly, we hold that the same rule obtains in California and that the portions of the judgment which declare that Peter Milan and Lew Irvine have liens in the "Dealer's Reserve Account" and in the "Special Holdback Account" now on deposit with the clerk of the court and that such liens are superior to the liens of the state therein, must be reversed.

(4) *Errors asserted by the respondents are not available to them.*

[10] One of the respondents says that the evidence which tends to prove that Durkin was insolvent is "scanty," and the other respondents seem to concur. They furnish no basis for a reviewing court to disturb the trial court's finding that Durkin has been insolvent at all times since June, 1949. Also, not having appealed, respondents are not in a position to urge the point. State of California v. Day, 76 Cal.App.2d 536, 551, 173 P.2d 399; Hudgins v. Standard Oil Co., 136 Cal.App. 44, 48–49, 28 P.2d 433.

Respondent Gregory additionally requests this court to grant his claim for interest and attorney fees which the trial court denied him. As a nonappellant he is in no position to make such a claim.

Those portions of the judgment which award Peter Milan and Lew Irvine liens in the funds on deposit and declare such liens superior to those of the state are reversed with directions to revise those portions in accordance with the views herein expressed; all other portions of the judgment appealed from are affirmed. It is ordered that the successful respondents Robert Gregory and Rollen F. Campbell shall recover costs on appeal against the state; the state shall recover costs on appeal against respondents Peter Milan and Lew Irvine.

PETERS, P. J., and BRAY, J., concur.

133 Cal.App.2d 486

Kenneth SMITH and Benjamin Grossberg, doing business under the firm name and style of S. & G. Bindery, Plaintiffs and Appellants,

v.

LOS ANGELES BOOKBINDERS UNION NO. 63, an unincorporated association and George E. Smith, Defendants and Respondents.

Civ. 20698.

District Court of Appeal, Second District, Division 3, California.

June 8, 1955.

As Modified June 24, 1955.

Action for libel. The Superior Court, Los Angeles County, Philbrick McCoy, J., relieved defendants from default in demurring or answering to amended complaint and rendered judgment for defendants after demurrer, and plaintiffs appealed. The District Court of Appeal, Ashburn, J. pro. tem., held that allegation that plaintiffs had been injured in their trade, business and occupation by reason of publication in sum of $100,000 was sufficient allegation of special damage to withstand a general demurrer, and, where publication had been determined not to be libelous per se, plaintiffs could properly amend to plead special damages more specifically as for a libel per quod, although statute of limitations had expired.

Judgment reversed; purported appeal from order vacating default affirmed.

1. Libel and Slander 🔑123(1)

Question whether a publication is libelous per se must be determined by court as a matter of law.

2. Libel and Slander 🔑6(1), 19

Quality of a publication as libelous per se is measured, not so much by its effect when subjected to critical analysis of a mind trained in law, as by natural and probable effect, and it is duty of court to give language used natural and popular construction of average reader.

3. Libel and Slander 🔑86(1)

In determining whether a publication is libelous per se, innuendo does not count.

4. Libel and Slander 🔑6(1)

It is not defamatory to accuse one of doing what he may legally and properly do.

5. Libel and Slander 🔑41

A necessarily broad area of discussion without civil responsibility in damages must be considered an indispensable concomitant of a labor dispute.

6. Libel and Slander 🔑19

Where alleged defamatory matter is susceptible of an innocent interpretation, it is not actionable per se.

7. Libel and Slander 🔑9(7)

Publication wherein union stated that plaintiffs ran a non-union shop and paid wages below union scale, and based prices upon lower cost of production and did not stress superior equipment, quality of work and service as their selling point, and which appealed to customers to direct business to a union shop, was a legitimate means to a lawful objective, and was not libelous per se.

8. Libel and Slander 🔑89(2)

In a libel action, special damage, where necessary, must be averred with particularity.

9. Libel and Slander 🔑89(3)

In libel complaint, allegation that plaintiffs had been injured in their trade, business and occupation by reason of publication in sum of $100,000 was not a sufficiently particular allegation of special damages.

10. Pleading 🔑248(2)

When basic facts are the same, a shifting from one theory of liability to another is not the substitution of a new cause of action, and absence of a vital allegation in original complaint, resulting in statement of no cause of action at all, does not preclude amendment to incorporate that indispensable element.

11. Pleading 🔑229

Great liberality is indulged in matter of amendment to end that lawsuits may be determined upon their merits.

12. Action 🔑1

A "cause of action" is the right to secure redress for violation of an obligation owing to claimant.

See publication Words and Phrases, for other judicial constructions and definitions of "Cause of Actions".

13. Libel and Slander 🔑98

Where original complaint in action for damages for libel per quod makes no reference to special damage, complaint may nevertheless be amended to allege special damage.

14. Libel and Slander 🔑97
Limitation of Actions 🔑127(7)

Allegation in libel complaint that plaintiffs had been injured in their trade, business and occupation by reason of publication in sum of $100,000 was sufficient allegation of special damage to withstand a general demurrer, and, where publication had been determined not to be libelous per se, plaintiffs could properly amend to plead special damages more specifically as for a libel per quod, although statute of limitations had expired. West's Ann.Civ.Code, §§ 43, 45a.

15. Fraud 🔑25, 47

Fraud without damage is not actionable, and averment of damage is essential to a good complaint. West's Ann.Civ.Code, § 3343.

16. Libel and Slander 🔑123(1)

Letter wherein union alleged that plaintiff ran a non-union shop and paid wages below union scale, and based prices upon lower cost of production and did not stress superior equipment, quality of work and service as selling point, and which appealed to customers to direct their business to a union shop was not, as a matter of law, libelous per quod. West's Ann.Civ.Code, §§ 43, 45a, 48a, subd. 4; West's Ann.Code Civ.Proc. § 340, subd. 3.

17. Appeal and Error 🔑78(1), 82(3)

Order vacating defendants' default before judgment had been rendered against them was not separately appealable, as it was neither a final judgment nor order made after final judgment, but was reviewable upon appeal from judgment for defendants subsequently entered.

18. Appeal and Error 🔑1197

Where it is determined by reviewing court that trial court erred both in rendering judgments for defendants and in relieving defendants from default, there can be no further proceedings other than hearing upon application for default judgment.

19. Appeal and Error 🔑982(1)
Judgment 🔑344

Matter of relief under statute relating to relief from judgments entered by mistake or inadvertence resides in discretion of trial judge, whose action will not be disturbed unless abused. West's Ann.Code Civ.Proc. § 473.

20. Judgment 🔑138(3)

Where defendants were known to have actively engaged in contesting libel case, and had on file a verified answer to original complaint which denied principal allegations and averred two good defenses, and plaintiff had obtained default without notice to defendants, trial court was justified, under the circumstances, in granting defendants relief as against a judgment entered by mistake or inadvertence. West's Ann.Code Civ.Proc. §§ 432, 473, 585, subd. 2.

Perry Bertram, Los Angeles, for appellants.

Gilbert, Nissen & Irvin, Los Angeles, for respondents.

ASHBURN, Justice pro tem.

Action for libel. Plaintiffs appeal from judgment for defendants entered after demurrer to amended complaint sustained without leave to amend; they also appeal from an order relieving defendants from default in demurring or answering to the amended complaint.

The appeal from the judgment presents the question whether the amended complaint brought into the case a new cause of action after the statute of limitation had run upon it. And the debate revolves around the matter of pleading special damage. Plaintiffs argue that the alleged defamatory matter is a libel *pro se* and defendants say it is neither libelous on its face nor susceptible of the meanings ascribed to it in the innuendo, but if it is held to be in the category of a libel *per quod* the original complaint was fatally defective for want of averment of special damage and the inclusion of such averments in the amended complaint introduced an entirely new cause of action after the statute had run. These contentions require primarily an analysis of the original complaint.

It alleges that plaintiffs, a copartnership, are engaged in business under the name of S. & G. Bindery; that defendant Los Angeles Bookbinders Union No. 63 is a labor union and defendant George S. Smith its secretary; by inference that plaintiffs' business is that of bookbinding. The alleged libel consists of an excerpt from a letter sent by defendants on or about October 3, 1952, to numerous existing and potential customers of plaintiffs, which excerpt reads as follows:

> " 'In almost any Trade Bindery, with the exception of the S and G, the em-

> ployer gives a bid on your job, not based on the scale and hours his employees work, but on his equipment, quality and service—but not so the S and G Bindery.
>
> "Our scale for journeywomen is \$1.651 per hour, 7½ hours per day. The S and G Bindery scale is from 75 cents to \$1.45, 8 hours a day—only one employee receiving the \$1.45. Most of his employeees receive from 75 cents to \$1.15.'"

It is alleged that the letter was sent to these persons maliciously and with intent to injure plaintiffs in their reputation and in their occupation and business. By way of innuendo it is averred that the meaning intended to be conveyed and actually conveyed to readers of the letter was "* * * that the only basis upon which the Plaintiffs estimate the price of work to be performed for its customers is sub-standard rates of pay alleged to be paid to their employees; that the Plaintiffs have inferior equipment; that the Plaintiffs turn out work of inferior quality; that the Plaintiffs do not give to their customers the same service which the customers might expect of other trade binderies, but on the contrary, give inferior and poor service; that Plaintiffs pay sub-standard wages to their employees and require their employees to work under sub-standard working conditions; and that customers who place their work with the Plaintiffs could expect that such work would not be of high quality, but would be of inferior quality and that the Plaintiffs could not and would not give to such customers the same service that they could obtain from other trade binderies." Again it is alleged that the publication of the letter was for the purpose "* * * of exposing the Plaintiffs to hatred, contempt, ridicule and obloquy and for the purpose of injuring them in their trade, business and occupation." The ad damnum allegation consists of paragraph XI, reading as follows: "Plaintiffs have been injured in their reputation and in their trade, business and occupation by reason of the publication by the Defendants and each of them of said false and defamatory matters in the sum of One Hundred Thousand Dollars (\$100,000.00)." Plaintiffs pray for "* * * general damages in the sum of \$100,000.00, for punitive and exemplary damages in the further sum of \$100,000.00, for costs * * and for all proper relief." Defendants having answered, the cause was reached for trial and defendants objected to the introduction of any evidence upon the ground that the complaint did not state a cause of action; the objection was sustained with leave to plaintiffs to amend. Counsel seem to agree that this was "* * * upon the ground that the complaint did not allege a libel on its face and wholly failed to allege any special damages as required by Section 45(a) of the Civil Code." In due course an amended complaint was served and filed on May 17, 1954. The same excerpt from the same letter was alleged as the libel and the substantial changes carried into the amended pleading were these: By way of further inducement it was alleged to be a fact, known to defendants, that plaintiffs served many printing firms in the Los Angeles area, particularly those having printing contracts with the United States government and its military branches; that all those firms required their binding work to be of excellent quality, delivered promptly and without delays; that any statements raising a question or doubt as to the quality of work, service or equipment of the plaintiffs would cause such firms to believe they could not depend upon receiving good quality or service on work placed with plaintiffs and that breakdown of equipment would occur, delaying deliveries and jeopardizing their own general business and their government contracts; and would cause such concerns to withhold their business from plaintiffs. The innuendo was enlarged to allege a further meaning that plaintiffs "* * * require their employees to work under sub-standard working condition; that customers who place their work with the plaintiffs could expect that such work would not be of high quality, but would be of inferior quality and that the plaintiffs could not and would not give to such customers the same service that they could obtain from other trade binderies; and that the plaintiffs in holding themselves out as offering good quality and service and having good equipment, were guilty of misrepresentation and sharp and dishonest business practice." Paragraph XII alleges damages in the same language as paragraph XI of the original complaint, above quoted. Paragraph XIII is new. "As a direct and proximate result of the publication by the defendants of the statements contained in their letters of October 3, 1952, as aforesaid, plaintiffs lost one of their largest accounts, to-wit, Gartner Printing and Lithograph Co., with whom, during the year immediately preceding said publication, they had been doing an average business of approximately $4,000.00 per month, to their damage to the date of this amendment in the approximate sum of $64,000.00. Plaintiffs are informed and believe and upon information and belief allege that at least one other account, to-wit, Gehling Printing and Lithography, ceased doing business with plaintiffs as a direct and proximate result of the statements contained in said letter as aforesaid, to plaintiffs damage in the sum of approximately $2,000.00." The prayer is for "* * * general damages in the sum of $100,000.00, for special damages in the further sum of $66,000.00, for punitive and exemplary damages in the further sum of $100,000.00," and for costs and all proper relief.

After defendants had been relieved of their default with respect to the amended complaint they demurred upon general and special grounds. The general demurrer was overruled but the special demurrer based on the statute of limitation was sustained and judgment for defendants rendered, reciting that the court did "* * * sustain said demurrer without leave to amend upon the ground that the alleged cause of action set forth in the plaintiffs' amended complaint is barred by the provisions of Section 340, subdivision 3, of the Code of Civil Procedure."

Whether a new cause of action was included in the amended complaint depends first upon a determination of the nature of the alleged libel, whether it is one *per se* (as contended by plaintiffs' counsel) or is at best a libel *per quod* (as argued by the defense). If the letter is libelous on its face, there was no new cause of action introduced by the amendment for all the essentials of a libel *per se* are repeated and new matter becomes mere surplusage.

[1–6] The question of whether a publication is libelous *per se* must be determined by the court as a matter of law. Howard v. Southern California, etc., Newspapers, 95 Cal.App.2d 580, 584, 213 P.2d 399; Peabody v. Barham, 52 Cal.App.2d 581, 584, 126 P.2d 668. The language "* * * is to be measured, not so much by its effect when subjected to the critical analysis of a mind trained in the law, but by the natural and probable effect upon the mind of the average reader." Bates v. Campbell, 213 Cal. 438, 442, 2 P.2d 383, 385. It "* * * is the duty of the court to give the language used the natural and popular construction of the average reader, not the critical analysis of a mind trained in technicalities." Sullivan v. Warner Bros. Theatres, Inc., 42 Cal.App.2d 660, 662, 109 P.2d 760, 762. In this inquiry the innuendo does not count. Washer v. Bank of America, Nat. Trust & Savings Ass'n, 21 Cal.2d 822, 828, 136 P.2d 297, 155 A.L.R. 1338; 16 Cal.Jur. § 58, p. 89. Although the statutory definition of libel, Civil Code, § 45, "* * * has been held to include almost any language which, upon its face, has a natural tendency to injure a person's reputation, either generally, or with respect to his occupation", Bates v. Campbell, supra, 213 Cal. 438, 441, 2 P.2d 383, 385, it is not defamatory to accuse one of doing what he may legally and properly do, Sullivan v. Warner Bros. Theatres, Inc., supra, 42 Cal.App.2d 660, 663, 109 P.2d 760; 16 Cal.Jur. § 26, p. 53. Since labor disputes "* * * normally involve considerable differences of opinion and vehement adherence to one side or the other, a necessarily broad area of discussion without civil responsibility in damages must be considered an indispensable concomitant of the controversy." Emde v. San Joaquin County, etc., Council, 23 Cal.2d 146, 155, 156, 143 P.2d 20, 26, 150 A.L.R. 916. Moreover, when the alleged defamatory matter is susceptible of an innocent interpretation it is not actionable *per se*. Washer v. Bank of America, Nat. Trust & Savings Ass'n, supra, 21 Cal.2d 822, 828, 136 P.2d 297;

Howard v. Southern California, etc., Newspapers, 95 Cal.App.2d 580, 584, 213 P.2d 399; Babcock v. McClatchy Newspapers, 82 Cal.App.2d 528, 538, 186 P.2d 737; Bates v. Campbell, supra, 213 Cal. 438, 442, 2 P.2d 383; Peabody v. Barham, supra, 52 Cal. App.2d 581, 584, 126 P.2d 668. In the last cited case Mr. Presiding Justice Moore said, 52 Cal.App.2d at page 584, 126 P.2d at page 670: "When offending language is susceptible of an innocent interpretation it is not actionable *per se*. Neither will language be given a libelous character unless such is its plain and obvious import. Dillard v. Shattuck, 36 N.M. 202, 11 P.2d 543, 546. Neither is it actionable *per se* if the offending language has more than one meaning. Ruble v. Kirkwood, 125 Or. 316, 266 P. 252; Manley v. Harer, 73 Mont. 253, 235 P. 757, 759."

[7] The plain import of the publication in question is that plaintiffs run a non-union shop and pay wages below the established union scale; that they base their prices upon this lower cost of production and do not stress as their selling point the argument which unionized competitors must advance,—superior equipment, quality of work and service. This letter is an appeal to customers, actual and prospective, to direct their business to a union shop; under the authorities this is a legitimate means to a lawful objective. Imperial Ice Co. v. Rossier, 18 Cal.2d 33, 35, 112 P.2d 631; Emde v. San Joaquin County, etc., Council, supra, 23 Cal.2d 146, 155, 158, 159, 143 P.2d 20. The letter was plainly susceptible to this construction by the persons to whom published, and it is an innocent meaning. The extract from the letter, standing alone, is not libelous on its face.

[8, 9] Though insisting that he had alleged a libel *per se,* counsel for appellant bowed to the court's ruling and included in the amended complaint paragraph XIII (above quoted) alleging specific items of special damage proximately caused by the alleged libel. Respondents' counsel argue that this is the heart of the case when the libel is *per quod,*—not actionable *per se.* And it is true that no action can be maintained without an averment of special damage. Civil Code, § 45a:

> "A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof. Special damage is defined in Section 48a of this code."

> Section 48a, subd. 4: "[*Definitions.*] As used herein, the terms 'general damages,' 'special damages,' 'exemplary damages' and 'actual malice,' are defined as follows:
>
> "(a) *'General damages'* are damages for loss of reputation, shame, mortification and hurt feelings;
>
> "(b) *'Special damages'* are all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has expended as a result of the alleged libel, and no other * * *."

It is well settled that special damage must be averred with particularity. Pridonoff v. Balokovich, 36 Cal.2d 788, 791–792, 228 P.2d 6; Shook v. Pearson, 99 Cal.App.2d 348, 351–352, 221 P.2d 757. And this the original complaint did not do. The allegation that plaintiffs "have been injured * * * in their trade, business and occupation by reason of the publication * * * in the sum of One Hundred Thousand Dollars ($100,000.00)" is not enough. But that does not mean that it was not enough to afford basis for amendment, especially in the light of the fact that the complaint alleged five times that the letter, addressed to existing and prospective customers of plaintiffs, was aimed at injury to their business. Special damage is an essential element of a libel *per quod,* and a sufficient allegation of same is requisite to a good complaint. But the omission or inclusion of that allegation pertains to only one element of the cause of action.

[10, 11] When the basic facts are the same a shifting from one theory of liability to another is not the substitution of a new cause of action. Oberkotter v. Woolman, 187 Cal. 500, 504, 202 P. 669; Wennerholm v. Stanford University School of Medicine, 20 Cal.2d 713, 718, 128 P.2d 522, 141 A.L.R. 1358; Barr v. Carroll, 128 Cal. App.2d 23, 33–34, 274 P.2d 717. The absence of a vital allegation in an original complaint, resulting in the statement of no cause of action at all, does not preclude an amendment to incorporate that indispensable element of the action. The correct view is well stated in 2 Witkin's California Procedure, § 606, p. 1619: "If the original complaint *fails to state a cause of action*, because of defective pleading of the elements, it is in a sense true that the amended pleading states a new cause of action. But there is no objection to an amendment of this kind, for this is the typical next step when a general demurrer is sustained with leave to amend. The important point is that the amended complaint merely improves the formerly defective statement of the same cause of action; there is no change in the nature of the case and therefore no surprise or prejudice to the defendant. (See Rauer's Law, etc., Co. v. Leffingwell (1909), 11 Cal.App. 494, 495, 105 P. 427; Ruiz v. Santa Barbara Gas, etc., Co., (1912), 164 Cal. 188, 194, 128 P. 330; Woods v. Cook (1936), 14 Cal.App.2d 560, 562, 58 P.2d 965, infra, § 613.)" Great liberality is indulged in this matter of amendment to the end that lawsuits may be determined upon their merits. Klopstock v. Superior Court, 17 Cal.2d 13, 19, 108 P.2d 906, 135 A.L.R. 318; Frost v. Witter, 132 Cal. 421, 424, 64 P. 705; Barr v. Carroll, supra, 128 Cal.App.2d 23, 26, 274 P.2d 717; Hanna v. Hirschhorn, 112 Cal.App. 438, 440–442, 296 P. 891. But the solution of every problem of whether a new cause of action has been inserted by amendment after the running of the statute of limitation must be solved by applying to the specific facts a correct conception of what constitutes a cause of action.

[12] A cause of action is the right to secure redress for violation of an obligation owing to the claimant. Though phrased in varying ways this is the result of the authorities. In Frost v. Witter, supra, 132 Cal. 421, 426, 64 P. 705, 707, the court said: "The action therefore springs from the obligation, and hence the 'cause of action' is simply the obligation." Again: "The 'cause of action' is therefore to be distinguished also from the 'remedy,' which is simply the means by which the obligation or the corresponding action is effectuated; and also from the 'relief' sought. Pom. Pl. & Prac. § 453." Klopstock v. Superior Court, supra, 17 Cal.2d 13, at page 20, 108 P.2d 906, at page 910: "In determining whether a wholly different cause of action is introduced by the amendment technical considerations or ancient formulae are not controlling; nothing more is meant than that the defendant not be required to answer a wholly different legal liability or obligation from that originally stated. As the court says in the Frost case, supra, 132 Cal. page 426, 64 P. page 707, for the purpose of determining whether amendment is possible, the 'cause of action' referred to as furnishing the test means only the legal obligation which it is sought to enforce against the defendant. Other courts have used almost identical language; the test is not whether under technical rules of pleading a new cause of action is introduced, but rather, the test is whether an attempt is made to state facts which give rise to a wholly distinct and different legal obligation against the defendant. The power to permit amendment is denied only if a change is made in the liability sought to be enforced against the defendant. See Harriss v. Tams, 258 N.Y. 229, 242, 179 N.E. 476." Day v. Western Loan & Bldg. Co., 42 Cal. App.2d 226, 231, 108 P.2d 702, 704: "It is well settled that, where the original complaint has been filed within the statutory period, an amended complaint may be filed after the statute has run as long as it does not state a new or different cause of action

from that appearing in the original complaint. Stated another way, if the original complaint defectively states a cause of action, it may be amended after the running of the statute as long as the cause of action stated in the amended pleading can trace its descent from the original pleading."

Section 43, Civil Code, declares that every person has "* * * the right of protection from * * * defamation * * *." Libel, as defined in section 45, is a violation of that right; and that violation is plaintiffs' cause of action. If libelous on its face recovery may be had without any specific showing of damage; if not libelous on its face special damage must be averred and proved. But whatever may be the procedural or evidentiary burden resting on plaintiff his basic cause of action is the violation of his right to be free from defamation. If the same publication be the gist of the original and the amended complaint there can be no departure so far as identity of cause of action is concerned.

[13, 14] If there had been no reference to injury to trade, business and occupation in the original complaint that fact could not have precluded the averments of special damage in the amendment. But the original allegation was sufficient to withstand a *general* demurrer under the ruling in Oberkotter v. Woolman, supra, 187 Cal. 500, 504, 202 P. 669, 670. There the allegation was that plaintiff "* * * has lost, and will continue to lose and be deprived of, great gains and profits which would otherwise have accrued to him in his calling, occupation, and profession, to his damage in the sum of $55,000." And the court said: "Here was a sufficient allegation of general and special damages, which, if proved, would entitle the plaintiff to recover." Certainly the amended complaint at bar "can trace its descent from the original pleading." Day v. Western Loan & Bldg. Co., supra, 42 Cal.App.2d at page 231, 108 P.2d at page 705.

[15] Eatwell v. Beck, 41 Cal.2d 128, 135–136, 257 P.2d 643, affords a persuasive analogy. That was an action for deceit. Of course, fraud without damage is not actionable at law and such an averment is essential to a good complaint. Munson v. Fishburn, 183 Cal. 206, 220, 190 P. 808; Maynes v. Angeles Mesa Land Co., 10 Cal.2d 587, 590, 76 P.2d 109; 12 Cal.Jur. § 69, p. 813. The exclusive measure of Eatwell's recovery was his out-of-pocket loss under section 3343, Civil Code; he had alleged certain damage which was not recoverable; confronted by motion for nonsuit he sought leave to reopen and to amend his complaint to aver the proper damages. This was denied and held to be erroneous. It was as if no damage had been originally alleged and an amendment to incorporate a proper allegation was held to be proper and indeed not to be denied.

The contention that a new cause of action was brought into the case by paragraph XIII of the amended complaint is without merit and the judgment in favor of defendants must be reversed.

[16] This is true notwithstanding respondents' contention that the letter in question is not susceptible of any of the interpretations alleged in the innuendo of the amended complaint and that the demurrer should have been sustained in any event, see Southall v. Security Title Ins., etc., Co., 112 Cal.App.2d 321, 323, 246 P.2d 74, as to the propriety of considering such contention. We cannot say that the letter in question will not bear any of the interpretations alleged in the innuendo and hence we cannot hold, as matter of law, that it was not libelous *per quod*.

[17, 18] The order vacating defendants' default before any judgment had been rendered against them is not separately appealable, as it is neither a final judgment nor an order made after final judgment; but it is reviewable upon this appeal from the judgment subsequently entered. Bernards v. Grey, 97 Cal.App.2d 679, 683, 218 P.2d 597; Turner v. Follmer, 84 Cal.App.2d 815, 191 P.2d 777. Though the appeal from the order must be dismissed, the claim should be examined; if it is sustained the judgment must fail upon that additional ground and there can be no further proceedings in the action other than a hearing upon application for default judgment.

The order granting defendants relief under section 473, Code of Civil Procedure, grew out of the following circumstances. When the trial judge sustained the objection to any evidence under the original complaint it was expressly understood that time for pleading to the amended complaint (under section 432, Code of Civil Procedure) would be ten days. In due course the amended complaint was served and filed, on May 17 or 18, 1954. On May 28, 1954, defendants served and filed a motion to strike the said complaint from the files, same being noticed for hearing on June 3rd; but they did not serve or file any demurrer or answer thereto. Plaintiffs' attorney made no point of this at the time, he never called on his opponents to plead further, and told them nothing about any intent to seek a default judgment. On June 1st, four days after the motion was served, defendants' default was entered upon plaintiffs' request. On June 3rd, the date set for hearing the motion to strike in department 35 of the court, counsel for defendants discovered that the attorney for plaintiffs was in department 34 for a hearing upon application for a default judgment. Thereupon the motion to strike was placed off calendar as was the application for default judgment. Four days later defendants served and filed their motion for relief under section 473, which was supported by affidavit and copies of proposed demurrer and answer. Same was heard and granted on June 15th, and demurrer and motion to strike set for hearing on June 24th; they were reached on June 29th at which time, after argument, the demurrer was sustained without leave to amend and the motion to strike went off calendar.

[19, 20] Defendants' counsel, in support of their motion for relief under section 473, relied upon certain technical grounds, which are without merit, and upon a claim of mistake of law on their part. That mistake consisted, so they say, of the conclusion reached after careful examination of the law that they would waive any right to strike the amended complaint if they answered or demurred at the same time and that the motion would stand as a demurrer and prevent any default under sections 432 and 585, subdivision 2, Code of Civil Procedure. They make the same argument on appeal but cite no California case so holding. In view of the prevailing practice of filing and hearing motions to strike and demurrers at the same time (see Los Angeles County Superior Court rule 7, section 3; and rule 3(c) of Rules for Superior Courts prescribed by Judicial Council), the experience and ability of counsel, it would be difficult to understand the ruling of the judge in vacating the default, see Witkin on California Procedure, § 50, p. 2102; Security Truck Line v. City of Monterey, 117 Cal.App.2d 441, 445–446, 256 P.2d 366, 257 P.2d 755, were it not for other considerations immediately apparent. The matter of relief under section 473 resides in the discretion of the trial judge whose action will not be disturbed unless an abuse of discretion clearly appears. Beard v. Beard, 16 Cal.2d 645, 647, 107 P.2d 385. Speaking of an order setting aside a default judgment the court said in Shearman v. Jorgensen, 106 Cal. 483, 39 P. 863: "It is only in exceptional cases that orders of that kind will be reversed by this court * * *", and in Berri v. Rogero, 168 Cal. 736, 740, 145 P. 95, 97: "The law does not favor snap judgments. The policy of the law is to have every litigated case tried upon its merits, and it looks with disfavor upon a party who, regardless of the merits of his case, attempts to take advantage of the mistake, surprise, inadvertence, or neglect of his adversary. Where a party in default makes seasonable application to be relieved therefrom, and files an affidavit of merits alleging a good defense, and the plaintiff files no counter affidavit and makes no showing that he has suffered any prejudice, or that injustice will result from the trial of the case upon its merits, very slight evidence will be required to justify a court in setting aside the default. A broad discretion is allowed to courts in granting relief, against default, and it is in cases only where the lower court has abused its discretion that the appellate court will reverse its action." The quiet speed of plaintiffs' attorney in seeking a default judgment without the knowledge of defendants' counsel is not to be commended. 2 Witkin California Procedure, § 59, p. 1694, says: "There is no statutory or rule requirement that the plaintiff's attorney notify the defendant's attorney (if known) that he intends to take a default. But failure to do so will usually be a sufficient ground for setting the default aside on motion under C.C.P. 473." Defendants, as plaintiffs' counsel well knew, were actively engaged in contesting the case, challenging the sufficiency of the publication to constitute a libel—(we have held it not to be libel *per se,* and there is considerable room for doubt as to whether it is susceptible of many of the implications alleged in the amended complaint)—and lastly they had on file a verified answer to the original complaint which denied its principal allegations and adequately averred two

good defenses, truth and privilege. This fact, coupled with the other circumstances already mentioned, adequately justified the court's ruling in favor of a trial on the merits.

In Gray v. Hall, 203 Cal. 306, 265 P. 246, the question arose as to the validity of entry of default for failure to answer an amended complaint. Holding that the default was improperly entered, the court said at page 310–311 of 203 Cal. at page 250 of 265 P.: "It has been generally held that where a plaintiff amends his declaration or complaint so as to change the cause of action or add a new one, it constitutes an abandonment of the original issues, and judgment by default may be taken against the defendant if he fails to file a new or amended answer or plea within the time allowed therefor, notwithstanding the original answer or plea is still on file. 34 C.J. 164, § 375d, and authorities there cited. This rule is without application, however, where the amendment is merely as to formal or immaterial matters, and does not change the cause of action; *nor does it apply where the original plea or answer set forth a sufficient defense to the declaration or complaint as amended.*" (Emphasis added.) At page 313, of 203 Cal., at page 250 of 265 P., quoting from a Minnesota case [Ermentraut v. American Fire Ins. Co., 63 Minn. 194, 65 N.W. 270]: "'In short, when a complaint is amended after answer, the defendant is not bound to answer *de novo*. He may do so if he chooses; but, if he does not elect to do so, his original answer stands as his answer to the amended complaint; and in such case he will not be in default except as to the additional facts set up in the amended complaint, and not put in issue by the answer. * * *'" This Gray case was cited with approval in Drotleff v. Renshaw, 34 Cal.2d 176, 182, 208 P.2d 969, and was quoted and applied in Steinbauer v. Bondesen, 125 Cal.App. 419, 428, 14 P.2d 106. The amended complaint herein did not state a new cause of action; the answer to original complaint did allege good affirmative defenses; the rule of Gray v. Hall was pertinent and of itself fully justified the ruling relieving defendants of default.

The judgment is reversed. The purported appeal from order vacating defendants' default is dismissed.

PARKER WOOD, Acting P. J., concurs.

VALLÉE, J., concurs in the judgment.

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133 Cal.App.2d 451

In the Matter of the ESTATE of Mary B. Chrisman GREEN, Deceased.

E. A. WINSTANLEY, Public Administrator, Petitioner and Respondent,

Ora M. Munyon, Syneva Vedvig, Mignon P. Chrisman, Heirs-at-Law and Respondents,

Melba Markly Penn, Heir-at-Law and Respondent,

v.

Nelle E. GIBSON, Contestant and Appellant.

Civ. 20765.

District Court of Appeal, Second District, Division 1, California.

June 7, 1955.

Proceeding in settlement of a decedent's estate wherein the Superior Court, Los Angeles County, John Gee Clark, J., rendered judgment and an appeal was taken. Appellant moved to strike brief of certain respondents. The District Court of Appeal, Drapeau, J., held, inter alia, that parties listed as respondents in clerk's transcript in case on appeal were entitled to file briefs.

Motion denied.

1. Appeal and Error ⚷767(1)

Parties listed as respondents in clerk's transcript in case on appeal were entitled to file briefs. Rules on Appeal, rule 14.

2. Appeal and Error 🔑767(1)

District Court of Appeal is unwilling to go beyond record and strike out briefs upon statements of counsel or affidavits of parties.

3. Appeal and Error 🔑767(1)

Courts prefer to rest their decisions upon merits of causes, rather than to spend the time on matters collateral to questions on appeal.

4. Appeal and Error 🔑767(2)

District Court of Appeal, in its discretion, denied motion to strike allegedly irrelevant portions of brief.

5. Appeal and Error 🔑767(2)

Question whether to strike allegedly irrelevant portions of brief is a matter within discretion of reviewing court.

William Dellamore and E. W. Miller, Los Angeles, for appellant.

Harry C. Mabry, Los Angeles, for respondents Munyon, Vedvig and Chrisman.

DRAPEAU, Justice.

Appellant moves to strike out all or portions of a brief filed in this Court on behalf of certain respondents in the Estate of Green, now pending on appeal in this Court.

The motion is based upon two grounds: (1) that the persons in whose behalf the brief is filed are not in fact respondents; and (2) that portions of the brief are irrelevant.

In support of the first ground appellant states that nothing is distributed to the respondents in a decree of preliminary distribution in the estate concerning which the appeal is pending.

[1] But they are listed as respondents in the Clerk's Transcript in the case on appeal, and under Rule 14, Rules on Appeal are entitled to file briefs.

[2, 3] This Court is unwilling to go beyond the record, and strike out briefs upon statements of counsel or affidavits of parties. Courts prefer to rest their decisions upon the merits of causes, rather than to spend time on matters collateral to questions on appeal. Strauss v. Kroop, 207 Cal. 39, 276 P. 993.

[4, 5] So far as the motion to strike irrelevant portions of the brief is concerned, it is concluded that it will be better to consider the appeal on all of the briefs submitted, rather than to spend time determining what, if any, portions of briefs are or are not relevant, or should or should not be stricken out. Irrelevant matters in briefs do not have any persuasive weight in determining an appeal. And, in any event, this is a matter committed to the discretion of the reviewing court. Carpenter v. Pacific M. Life Ins. Co., 10 Cal.2d 307, 74 P.2d 761.

The motion is denied.

WHITE, P. J., and DORAN, J., concur.

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133 Cal.App.2d Supp. 777

PEOPLE of the State of California, Plaintiff and Appellant,

v.

Lee SMITH, Defendant and Respondent.

C. A. 3269.

Appellate Department, Superior Court,
Los Angeles County, California.

May 18, 1955.

Prosecution of employer for violation of Labor Code. The Municipal Court, San Jose Judicial District, ordered dismissal of cause, and the People appealed. The Superior Court, Appellate Department, Los Angeles County, Shaw, P. J., held that criminal statute which provides that employer who advertises for laborers during strike, lockout or other trade dispute at his shop must inform them of that fact in his advertisement was not invalid because of indefiniteness and uncertainty.

Reversed.

1. Criminal Law 🔑1088(13)

Under statutory provision which requires that reason must be set forth in order entered on minutes for dismissal of cause in furtherance of justice and under Court rule that such minutes are to be part of record on appeal, even though entry on docket read like opinion, it could be considered on appeal. Pen.Code, §§ 1385, 1428; Rules on Appeal from Municipal and Inferior Courts in Criminal Cases, rule 3.

2. Criminal Law ⚷1024(1)

In prosecution of employer under statute which prohibits advertising for laborers without asserting in advertisement that labor disturbances existed at his shop, efficacy of People's appeal from order granting defendant's motion to dismiss was not impaired by fact that before motion to dismiss was made trial had proceeded to extent that evidence had been introduced against defendant. Labor Code, § 973.

3. Criminal Law ⚷204

Under statute which authorizes People to appeal from judgment of dismissal made before defendant has been placed in jeopardy, or where defendant has waived jeopardy, even if defendant was placed in jeopardy by proceedings which occurred before his motion to dismiss on ground of invalidity of statute, he waived that jeopardy by making such motion. Pen.Code, § 1466.

4. Criminal Law ⚷752½

Under statute which authorizes dismissal "in furtherance of justice" but which provides that no dismissal shall be made for any cause which would be ground for demurrer to accusatory pleading, municipal court had no authority to dismiss prosecution for violation of section of Labor Code on ground of invalidity of such section. Labor Code, § 973; Pen.Code, §§ 690, 1004, 1385.

5. Criminal Law ⚷13

"Strike" and "lockout" are of such common use and their meaning, when applied to subject of labor relations, so plain, that their use in statute providing that employer advertising for employees while he is having strike, lockout or other labor disturbances must state that fact in his advertisement did not introduce any uncertainty into statute. Labor Code, § 973.

6. Constitutional Law ⚷48

All presumptions and intendments favor validity of statute and they must be upheld unless their unconstitutionality clearly, positively and unmistakably appears.

7. Criminal Law ⚷13

Statute should be sufficiently certain so that person may know what is prohibited thereby and what may be done without violating its provisions, but it cannot be held void for uncertainty if any reasonable and practical construction can be given to its language.

8. Statutes ⚷47

Mere difficulty in ascertaining meaning of statute, or fact that it is susceptible of different interpretations will not render it nugatory.

9. Statutes ⚷194

In construing statute which provides that employer who advertises for employees during strike lockout or other "trade dispute" at his shop must mention in his advertisement fact that "labor disturbance" exists, rule of ejusdem generis was applicable, and, as this was criminal statute, rule was to be applied with stringency. Labor Code, §§ 973, 974.

10. Labor Relations ⚷293

Under statute which provides employer who advertises for employees during strike, lockout or other "trade dispute" in his shop must inform them of that fact in his advertisement, "trade dispute" refers to relations between employers and employees, not disputes between tradesmen. Labor Code, § 973.

See publication Words and Phrases, for other judicial constructions and definitions of "Trade Dispute".

◆

S. Ernest Roll, Dist. Atty., Jere J. Sullivan, Deputy Dist. Atty., Lewis Watnick, Deputy Dist. Atty., Los Angeles, Pauline Nightingale, Edward M. Belasco and Leon H. Berger, Los Angeles, for appellant.

Stanford Shaw, Ontario, for respondent.

SHAW, Presiding Judge.

This is an appeal by the People from an order dismissing the action. The defendant was prosecuted under section 973 of the Labor Code, the complaint charging that he "did wilfully and unlawfully while a strike, lockout, or other trade dispute was in active progress at his establishment located at 350 South Thomas Street, in the City of Pomona, County of Los Angeles, State of California, insert an advertisement in the Los Angeles Examiner, a newspaper, published in the said County of Los Angeles, soliciting persons to work for him, the said Lee Smith, and failed to state plainly and explicitly in the said advertisement that a strike, lockout, or other trade dispute was in active progress at his said establishment."

The docket of the trial court shows the following matters affecting the dismissal. The trial proceeded before the court without a jury, and evidence was introduced in behalf of the People. Then we find this entry in the docket: "Motion of defendant's counsel Stanford Shaw for dismissal on the ground of the unconstitutionality of the statutes of which the defendant is charged as being indefinite and uncertain. Ruling reserved on motion." Then another witness was sworn for the People, following which is the further docket entry: "Action dismissed by order of the Court in the furtherance of justice, it appearing to the Court that Section 973 of the Labor Code, under which the defendant is charged, is indefinite, and uncertain." Following this is a discussion of the rule requiring certainty in a penal statute, winding up with this statement: "The statute is so indefinite as to leave within the mind of the trial court the question as to what shall constitute the prohibited acts. The person to be charged has the right to know exactly what particular acts are prohibited. For the reasons stated it is ordered that the action be dismissed in furtherance of justice."

[1] Although this entry reads like an opinion of the trial judge, we may consider it, for section 1385 of the Penal Code, which authorizes a dismissal "in furtherance of justice" requires that the reason therefor be set forth in an order "entered upon the minutes", and the docket of the trial court here is to be regarded as its minutes. Penal Code, § 1428, as amd. in 1953. All such minute entries are required to be sent up as a part of the record on appeal by Rule 3 of "Rules on Appeal from Municipal Courts and Inferior Courts in Criminal Cases."

[2, 3] The efficacy of the People's appeal from the order is not impaired by the fact that before it was made the trial had proceeded to the extent that evidence had been introduced against defendant. Section 1466, Penal Code, as amended in 1951, authorizes the People to appeal from a judgment of dismissal made before the defendant has been placed in jeopardy, "or where the defendant has waived jeopardy." Assuming that the defendant was placed in jeopardy by the proceedings occurring before his motion to dismiss, he waived that jeopardy by making such motion. In People v. Finch, 1953, 119 Cal.App.2d Supp., 892, 899, 258 P.2d 1124, a case substantially the same on its facts as that now here, was presented to this court, and we held that by making the motion to dismiss, the defendant waived jeopardy and the People's appeal was effective. We see no reason to depart from that decision, and refer to it for a full discussion of the matter.

[4] Considering now the grounds on which the dismissal was made, we find that they amount to no more and no less than this: "that the facts stated do not constitute a public offense"; a conclusion which must follow if the statute purporting to create an offense from those facts is invalid. This is one of the grounds of demurrer specified in section 1004, Penal Code, which is made applicable to municipal courts by section 690, Penal Code. Section 1385, Penal Code, as amended in 1951, which is the only authorization for the court to dismiss an action "in furtherance of justice," specifically provides that "No dismissal shall be made for any cause which would be ground of demurrer to the accusatory pleading." The court, therefore, exceeded its authority in making the dismissal for the reason stated, and the order must be reversed, even if no other cause for reversal appeared.

We conclude, further, that the trial court was in error in holding section 973 of the Labor Code invalid, and for that reason also, a reversal is necessary. Section 973, so far as material here, provides: "If any person advertises for, or seeks employees by means of newspapers, posters, letters, or otherwise, or solicits or communicates by letter or otherwise with persons to work for him or the person for whom he is acting, or to work at any shop, plant, or establishment while a strike, lockout, or other trade dispute is still in active progress at such shop, plant, or establishment, he shall plainly and explicitly mention in such advertisement or oral or written solicitations or communications that a strike, lockout, or other labor disturbance exists." Section 974 makes a violation of section 973 a misdemeanor.

In support of the judgment, it is urged here that the terms "trade dispute" and "labor disturbance" are not defined in the Labor Code, and that they are too indefinite and uncertain for use in a penal statute, and it is therefore void, so far as they are concerned.

[5] The memo. of the trial court seems to suggest that the terms "strike" and "lockout" are also in need of definition, but we see no ground for such a claim. These words are of such common use and their meaning, when applied to the subject of labor relations, with which this statute deals, is so plain, that their use in the statute cannot be held to introduce any uncertainty into it. For definition of the words, see 54 C.J.S., Lockout, p. 665, and 83 C.J.S., Strike, pp. 525–526. However, since the complaint here uses the terms "strike, lockout or other trade dispute" in the alternative so that proof of any one of them might support the charge, we must consider the validity of the statute separately as to each.

[6] The rule regarding uncertainty of a statute is thus stated in Lockheed Aircraft Corp. v. Superior Court, 1946, 28 Cal.2d 481, 484, 171 P.2d 21, 23, 166 A.L.R. 701, where it was held that the words "politics" and "political" are not too uncertain for use in a statute:

> "The first contention made by defendant is that section 1101 is so uncertain and ambiguous that it is unconstitutional. All presumptions and intendments favor the validity of a statute and mere doubt does not afford sufficient reason for a judicial declaration of invalidity. Statutes must be upheld unless their unconstitutionality clearly, positively and unmistakably appears. Collins v. Riley, 24 Cal.2d 912, 915, 152 P.2d 169; People v. Superior Court, 10 Cal.2d 288, 298, 73 P.2d 1221. See, also, Jersey Maid Milk Products Co. v. Brock, 13 Cal.2d 620, 636, 91 P.2d 577, and cases cited.
>
> [7, 8] "A statute should be sufficiently certain so that a person may know what is prohibited thereby and what may be done without violating its provisions, but it cannot be held void for uncertainty if any reasonable and practical construction can be given to its language. As stated in Pacific Coast Dairy v. Police Court, 214 Cal. 668, at page 676, 8 P.2d 140, 143, 80 A.L.R. 1217, 'Mere difficulty in ascertaining its meaning, or the fact that it is susceptible of different interpretations will not render it nugatory. Doubts as to its construction will not justify us in disregarding it.'"

In Smith v. Peterson, 1955, 131 Cal.App 2d 241, 280 P.2d 522, 525, the court expressed like views, and added: "The requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding." In Smulson v. Board of Dental Examiners, 1941, 47 Cal.App.2d 584, 587, 118 P.2d 483, 484, the court said: "It is not required that even a penal statute, to be valid, have that degree of exactness which inheres in a mathematical theorem." In People v. Smith, 1939, 36 Cal.App.2d Supp. 748, 752, 92 P.2d 1039, 1042, this court said: "To make a statute sufficiently certain to comply with constitutional requirements it is not necessary that it furnish detailed plans and specifications of the acts or conduct prohibited." In People v. Ring, 1937, 26 Cal.App.2d Supp. 768, 772, 70 P.2d 281, 283, this court said: "Words used in creating a statutory crime do not fail of such certainty merely because the offense, when viewed through them, may not have all the precision in outline of a geometrical figure; if the main and central part of the field of view is clear, some slight lack of definition around its outer edges is not fatal."

[9] Section 973 provides in substance that one who advertises for employees "while a strike, lockout or other trade dispute is still in active progress" at his shop shall mention in his advertisement the fact that "a strike, lockout, or other labor disturbance exists." It is no doubt true that the terms "trade dispute" and "labor disturbance" if considered by themselves, without context, might have different significations. But here they appear in the same sentence, and in such context that it seems the same sort of situation must be intended by both of them. The legislature was trying to protect workers against the form of misrepresentation of which there had been much complaint in the past, in which employers who had labor troubles sought employees without notifying those approached that such labor troubles existed. With such object in view, it seems unreasonable to suppose that the labor troubles whose existence requires an employer to make a public statement in his advertisement would be in any wise different from those which he was required to state. We think they are not. Each of these terms, when so used, throws some light on the meaning of the other. Moreover, each of these phrases is of general import and they are accompanied by more specific words. Hence the rule of *ejusdem generis* is applicable here, and this being a criminal statute, it is to be applied with stringency. People v. Thomas, 1945, 25 Cal.2d 880, 899, 156 P.2d 7.

[10] With these matters in mind, we see at once that the two phrases in question apply only to matters affecting the relations between employers and those who work or might work for them. This eliminates the possibility, discussed in argument, that the phrase "trade dispute" might refer to disputes between tradesmen as to customers and other matters. See McKinley v. California Employment Comm., 1949, 34 Cal.2d 239, 242, 209 P.2d 602, where the court used the term "labor dispute" as if it were synonymous with "trade dispute" in the statute next to be cited.

The term "trade dispute" is not new in our law. In 1935 our legislature passed the Unemployment Insurance Act, Stats.1935, p. 1226, which contained a section 56 providing that an employee is not eligible for unemployment benefits "if he left his employment because of a trade dispute * * in the establishment in which he was employed." p. 1238 of Stats.1935. This provision is now in section 1262 of the Unemployment Insurance Code, in substantially the same form. The scope and meaning of the term "trade dispute" in this statute have been frequently before the courts, and while no decision has formulated a definition of it, the courts have apparently had no difficulty in ascertaining whether a particular situation was or was not within its meaning, nor have any of the decisions suggested that there was any uncertainty about it. See the following cases in which this matter was discussed: Bodinson Mfg. Co. v. California Employment Comm., 1941, 17 Cal.2d 321, 324, 109 P.2d 935; Matson Terminals Inc. v. California Empl. Comm., 1944, 24 Cal.2d 695, 702, 151 P.2d 202; American-Hawaiian Steamship Co. v. California Empl. Comm., 1944, 24 Cal.2d 716, 719, 151 P.2d 213; W. R. Grace & Co. v. California Empl. Comm., 1944, 24 Cal.2d 720, 727, 151 P.2d 215; Bunny's Waffle Shop, Inc., v. California Empl. Comm., 1944, 24 Cal.2d 735, 740–1; Mark Hopkins Inc. v. California Empl. Comm., 1944, 24 Cal.2d 744, 748, 151 P.2d 229, 154 A.L.R. 1081; McKinley v. California Empl. Stab. Comm., supra, 1949, 34 Cal.2d 239, 242, 209 P.2d 602; Thomas v. California Empl. Stab. Comm., 1952, 39 Cal.2d 501, 505, 247 P.2d 561. In all of these cases the term "trade dispute" has been regarded as relating to the relations between employers and those who did or might work for them. It extends to contentions between employers and unions, even though no members of the union are then working for such employers. From the decisions in these cases, a sufficiently accurate meaning for the term may be found to justify its use in a statute.

We note that in Commonwealth v. Libbey, 1914, 216 Mass. 356, 103 N.E. 923, 49 L.R.A.,N.S., 879, a statute requiring that an employer advertising for employees during a strike or labor disturbance shall advertise the fact that "'a strike, lockout, or other labor disturbance exists'" was held valid against several attacks made on it. It does not appear that the particular objection of uncertainty was made, so the case is not direct authority here; but at least the decision contains no suggestion of a doubt on that point.

We are not considering the question whether the use in the complaint of the words "trade dispute" where the statute uses the words "labor disturbance" would impair the efficacy of the complaint to charge an offense.

The judgment of dismissal is reversed, and the trial court is directed to retry the case.

PATROSSO and SWAIN, JJ., concur.

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133 Cal.App.2d Supp. 773

J. G. OPPENHEIMER, Plaintiff and Appellant,

v.

UNION PACIFIC RAILROAD COMPANY, etc., et al., Defendants and Respondents.

C. A. 8684.

Appellate Department, Superior Court, Los Angeles County, California.

May 17, 1955.

Proceeding on attachments levied by plaintiff against railroad and employee. Upon filing of bond, commissioner of the Municipal Court, Los Angeles County Judicial District, made ex parte orders releasing property of both defendants from operation of attachment and vacating prior order releasing property of one defendant. Plaintiff appealed. The Superior Court, Appellate Department, Shaw, P. J., held that motion to discharge attachments cannot be made ex parte, and since court commissioner has only power to hear and determine ex parte motions for orders, court commissioner could not release property from attachment.

One order reversed, and appeal from other order dismissed.

1. Evidence 🔑41

Appellate Department of Superior Court took judicial notice of fact that at no time are all judges of Los Angeles Municipal Court absent or unable to act, within statute empowering Superior Court Commissioners to hear and determine ex parte motions for orders and writs only in absence or inability to act of judge or judges of Superior Court. West's Ann.Code Civ. Proc. § 259.

2. Court Commissioners 🔑1

In statute authorizing appointment of commissioners for Municipal Court of Los Angeles Judicial District, and stating that each commissioner shall exercise powers and perform duties authorized by law to be performed by commissioners of the Superior Court, the "Superior Court" refers to that court in Los Angeles County. Gov. Code, § 72706.

See publication Words and Phrases, for other judicial constructions and definitions of "Superior Court".

3. Court Commissioners 🔑3

Power given to commissioners of Los Angeles Municipal Court is not limited to periods when all its judges are unable to act. West's Ann.Code Civ.Proc. § 259a; Government Code, § 72706.

4. Court Commissioners 🔑4

As a motion to discharge an attachment is not one of the motions that may be made ex parte, and therefore is not one of those that court commissioner of Los Angeles Municipal Court is authorized to hear, ex parte order of such commissioner discharging attachments was void. West's Ann.Code Civ.Proc. §§ 259a, 554, 1003.

5. Attachment 🔑244, 264

Court Commissioners 🔑4

Before a motion for an order, discharging an attachment may be granted, an order must be made requiring an undertaking and fixing its amount and when this is furnished it may, if the court wishes, be referred to and approved by a commissioner, and the sureties may justify before him if excepted to, and only after the undertaking is given may the order releasing the attachment be made, but such order is authorized only if requested upon reasonable notice to plaintiff and may not be made ex parte by a court commissioner but only by a judge of the court, upon notice. West's Ann.Code Civ.Proc. §§ 554, 555.

6. Attachment ⚷244

Failure to give notice of motion for order discharging an attachment may be waived. West's Ann.Code Civ.Proc. §§ 554, 555.

7. Court Commissioners ⚷4

Action by plaintiff in attachment proceedings in attempting to have corporate surety of railroad justified did not confer upon court commissioner power he did not have to order release of attachment. West's Ann.Code Civ.Proc. §§ 259, 259a, 554, 1003; Government Code, § 72706.

8. Court Commissioners ⚷4

Court commissioner who made ex parte order without authority could make an ex parte order setting improper order aside. West's Ann.Code Civ.Proc. § 937.

◆

J. G. Oppenheimer, in pro. per., for appellant.

E. E. Bennett, Edward C. Renwick, Malcolm Davis, Jack W. Crumley & Donald M. Ladd, Jr., Los Angeles, for respondents.

Before SHAW, P. J., and BISHOP and SWAIN, JJ.

BY THE COURT.

The plaintiff has appealed from two orders made by a commissioner of the Los Angeles Municipal Court releasing attachments levied at plaintiff's direction. A bank account of the corporate defendant had been levied upon and some salary due the defendant Smith from his codefendant was garnisheed. Following the filing of an undertaking by the corporate defendant with the clerk of the trial court, a commissioner of that court made an ex parte order, October 19, releasing all the property of the defendant Smith from the operation of the attachment. Because the undertaking did not mention Smith, the commissioner became convinced that his order of October 19 should not have been made, and so he vacated it on October 25 by an ex parte order. A new bond had been filed, on October 25, acknowledging that the attachment affected the property of both defendants, and the commissioner made a new order, also ex parte, releasing the property of both defendants from the operation of the attachment.

The situation with which we are concerned is that of the release of an attachment following the filing of an undertaking with the clerk, after a levy, and is not to be confused with the filing of a bond with the sheriff to prevent a levy or to secure a release by the sheriff of attached property. The latter is authorized by section 540, Code of Civil Procedure, the former by sections 554 and 555. The undertaking given on October 25 is entitled "Bond on Release of Attachment sec. 555, C.C.P.," and properly so.

Looking at sections 554 and 555, Code of Civil Procedure, we find a simple procedure clearly outlined. Whenever any defendant has appeared in an action—both defendants had appeared in this action prior to October 19—he may "upon reasonable notice to the plaintiff" apply for an order to discharge the attachment, "and upon the execution of the undertaking mentioned in [section 555], an order may be made releasing from the operation of the attachment" any or all of the property levied upon. Section 555 provides that before making the order of release the court must require an undertaking, with the terms prescribed in the section, and in an amount fixed by the court.

[1-3] Now our attention shifts to those sections which determine the power of the commissioners of the Municipal Court of the Los Angeles Judicial District. Section 72706, of the Government Code, dealing with the court just mentioned, authorizes its judges to appoint four commissioners, and states that "each commissioner shall exercise the powers and perform the duties

authorized by law to be performed by commissioners of the superior court * * *." As there are fifty-eight superior courts in the state, the reference to "the superior court" is not a happy one. If the intention is to give to the court commissioners of the Los Angeles Municipal Court the same authority as that entrusted to superior court commissioners generally, then they are empowered to hear and determine ex parte motions for orders and writs but "only in the absence or inability to act of the Judge or Judges of the Superior Court". 259, C.C.P. We take judicial notice of the fact that at no time are all the judges of the Los Angeles Municipal Court, forty-two in number, absent or unable to act. We are inclined to conclude, therefore, that the reference in section 72706, Government Code, to "the superior court" is to that court in Los Angeles County. So interpreted, we find that the power given to the commissioners of the Los Angeles Municipal Court is not limited to periods when all its judges are unable to act, for there is no such limitation upon the power of the Los Angeles Superior Court Commissioners, section 259a.

[4] This construction, although it removes one limitation upon the powers given to the commissioner whose orders are under review, is not sufficient to save the orders, for the power is still "to hear and determine ex parte motions for orders and alternative writs." But, as we have already discovered, a defendant who would apply for an order to discharge an attachment may do so "upon reasonable notice to the plaintiff". Section 554, Code Civ.Proc. "An application for an order is a motion", defines section 1003 of the Code of Civil Procedure. A motion to discharge an attachment, made under section 554, is not one of the motions that may be made ex parte, therefore, and as a consequence, is not one of those that a court commissioner is authorized to hear.

[5] It has been argued that the authority given the court commissioner "To take and approve bonds and undertakings whenever the same may be required in actions or proceedings * * * and to examine the sureties thereon when an exception has been taken to their sufficiency," found in both sections 259 and 259a, somehow carries with it the power to order the discharge of the attachment. We find no persuasive force in the argument. The course of events is clearly outlined. Before a motion for an order of discharge may be granted, an order must be made requiring an undertaking and fixing its amount. When this is furnished it may, if the court wishes, be referred to and approved by a commissioner, and the sureties may justify before him, if excepted to. Only after the undertaking is given may the order releasing the attachment be made. But as this order is authorized only if requested "upon reasonable notice to the plaintiff," it may not be made ex parte, by a court commissioner, but only by a judge of the court, upon notice.

[6, 7] The failure to give notice, when required, may be waived, but as lack of authority may not be conferred by a waiver, Norton v. Baranov, 1935, 4 Cal.2d 443, 444, 50 P.2d 67, 68, the action taken by the plaintiff in this case in making a futile attempt to have the corporate surety justify, did not serve to confer upon the commissioner the power he did not have, to order the attachment released.

[8] "An order made out of Court, without notice to the adverse party, may be vacated or modified, without notice, by the Judge who made it * * *." Section 937, Code of Civ.Proc. From this, we conclude, the commissioner who made the ex parte order of October 19, had authority to make an ex parte order setting it aside. It follows that the order of October 19 is no longer effective, and the appeal from that order should be, and it is, dismissed. Palm v. Weber, 1945, 71 Cal.App.2d 481, 485, 162 P.2d 863, 865. The order of October 25 attempting to release the property of the defendants from the operation of the attachment is reversed. Appellant shall have his costs on appeal.

44 Cal.2d 679

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Oscar Leon WILKES and Lewis Edward Jones, Defendants and Appellants.

Cr. 5713.

Supreme Court of California.
In Bank.
June 10, 1955.
Rehearing Denied July 6, 1955.

Defendants were convicted of burglary of the second degree. The Superior Court, Marin County, Thomas F. Keating, J., rendered judgments and an order denying motion for new trial, and defendants appealed. The Supreme Court, Schauer, J., held that comment by prosecuting attorney in argument to jury on failure of wife of one of defendants to testify in support of their only defense of alibi, aggravated by comment of trial judge and instruction, constituted reversible error.

Judgments and order reversed.

Opinion, 280 P.2d 88, vacated.

1. Burglary 🔑43

Evidence of guilt of second degree burglary was furnished by unexplained possession of burglary tools which, according to expert testimony, were used to commit the crime charged and by contradictory accounts given authorities by defendants of their whereabouts.

2. Criminal Law 🔑351(2)

Contradictory accounts given authorities by defendants of their whereabouts may be considered as showing consciousness of guilt.

3. Witnesses 🔑379(9)

Refusal of a witness to testify at preliminary hearing may be shown for purpose of impeachment.

4. Witnesses 🔑387

Error could not be predicated on cross-examination of defendant concerning his refusal to testify at preliminary hearing as constituting improper attempt to impeach defendant by showing prior misdemeanor conviction for criminal contempt where defendant in explaining refusal to testify volunteered the information that he had received 90 days for such refusal. West's Ann. Code Civ.Proc. § 2051; Pen.Code, § 166.

5. Criminal Law 🔑1171(1)

Cross-examination of defendant concerning prior felony convictions which elicited testimony as to prior misdemeanor conviction of defendant in same county for forgery was not prejudicial to defendant, where he had just admitted "quite a few" prior felony convictions and had specifically identified two such convictions. West's Ann.Code Civ.Proc. § 2051; Pen.Code, §§ 17, 473.

6. Jury 🔑92

That district attorney or a deputy district attorney has acted or is acting as private counsel for a member of jury panel is not a ground prescribed by statute on which challenge of such juror for implied bias must be allowed. Pen.Code, § 1074.

7. Criminal Law 🔑1166½(8)

Defendants could not complain on appeal that objectionable juror was forced on them, even if challenge of juror for cause was erroneously disallowed, where defendants could have had juror excused by peremptory challenge but did not exhaust their peremptory challenges.

8. Criminal Law 🔑1172(2)

Instructions as to oral admissions, contradictory statements and acts or statements which might be designed to ward off suspicion disclosed no prejudice to defendants.

9. Criminal Law 🔑721½(1), 1171(1)

Comment by prosecuting attorney in argument to jury on failure of wife of one of defendants to testify in support of their only defense of alibi, aggravated by comment of trial judge and instruction to the effect that because defendant's wife was not produced as a witness, jury should distrust defendants' testimony as to telephone conversation with her from a point sufficiently distant from location of offense charged to establish an alibi, constituted reversible error. Pen.Code, § 1322.

10. Witnesses ⚷52(8)

Under statute making husband and wife incompetent to testify for or against the other in a criminal case without the consent of both, defendant had no power to produce wife as a witness in his behalf in prosecution for burglary, if she did not consent to testify. Pen.Code, § 1322.

11. Criminal Law ⚷788

Instruction in relation to failure of wife of one of defendants to testify in support of their defense of alibi that if weaker or less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of a party, the evidence offered should be viewed with distrust, was erroneous as indicating that testimony of defendant's wife was better as a matter of law than the testimony of defendants themselves. Pen.Code, § 1322.

Carl B. Shapiro, Fairfax, for appellants.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., W. O. Weissich, Dist. Atty., and Roger P. Garety, Chief Criminal Deputy Dist. Atty., San Rafael, for respondent.

SCHAUER, Justice.

Defendants appeal from judgments of conviction of burglary of the second degree, pursuant to jury verdicts, and from an order denying their motion for new trial. We have concluded that defendants were deprived of their right to have the evidence fairly appraised by the jury because of improper comment of the prosecuting attorney, the effect of which was made more serious by comment of the trial judge, as to the failure of the wife of defendant Wilkes to testify.

The evidence of guilt, which is circumstantial, is as follows: At about 3:30 a. m. on January 31, 1954, the night bartender at the Village Inn in Novato, Marin County, after having cleaned the premises, put cash and checks in the safe, and locked the safe and the doors and windows, left the building. At 7 a. m. the day bartender came to the Village Inn and found that the outside side door and the door leading to the room in which the safe and the liquor were had been forced open. The dial and other parts had been knocked off the safe, the door was ajar, and boxes in which money and checks had been kept in the safe were on the floor. Plates and a spindle which had been part of the safe lock were lying inside the safe. On the floor near the safe were chips of paint. About $1,674 in cash and about a case and a half of whiskey had been taken. An officer who examined the doors which had been broken open, the safe and the boxes which had been in it, and a file cabinet which was in the room, found only old, smudged fingerprints, no fresh prints.

At about 1 a. m. on February 1, 1954, a deputy sheriff on patrol in a residential district of Fresno about two and one-half miles from Highway 99 found defendants asleep in the 1953 Chevrolet automobile of defendant Jones. The deputy summoned other officers. They awakened defendants, questioned them, and examined their car. Defendants were taken to the sheriff's office and questioned further.

As will hereinafter appear, there are numerous conflicts among defendants' various extrajudicial statements, their testimony at the preliminary hearing, and their testimony at the trial. As to one point their testimony and statements are consistent: that they were not in Novato at or near the time of the burglary.

At the time of defendants' arrest a pair of grip pliers with draft punch attached was found in Jones' car. Just after their arrest both defendants denied ownership of these instruments. At the trial Wilkes testified that he had never seen them before the preliminary hearing; Jones testified that they were first shown to him by one of the Fresno deputies and that to his knowledge they had not been in his car. In the opinion of an expert this punch had made marks on the spindle which was removed from the safe; this opinion was based on the distinctive similarity between the lines in marks made by the punch and the lines in tool-marks on the spindle.

In the car was a tire iron which Jones at the time of his arrest admitted was his. At the trial, however, he testified that it had not been in his car. An expert testified that on the tire iron were chips of paint which had been transferred there under pressure; this paint was in layers of three distinct colors which were identical with chips of paint found at the scene of the crime.

In Jones' car were San Francisco newspapers dated January 27 and 30 and February 1, 1954. According to defendants, they bought the paper of February 1 in Bakersfield but had no knowledge of the other two papers.

The Fresno deputies found two boxes of washers in the car, one on the floor and one in a suitcase in the trunk. At the time of his arrest Wilkes said he had brought the washers from Arkansas. A Novato storekeeper identified the box from marks made on it during inventory as one which had been in his store shortly after the first of 1954. Wilkes testified at the trial that he was not shown the washers in Fresno, that he may have then stated that if there were washers in the car he may have put them there, but that he did not have washers in his suitcase.

Defendants when they were arrested had in their possession only about $370 and no whiskey.

Defendants' testimony at the trial is as follows: Defendant Jones, a resident of Texas, and defendant Wilkes, a resident of Arkansas, left Arkansas in Jones' car on the evening of January 25, 1954. Wilkes is a brick mason. Jones had sold his hauling business. They came to California to look for construction work. They entered California from Nevada at Truckee on the evening of Friday, January 29, drove through Sacramento, Stockton, Fresno, and Bakersfield, and arrived in Los Angeles late on the morning of Saturday, January 30. Wilkes telephoned the brick masons' union and was told that there was a scarcity of brick work in Los Angeles but that there might be work available east of Los Angeles. It is not usual for union construction jobs to operate on Saturday, but defendants drove around looking for such jobs. They found no work.

At about 5 p. m. on the 30th defendants went into a bar in Los Angeles and stayed there until about 1 a. m. In the bar they met two women. Defendants left the bar in the company of the women and went to their apartment. They left the apartment at about 6 a. m. on Sunday, January 31. Defendant Wilkes then telephoned his wife in Arkansas from a public telephone booth. Mrs. Wilkes was defendant Jones' sister. Jones also talked to her. At about 8 a. m. defendants went to the apartment of Wilkes' mother and step-father. They left there before 10 a. m. At about noon they arrived in Bakersfield and rented a cabin at a motel. Wilkes registered under the name "J. L. Wright"; he testified that he did not know why he did this. Defendants were in Bakersfield until about 8 p. m. on Monday, February 1. While there they bought a San Francisco newspaper of February 1 for they intended to go to San Francisco to look for work. They went to Fresno, with Wilkes driving; Jones was asleep; Wilkes became sleepy, stopped, and also went to sleep. Defendants were awakened by the deputy sheriffs.

Shortly after defendants' arrest Jones stated that they were in Arizona on the night of January 30, 1954, that they entered California on Highway 66 and stayed in Bakersfield on the night of the 31st; Wilkes also stated that they had entered California on Highway 66 and arrived in Bakersfield on January 31. Later Jones told a deputy sheriff of Marin County that he had not been in California during the month of January, 1954. At the trial Jones denied that he had made the statement that defendants had entered California on Highway 66 and the statement that he was not in California during January.

The mother of defendant Wilkes testified in accord with defendants that they visited her in her Los Angeles apartment shortly after 8 a. m. on the morning of January 31. At the time of defendants' visit, she testified, she and her husband had lived in the apartment for about a week. The manager of the apartment house, however, testified on rebuttal that Wilkes' mother and stepfather did not move into the house until February 23.

[1, 2] The foregoing summary of the evidence shows the untenability of defendants' claim that the evidence against them is weak. Evidence of guilt is furnished by their unexplained possession of burglarious tools which, according to expert testimony, were used to commit the crime (see People v. Godlewski (1943), 22 Cal.2d 677, 685, 140 P.2d 381) and their contradictory (and therefore in part necessarily false) accounts to the authorities of their whereabouts in California, which may be considered as showing consciousness of guilt (see People v. Cole (1903), 141 Cal. 88, 90, 74 P. 547; People v. Peete (1921), 54 Cal.App. 333, 353, 202 P. 51). The evidence of consciousness of guilt is dramatically supplemented (if the rebuttal testimony of the landlord of Wilkes' mother is believed) by the showing that the mother's corroboration of defendants' alibi was fabricated.

[3, 4] Wilkes asserts that the prosecuting attorney, in violation of the rule that a witness may be impeached by showing a prior conviction of felony but not of misdemeanor (Code Civ.Proc. § 2051; People v. White (1904), 142 Cal. 292, 294, 75 P. 828), improperly asked him on cross-examination concerning his conviction of the misdemeanor of criminal contempt (Pen. Code, § 166) founded on Wilkes' conduct while he was on the stand at the preliminary hearing. The record of the trial shows that the prosecuting attorney did not ask Wilkes about a conviction of criminal contempt. He asked whether Wilkes had not refused, at the preliminary hearing, to answer concerning his whereabouts between 7 and 10 a. m. on Sunday, January 31, a time which was shortly after the burglary was committed in Novato and which was when Wilkes had testified at the trial that he was with his mother in Los Angeles. Objection to this question was correctly overruled; Wilkes' refusal to testify at the preliminary hearing could be shown for the purpose of impeachment (see People v. Montgomery (1941), 47 Cal.App.2d 1, 21, 117 P.2d 437). Wilkes answered that he had refused to testify, and explained that he had taken the stand at the preliminary hearing against the advice of his attorney because "I had nothing to hide" but that he refused to state where he was on Sunday morning, January 31, because, although he had tried to give the authorities such information as he thought was relevant to the case, they "didn't check out" the information which he gave them. In connection with his explanation of his refusal to answer the question at the preliminary hearing Wilkes volunteered the statement, "I received ninety days for that." No question of the prosecuting attorney called for Wilkes to mention the matter of his criminal contempt conviction. Since Wilkes himself chose to bring the matter to the attention of the jury he cannot now complain of it. (People v. Schoon (1918), 177 Cal. 678, 683–684, 171 P. 680; People v. Simmons (1946), 28 Cal.2d 699, 722, 172 P.2d 18.)

Wilkes complains that the prosecuting attorney, in an effort to impeach him, improperly questioned him concerning a prior misdemeanor conviction of forgery. Asked if he had ever been convicted of a felony Wilkes answered, "Yes, quite a few, sir." He testified to two previous convictions of felony. The following then occurred: "Mr. Garety [prosecuting attorney]: Q. Was there a third felony? A. I don't know if I was convicted of a felony that time or not.

"Q. What crime was that, forgery?

"Mr. Shapiro [defendants' attorney]: I object to that.

"Mr. Garety: I think it is a proper question. He said he wasn't sure.

"The Court: The objection is overruled.

"Mr. Garety: Q. The third crime was a forgery?

"A. Yes, sir.

"Mr. Shapiro: The question as to the nature of the crime is not determinative of whether he was convicted of a felony.

"The Court: I think the inquiry is proper as to whether he was convicted of a third felony.

"Mr. Garety: Were there any others you were convicted of? A. Felonies? No, sir."

Later in the cross-examination of Wilkes, when he was asked whether he had been in Marin County before, he volunteered the statement, "Yes. You convicted me of a felony here in Marin County, or a misdemeanor, I don't know."

[5] According to defendants' briefs Wilkes' previous forgery conviction in Marin County was a misdemeanor, not a felony, because of the sentence imposed (Pen.Code, §§ 473, 17), and the district attorney should have known this and should not have asked defendant concerning conviction. However, the above quotation from the record shows that Wilkes was as active as the prosecuting attorney in bringing the matter to the attention of the jury. Furthermore, it is impossible to believe that this discussion as to the forgery conviction could have prejudiced Wilkes, in view of the fact that he had just admitted "quite a few" prior felony convictions and specifically identified two such convictions.

[6] Defendants complain that they were not tried by a legally constituted jury because two members of the panel had as their private counsel, respectively, a deputy district attorney and the district attorney. Such a relationship of a juror with the district attorney is not a statutorily prescribed ground on which a challenge for implied bias must be allowed. Section 1074 of the Penal Code provides that "A challenge for implied bias may be taken for all or any of the following causes, and for no other"; such causes do not include having the district attorney or a member of his staff as private counsel, although they do include standing in the relation of attorney and client with the defendant or the person allegedly injured by the offense charged or on whose complaint the prosecution was instituted.

[7] One member of the jury panel testified that she had employed a deputy (not one who handled this case) to draw a will for her. Defendants' counsel challenged her for cause. The trial judge disallowed the challenge because it was not on a ground specified by statute. This prospective juror was later excused on peremptory challenge of defendants. Another member of the jury panel (who later became foreman of the jury) testified that the district attorney (who did not try this case) had represented him in a private suit in which he had won a judgment which he was trying to collect; the prospective juror further testified that this relation with the district attorney would not affect his ability to serve as a juror. Defendants did not challenge this juror. When the jury had been selected, defendants had eleven peremptory challenges which they had not used. Even if the trial judge had erroneously disallowed a challenge for cause, defendants could not complain that an objectionable juror was forced on them where they could have had him excused by peremptory challenge. (People v. Troutman (1921), 187 Cal. 313, 321, 201 P. 928; People v. Goldberg (1952), 110 Cal.App.2d 17, 23, 242 P.2d 116.)

[8] Defendants complain generally of the instructions as to "oral admissions, contradictory statements and acts or statements which may be designed to ward off suspicion." Defendants do not point out any error in these instructions and it does not appear that they could in any way have prejudiced defendants.

In oral argument the prosecuting attorney said concerning the failure of the wife of defendant Wilkes to testify, "if they were making a phone call to Mrs. Wilkes from Los Angeles at 6:00 A.M., they could not have burglarized the Village Inn in Novato. I am sure that is clear to all of you and that is the reason for this fabricated stuff. But the phone call, according to them, was to Maxine Wilkes. * * * Where was she during the last four days? Apparently very close by and very much in evidence."

Defendants counsel said, "I object to that as prejudicial misconduct, and ask the jury be instructed as to the right of a wife not to testify."

The court said, "The question is not her right not to testify, but whether or not the best evidence has been brought out by the party to whom it is available. * * * I suppose you can discuss the phone call."

The prosecuting attorney continued, "I am not talking of Maxine Wilkes testifying against her husband, but I am saying, why didn't she take the stand and testify for him? Who would know better than she whether or not Oscar Leon Wilkes called from Los Angeles on the morning of January 31st? You didn't hear from her."

After argument the court as part of its formal instructions gave the jury the following instruction, pertinent here only because the court had previously said that the question as to Mrs. Wilkes' failure to testify concerned "whether or not the best evidence has been brought out by the party to whom it is available": "That evidence is to be estimated not only by its own intrinsic weight but also according to the evidence which is in the power of one side to produce and the other to contradict and if weaker or less satisfactory evidence is offered when it appears stronger and more satisfactory evidence was within the power of a party the evidence offered should be viewed with distrust."

Section 1322 of the Penal Code provides, "Neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties, except with the consent of both * * *"

[9] It was error for the prosecution to comment on the failure of Mrs. Wilkes to testify. (People v. Klor (1948), 32 Cal.2d 658, 663, 197 P.2d 705; People v. Harmon (1948), 89 Cal.App.2d 55, 61–62, 200 P.2d 32; see Thompson v. Hickman (1948), 89 Cal.App.2d 356, 365–368, 200 P.2d 893.) Such error has repeatedly been denounced but held not to have been prejudicial in the circumstances of the particular cases in which it has occurred. Because of such repeated holdings, it appears from the brief of the People, prosecuting officials have come to the belief that erroneous conduct in this regard is, as a matter of law, not cause for reversal. The conduct here, as in previous cases where it has been rebuked but held not prejudicial, was manifestly deliberate. Regrettably, the circumstances make it apparent that we must recognize and deal with the fact that such conduct will not be discontinued as long as it is merely rebuked. (See People v. Ford (1948), 89 Cal.App.2d 467, 472, 200 P.2d 867 ["We have extended our remarks respecting misconduct in the hope that they will be taken as a serious effort to inspire a greater degree of responsibility, duty and caution on the part of those prosecutors who are either careless in the observance of the rights of the accused or wholly indifferent to the consequences of their misconduct. It is regrettable that so much is left for reviewing courts in the way of discouraging misconduct. Fewer judgments would have to be reversed if the trial courts were more firm in controlling the comparatively few prosecutors who need restraint"].)

[10, 11] The prosecution's comment erroneously and deliberately struck at the heart of defendants' only defense, their sharply controverted alibi. When defendants' counsel objected to the prosecution argument the trial court, instead of instructing the jury as to the wife's right not to testify, as counsel requested, aggravated the effect of the error by stating that "The question is not her right to testify, but whether or not the best evidence has been brought out by the party to whom it is available"; then the trial court instructed the jury that "if weaker or less satisfactory evidence is offered when it appears stronger and more satisfactory evidence was within the power of a party the evidence offered should be viewed with distrust"; thus the jury were erroneously told that because Mrs. Wilkes was not produced as a witness it should distrust defendants' testimony that they talked with her on the telephone. Contrary to the effect of the trial court's instructions, Wilkes had no power to produce his wife as a witness if she did not consent to testify. Furthermore, the trial court erred in indicating that there was anything "better" as a matter of law about

the testimony of Mrs. Wilkes than the testimony of defendants themselves.

Because of the erroneous comment of the prosecuting attorney and the trial court as to Mrs. Wilkes' failure to testify, the judgments and order appealed from are reversed.

GIBSON, C. J., and CARTER, TRAYNOR and SPENCE, JJ., concur.

44 Cal.2d 649

Robert Carl PAULY, Plaintiff and Appellant,

v.

Owen KING and Scott King, doing business as Travelodge Company, and O. H. Logan and E. Lindquist, doing business as General Sheet Metal Company, Defendants and Respondents.

L. A. 23538.

Supreme Court of California.
In Bank.
June 10, 1955.

Action against contractor and subcontractor for injuries sustained by employee of another subcontractor. The Superior Court, Los Angeles County, William R. McKay, J., entered judgment for defendants and an order denying a new trial, and plaintiff appealed. The Supreme Court, Edmonds, J., held that any error in instruction as advising jury that any condition resulting in injury to plaintiff was plainly observable was cured by other instructions which submitted to jury as an issue of fact question of whether such condition was plainly observable.

Judgment affirmed and appeal from order denying a new trial dismissed.

Opinion, 275 P.2d 559, vacated.

Carter, J., dissented.

1. Negligence 🔑32(2.10)

Employee of a subcontractor occupies the relationship of an invitee to main contractor.

2. Negligence 🔑32(1), 52

Owner of realty is not an insurer of safety of invitee and is not liable for injury to invitee resulting from a danger which was obvious or should have been observed in exercise of reasonable care, but owner must use reasonable care to keep premises in reasonably safe condition and give warning of latent or concealed perils.

3. Negligence 🔑136(24)

In action for injuries sustained by employee of roofing subcontractor when flashing, installed by defendant subcontractor so as to extend several inches beyond edge of roof to cover veneer wall to be built later, collapsed and roofer fell, whether due care required flashing to be supported during roofing operations was a question for jury under conflicting evidence.

4. Negligence 🔑5

In action for injuries sustained by employee of roofing subcontractor when unsupported flashing, installed by another subcontractor so as to extend several inches beyond edge of roof, collapsed and plaintiff fell, plaintiff could not rely upon alleged custom and usage of roofers to stand upon all parts of flashing, unless to do so was consonant with due care.

5. Negligence 🔑3, 5

In determining negligence, the standard is due care, and such standard is not fixed by custom, though failure to observe custom may be evidence of negligence, and custom, while it may assist in determining what constitutes due care, is never a substitute for due care.

6. Negligence 🔑134(8)

In action against general contractor and a subcontractor for injuries sustained by employee of roofing subcontractor when flashing, installed by defendant subcontractor so as to extend several inches beyond edge of roof, collapsed and plaintiff fell, implied finding that danger which might arise from unsupported flashing was so obvious as to require no warning to plaintiff from defendants was supported by substantial evidence.

7. Trial ⚷296(9)

Any error in instruction that defendants were not required to advise plaintiff of any apparent conditions which, being plainly observable, would place a reasonable, prudent man on inquiry, as assuming as a fact that condition resulting in injury to plaintiff was plainly observable, whereas the evidence with respect thereto was in conflict, was cured by additional instructions submitting as issue of fact for jury question of whether existing conditions were plainly observable.

8. Trial ⚷295(10), 296(9)

Where instruction allegedly assuming existence of a fact as to which the evidence is in conflict presents only an ambiguity in such regard, the uncertainty may be cured by other instructions or another part of same instruction.

9. Trial ⚷242

Request for additional instructions concerning latent danger and defendants' duty disclosed that jurors did not misunderstand instruction as stating as a matter of law that condition resulting in injury to plaintiff was patent.

10. Trial ⚷296(9)

Any uncertainty as to whether instruction that there was nothing inherently dangerous in doing roofing work on a flat deck surface withdrew from jury factual issue as to whether any dangerous condition existed with regard to flashing, installed by defendant subcontractor so that it extended several inches beyond edge of roof without support and collapsed when plaintiff stepped on it, was resolved by other instructions which clearly submitted issue to jury as a question of fact.

11. Appeal and Error ⚷1064(1)

In instruction advising jury that general contractor had no duty to warn injured employee of roofing subcontractor of any dangers arising from doing roofing work on a flat deck surface which would be apparent to experienced roofer, statement that there was no inherent danger in doing such work was not prejudicial to injured roofer as being in conflict with another instruction relating to degree of caution required of roofer in exercising reasonable care for his own safety.

12. Trial ⚷62(2)

Excluding offers of proof made by plaintiff during rebuttal, which presented only a reiteration of testimony given by the same witnesses during plaintiff's case, was not abuse of discretion.

Victor C. Rose, Alfred M. Klein and Robert P. Dockeray, Los Angeles, for appellant.

Betts, Ely & Loomis, James A. Williams, Tripp & Callaway and Hulen C. Callaway, Los Angeles, for respondents.

EDMONDS, Justice.

While working as an employee of a roofing subcontractor, Robert Carl Pauly sustained injuries in a fall from a building. He sued the general contractor and another subcontractor, charging negligence. Upon his appeal from a judgment in favor of both defendants, Pauly challenges instructions which define the duties owed to him and rulings upon the admission of evidence.

There is no dispute as to the condition of the premises and the manner in which the injury occurred.

Travelodge Company, as owner and general contractor, constructed the framework of a two story motel building. On the south end of the structure, the lower story extended several feet beyond the upper one so as to form a deck or balcony. The deck, made of wooden sheathing, was to be surfaced with roofing material.

O. H. Logan, the proprietor of the General Sheet Metal Company, subcontracted to supply and install flashing. For this purpose, strips of narrow gauge sheet steel, about 12 inches wide, are formed somewhat like a trough and nailed to the roof's edge. The edges are then bonded to the roofing material. Ordinarily, flashing is installed so that it protrudes about one-half or three-quarters of an inch beyond the completed side wall, in order to give protection from the weather. In accordance with plans and specifications furnished by the contractor, Logan attached the flashing so that it extended some five and one-half inches beyond the edge of the deck. It was so placed in order to cover a brick veneer wall, subsequently to be erected, which would extend upward close to the bottom of the flashing and outward to about one-half inch from the edge.

On the morning of the accident, Pauly and another employee of the roofing subcontractor parked their truck on the south side of the building and began carrying roofing materials to the deck. Their path took them below the overhanging flashing and next to the footing which had been placed in readiness for the veneer wall. After making four trips, they started their work on the roof. Pauly unrolled some paper in preparation for affixing it to the deck. During this operation he stepped backward onto the flashing, which collapsed beneath him.

In his complaint, Pauly charged that Logan and Travelodge were negligent in fastening the flashing without adequate support and failing to warn him of the danger of such construction. The defendants denied generally the allegations of the complaint and, as affirmative defenses, pleaded contributory negligence and assumption of risk. The jury returned a verdict for the defendants.

[1, 2] An employee of a subcontractor occupies the relationship of an invitee to the main contractor. Dingman v. A. F. Mattock Co., 15 Cal.2d 622, 624, 104 P.2d 26; Hill v. Eaton & Smith, 65 Cal.App.2d 11, 13, 149 P.2d 762. "The applicable general principle is that the owner of property, insofar as an invitee is concerned, is not an insurer of safety but must use reasonable care to keep his premises in a reasonably safe condition and give warning of latent or concealed perils. He is not liable for injury to an invitee resulting from a danger which was obvious or should have been observed in the exercise of reasonable care." Brown v. San Francisco Ball Club, 99 Cal.App.2d 484, 486, 222 P.2d 19, 20; Blodgett v. B. H. Dyas Co., 4 Cal.2d 511, 512, 50 P.2d 801; Jones v. Bridges, 38 Cal.App.2d 341, 345, 101 P.2d 91.

Ample evidence supports the implied finding that the order of construction here followed is consistent with due care. One witness testified that it is the accepted standard of practice in the building industry to construct the structural framework and roof, and to install flashing and roofing materials, before erecting a veneer wall in order to protect it from damage during roofing operations. Another witness, a structural engineer who qualified as an expert, stated that this order of construction is necessary under existing city ordinances to allow compliance with the requirements for building inspection. There is no testimony to the contrary.

The evidence is in substantial conflict as to whether reasonable care required the extended flashing to be supported during roofing operations. According to Pauly, custom and usage required that it be supported; no different manner of construction had been followed "in years." A safety engineer also testified that the flashing should have been supported and described a type of support sometimes used. But he qualified his testimony by stating that the primary purpose of support was to avoid distortion of the flashing from other building operations, and admitted that he had never seen such an arrangement used where a veneer wall was to be erected.

[3] The testimony of these witnesses was quite different from that given on behalf of the defendants. An expert in sheet metal work stated that there is no custom or usage requiring temporary support for flashing. He said "it all depends upon the job," and told the jury he could not recall having seen extended flashing which was supported. A construction engineer testified that there is no standard of practice requiring temporary support for flashing, because it "has no structural value; therefore there is no intention that it would ever bear any structural weight." According to this witness, the "set up" here used complied with standard practice "for this type of con-

struction." The jury was free to, and impliedly did, resolve this conflict in evidence against Pauly.

As Pauly evaluates the evidence, it shows without contradiction that a roofer customarily works "all over the roof," flashing being considered a part of it. For that reason, he argues, the defendants should have warned him that the flashing was unsupported. The defendants reply that the evidence concerning the place where a roofer would work is in conflict. In any event, it is said, there is substantial evidence which would support a finding that any danger arising from unsupported flashing would be obvious to an experienced roofer.

[4, 5] Even if the evidence conclusively established a custom and usage of roofers to stand upon all parts of the flashing, Pauly would not be entitled to rely upon it unless to do so is consonant with due care. Cf. Polk v. City of Los Angeles, 26 Cal.2d 519, 529, 159 P.2d 931; Mehollin v. Ysuchiyama, 11 Cal.2d 53, 57, 77 P.2d 855. "Failure to observe custom may be evidence of negligence, but the standard is not fixed by custom. The standard is always due care. The presence or absence of custom does not alter that standard. Custom may assist in the determination of what constitutes due care. What others do is some evidence of what should be done, but custom is never a substitute for due care." Owen v. Rheem Mfg. Co., 83 Cal.App.2d 42, 45, 187 P.2d 785, 786.

The evidence as to the practice customarily followed by a roofer is not without conflict. Although Pauly and others stated that it was customary for the roofer to stand upon all parts of the roof, including the flashing, other witnesses testified that there is no custom or standard of practice as to where he should stand, but he should choose a footing which is structurally sound. According to these witnesses, that choice depends upon the circumstances of the case. From this testimony, the jury was warranted in concluding that no custom or usage required Pauly to stand upon the flashing and it would not be consistent with due care for him to do so if the danger arising from its being without support should be known to him.

[6] There is abundant evidence from which the jury reasonably might conclude that the danger arising from the unsupported flashing would be apparent to an experienced roofer. It is without dispute that the flashing here installed was equipped with a "crimp" or "gravel stop," described as an "inverted 'V'" rising from one-eighth to three-eighths of an inch above the surface of the flashing, which marked the edge of the supporting roof below it. Pauly, himself, testified that from the appearance of the gravel stop he knew the location of the edge of the roof. There was also evidence that the nails by which the flashing was attached to the roof were visible from above and extended only from the gravel stop inward. From these facts, an expert testified, an experienced roofer would assume that the extended flashing was without support. Furthermore, photographs of the overhanging flashing were shown to the jury, and both Pauly and his co-worker testified that it was "obvious" from the ground. Pauly made several trips before the accident through a point from which he might have observed the unsupported flashing, and although he stated he did not do so because his attention was directed elsewhere, the jury reasonably might have concluded that a prudent person should have seen it. In these circumstances, there is substantial evidence to support the implied finding that the danger which might arise from unsupported flashing was so obvious as to require no warning to Pauly from the defendants.

Pauly complains, however, that the following instruction removed that factual determination from the jurors:

> "There is nothing inherently dangerous in doing roofing work on a flat deck surface, such as that which was here involved, and therefore it was not encumbent upon either of the defendants to advise plaintiff concerning any apparent condition or conditions which, *being plainly observable,* would advise a reasonable and prudent man to make inquiry concerning any probable dangers which might be involved in their use. The question of whether or not

> the conditions existing herein were or were not plainly observable to a reasonable and prudent person is one of fact for the jury to determine from the evidence in this case in the light of the Court's instructions." (Italics added.)

By the italicized phrase, according to Pauly, in effect the jurors were told that the "condition of the roof, namely the unsupported metal flashing, was plainly observable to appellant." Relying upon dictum in Clarke v. Volpa Brothers, 51 Cal.App.2d 173, 124 P.2d 377, he argues that "where an instruction assumes the existence of a fact * * * with respect to which there is a conflict of evidence, * * * any error in this respect is not * * * cured by other charges which submit to the jury the question whether such fact exists." 51 Cal.App.2d at page 179, 124 P.2d 380.

[7, 8] The challenged instruction does not state that the condition *was* plainly observable, but specifies the defendants' duties with regard to "any apparent condition or conditions, which, being plainly observable, would advise a reasonable man to make inquiry concerning probable dangers." At most, it is ambiguous. Although, standing alone, the disputed phrase might be construed as having the meaning contended for by Pauly, it cannot be so read in the context of the complete instruction and others which tendered as an issue of fact, whether the unsupported flashing presented an apparent danger. Where an instruction claimed to assume the existence of a fact presents only an ambiguity in that regard, the uncertainty may be cured by other instructions or another part of the same one. Cf. Hatfield v. Levy Brothers, 18 Cal.2d 798, 815, 117 P.2d 841; State Compensation Ins. Fund v. Lamb, 96 Cal.App. 236, 241, 273 P. 1080.

Any uncertainty here was clarified by the sentence immediately following the challenged one, which told the jurors that the question "whether or not the conditions existing herein were or were not plainly observable to a reasonable and prudent person is one of fact for the jury." Also, in other instructions the jurors were fully, completely and properly instructed as to the defendants' duties with regard to latent or obvious defects, and that the nature of the defect here involved was a question of fact for their determination.[1] They were given the test for determining whether any dangerous condition was obvious or concealed. They were also told that it would be their duty to determine "from all of

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[1] All of the following instructions were given at the request of Pauly:

"Although a dangerous condition may be readily observable from one point of view, it may not be readily observable from another point of view. The test is not whether a flashing would be readily observable from the street but whether it would be readily observable at that time when an ordinarily prudent person would make the observation. If an ordinarily prudent person under the same or similar circumstances as Mr. Pauly would not have made an observation of the overhanging of the flashing from the street, and if he would not have made an observation until that time when Mr. Pauly did observe it, then the test is whether or not the dangerous condition was readily observable when Mr. Pauly in the exercise of ordinary care finally made the observation.

"Defects which are ordinarily plainly visible do not necessarily preclude a party who was injured thereby from recovery for negligence if a reasonably prudent person under the same or similar circumstances would not have observed the defect.

"I instruct you that if there was a latent condition upon the roof of which the plaintiff was not aware, and which condition was dangerous, it was the duty of the defendant Travelodge Corporation to warn the plaintiff of any danger of which they knew or which they, as prudent people, ought to know.

"I further instruct you that the duty to warn the plaintiff could not be delegated and a notice of the danger given to anyone other than the plaintiff himself, is not in law notice to the plaintiff.

"I instruct you that a workman is not charged with knowledge of a latent or concealed defect and he may recover damages resulting from such latent defect of which he has no knowledge and provided that the general contractor who created or maintained the latent or concealed defect knew, or by the exercise of reasonable care should know, of such defect and fail to remedy or warn the workman of that danger.

"I instruct you that even if an al-the evidence in this case" if there was a dangerous condition and whether it was latent or patent. Furthermore, they were cautioned against assuming, from any statement as to the possible existence of a state of facts, that the court was of the opinion that the evidence proved their existence.

[9] A colloquy, occurring when the jurors returned from their deliberations to request additional instructions, clearly indicates that they did not understand the challenged instruction to state, as a matter of law, that the dangerous condition was patent. Clearly, they considered that question to be one of fact for their determination because one of them asked to have repeated the instruction concerning "a latent potential danger on the job and the duty of the general contractor toward a subcontractor or tradesman thereupon." The record is as follows:

> "The Court: The test of whether a defect is patent or latent is whether, to an ordinarily prudent person under the same or similar circumstances, it is readily apparent to the eye. If it is not readily apparent to the eye, it is not a patent or obvious defect, but is a latent defect.
>
> "Juror Jameson: I believe that is it.
>
> "The Court: That is it? You were the one that made the inquiry concerning that particular fact?
>
> "Juror Jameson: I thought there was another one but I guess that is all.
>
> "The Court: It will be your duty to determine from all of the evidence in this case whether or not there was a dangerous condition created or maintained by defendant Travelodge Corporation herein and to further determine whether this dangerous condition was clearly visible or obvious to the plaintiff or whether he had actual or constructive knowledge of the existence of the dangerous condition or

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leged defect or danger in the construction was patent and observable, nevertheless, you must determine whether or not it was a want of ordinary care on the part of the plaintiff not to have looked at the flashing and to have made an inspection of it before stepping on it. If the plaintiff acted like an ordinary prudent person under the same or similar circumstances, that is all that is required of him since the law does not require exceptional care, skill or foresight.

"I instruct you that a failure to observe a defect or dangerous condition, if any there was, which might have been seen by close scrutiny does not necessarily constitute contributory negligence on the part of one who, without previous knowledge of its existence, is injured thereby. The test is whether the person who failed to observe a defect or dangerous condition was exercising ordinary care as such has been defined to you in these instructions.

"The test of whether a defect is patent or latent is whether, to an ordinarily prudent person under the same or similar circumstances, it is readily apparent to the eye. If it is not readily apparent to the eye, it is not a patent or obvious defect, but is a latent defect.

"It will be your duty to determine from all of the evidence in this case whether or not there was a dangerous condition created or maintained by defendant Travelodge Corporation herein and to further determine whether this dangerous condition was clearly visible or obvious to the plaintiff or whether he had actual or constructive knowledge of the existence of the dangerous condition or whether, in fact, the dangerous condition was actually a latent or concealed defect. Ordinarily, a contractor is not liable for injury sustained by a workman as a result of defects clearly visible or obvious to him or when he has actual or constructive knowledge of the existence of the defects. On the other hand, the workman is not charged with knowledge of a latent or concealed defect and he may recover damages resulting from such latent defect of which he had no knowledge provided that the contractor created or maintained the same or by the exercise of reasonable care should know of such defect and fail to remedy or warn the workman of that danger.

"Statements of law often cannot be made abstractly, but must be related to possible situations of fact. Throughout my instructions you will bear in mind that whenever the possibility of a certain state of facts is assumed for the purpose of stating the applicable law, I do not mean to imply an opinion that the evidence has proved the existence of those facts, nor to suggest an opinion favorable or unfavorable to either or any party."

whether, in fact, the dangerous condition was actually a latent or concealed defect * * *."

[10] Pauly also complains of the portion of the instruction which states that "[t]here is nothing inherently dangerous in doing roofing work on a flat deck surface, such as that which was involved here. * * *" He reads the phrase "nothing inherently dangerous" as referring to the condition of the flashing, thereby withdrawing that factual issue from the jury. Plainly, however, the reference is to "doing roofing work on a flat deck surface," which indisputably was being done at the time of the accident. Any uncertainty was resolved by other instructions which clearly stated that the jurors were to determine, as a question of fact, whether any dangerous condition existed. There can be no doubt that the jurors so considered the issue when the additional instructions which definitely posed the issue as a factual one are read.

Pauly also argues, however, that an instruction describing roofing work as not inherently dangerous conflicts with another one relating to the degree of caution required of him in exercising reasonable care for his own safety. In the latter instruction, the jurors were charged that when a lawful employment requires one to take risks beyond those which ordinarily would be taken by a reasonably prudent person, "the necessities of such a situation, insofar as they limit the caution that he may take for his own safety, lessen the amount of caution required of him by law in the exercise of ordinary care." In effect, he claims, the jury was told that he was not in a position of danger and the instruction, therefore, erroneously specified the amount of caution required of him for his own safety and enabled it to hold that the lawful and proper activities of a roofing worker amounted to negligence.

[11] The challenged instruction defines the duties of the defendants toward Pauly and does not purport to encompass Pauly's duty with regard to his own safety. It is based upon Hard v. Hollywood Turf Club, 112 Cal.App.2d 263, at page 275, 246 P.2d 716, at page 724, where in a comparable situation the court said: "There is nothing inherently dangerous in doing work on a high scaffold (citation) and therefore it was not incumbent upon appellant [general contractor] to advise respondent [employee of a subcontractor] against using his own scaffold." For that rule the court relied upon Schmidlin v. Alta Planing Mill Co., 170 Cal. 589, 150 P. 983. There the court considered the liability of a contractor to the employee of a subcontractor for the negligent act of another subcontractor. The contractor is not responsible for such negligence, the court declared, unless the negligent act of the subcontractor is performed pursuant to the directions of the contractor, or the activity is so inherently dangerous that the duty of due care in performing it is non-delegable.

Apparently in the Hard case the court was concerned with a possible extension of the rule concerning non-delegable duties to a situation where a contractor might be held liable for a failure of a subcontractor to exercise due care in furnishing equipment to his employee. Because the activity there shown was not "inherently dangerous" (meaning apparently not ultrahazardous), the court held that there was no responsibility of the contractor to warn the employee of any defect in the equipment furnished by the employer-subcontractor.

Here, the apparent purpose of the instruction was to advise the jury that the general contractor was under no duty to warn Pauly of any dangers arising from his doing roofing work on a flat deck surface, which would be apparent to an experienced roofer. In view of the numerous instructions which correctly define Pauly's duty for his own safety, it is very doubtful that the jurors would attach to this instruction the interpretation given to it by Pauly. So to hold would require this court to suppose that the jurors found him guilty of contributory negligence for doing acts properly to be performed by a roofer merely because one not engaged in that occupation would not do them. Any uncertainty in the instruction could not have prejudiced Pauly's case.

Another instruction, relating to the duty of a subcontractor with regard to complying with the plans and specifications furnished by the general contractor, is challenged on the ground that it is unsupported by "any decided case or legal authority." This instruction, however, is based upon, and is an almost verbatim statement of, the comment to section 404 of the Restatement of Torts. Furthermore, since it related only to the duty of Logan, the jury could not have predicated its verdict upon this instruction.

[12] Pauly's final contention is that the trial judge committed prejudicial error in excluding his offers of proof made during rebuttal. They consisted of the testimony of Pauly and another witness who had testified during the plaintiff's case. The ground for exclusion of this evidence was that it presented only a reiteration of that previously given by them. As such, it was only cumulative, and it cannot be said, as a matter of law, that the trial judge abused his discretion in excluding it. Cf. Moore v. Marshall, 41 Cal.App.2d 490, 494–495, 107 P.2d 89.

The judgment is affirmed and the purported appeal from the order denying a new trial is dismissed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

I agree with plaintiff that certain instructions were prejudicially erroneous.

A hotly disputed question of fact in this case, and a most important one, was whether plaintiff failed to exercise due care when he did not see the dangerous condition of the flashing. The record shows that on his four trips to the roof he was carrying, each time, a heavy load and that he was walking on uneven ground which necessitated a close watch to see where he was going. Plaintiff's evidence also showed that a roofer customarily worked all over the roof, including the flashing; and that it was not the custom to leave flashing unsupported; defendant's evidence was to the effect that there was not necessarily such a custom, and that flashing was sometimes left unsupported. This merely created a conflict—the resolution of which, *under proper instructions,* was for the determination of the jury. A litigant is entitled to instructions presenting his theory of the case, Buckley v. Shell Chemical Co., 32 Cal.App.2d 209, 89 P.2d 453; Morrow v. Mendleson, 15 Cal.App.2d 15, 58 P.2d 1302; Stickel v. Durfee, 88 Cal.App.2d 402, 199 P.2d 16. In Ferrula v. Santa Fe Bus Lines, 83 Cal.App.2d 416, 424, 189 P.2d 294, it was stated that it was the court's duty to give instructions expounding the law upon every reasonable theory of the case which found support in the evidence. See, also, Matsumoto v. Renner, 90 Cal.App.2d 406, 202 P.2d 1051; Baugh v. Beatty, 91 Cal.App.2d 786, 205 P.2d 671; Rather v. City and County of San Francisco, 81 Cal.App.2d 625, 184 P.2d 727.

Whether the unsupported flashing presented an obvious danger and so required no warning to plaintiff from the defendants was a question of fact for the jury to determine.

I agree with plaintiff that the following instruction removed that issue from the jury's determination by suggesting the answer to it: "There is nothing inherently dangerous in doing roofing work on a flat deck surface, such as that which was here involved, and therefore it was not encumbent upon either of the defendants to advise plaintiff concerning any apparent condition or conditions which, being plainly observable, would advise a reasonable and prudent man to make inquiry concerning any probable dangers which might be involved in their use." The just quoted first part of the instruction tells the jury, as a matter of law, that there was nothing dangerous on the roof; that any "apparent" condition was "plainly observable" to a reasonably prudent person. This took from the jury the most contested issue in the case: whether the condition was latent, or patent, and whether or not the condition was dangerous. The jury was flatly told there was nothing "inherently dangerous" in the type of work plaintiff was doing. Tacked on as a sort of afterthought was the statement that "The question of whether or not the conditions existing herein were or were not plainly observable to a reasonable and prudent person is one of fact for the jury to determine from the evidence in this case in the light of the Court's instructions." The jury, after being told there was nothing dangerous in the work, that any "apparent" (and hence *patent)* condition was "plainly observable" was then told that it might decide the issue. The instruction is clearly inconsistent in itself. The majority opinion seeks to get around this fact by saying that the instruction does not state that the condition "was plainly observable, but specifies the defendants' duties with regard to 'any apparent condition or conditions, which, being plainly observable, would advise a reasonable man to make inquiry concerning probable dangers.' At most, it is ambiguous." This statement is ridiculous. Nothing could be more certain than that the jury was instructed that neither of the defendants was under a duty to warn plaintiff of an "apparent condition" *which, being plainly observable* would advise a reasonable and prudent man to make inquiry concerning any danger. Webster defines the word "being" as "existing, present."

The correct rule is set forth 24 Cal.Jur., section 101, page 841 et seq.: "The province of the jury is invaded where an instruction assumes the existence of a fact which is not in evidence, or with respect to which there is a conflict of evidence, and any error in this respect is not, it has been held, cured by other charges which submit to the jury the question whether such fact exists." Cahoon v. Marshall, 25 Cal. 197, 202; Berkovitz v. American River Gravel Co., 191 Cal. 195, 215 P. 675; Fidelity & Casualty Co. v. Paraffine Paint Co., 188 Cal. 184, 204 P. 1076; Starr v. Los Angeles Ry. Corp., 187 Cal. 270, 201 P. 599; Sutter Butte Canal Co. v. American R. & A. Co., 182 Cal. 549, 189 P. 277; Brinck v. Bradbury, 179 Cal. 376, 176 P. 690; Dawson v. Pacific Electric Ry. Co., 177 Cal. 268, 170 P. 603; Hart v. Fresno Traction Co., 175 Cal. 489, 167 P. 885; Pigeon v. W. P. Fuller & Co., 156 Cal. 691, 105 P. 976; Still v. San Francisco etc. Ry. Co., 154 Cal. 559, 98 P. 672, 20 L.R.A.,N.S., 322; Anderson v. Seropian, 147 Cal. 201, 81 P. 521; Gribben v. Yellow Aster etc. Co., 142 Cal. 248, 75 P. 839; Roche v. Baldwin, 135 Cal. 522, 65 P. 459, 67 P. 903; Wahlgren v. Market Street Ry. Co., 132 Cal. 656, 62 P. 308, 64 P. 993; Williams v. Casebeer, 126 Cal. 77, 58 P. 380; De Baker v. Southern Cal. Railway Company, 106 Cal. 257, 39 P. 610; Childers v. San Jose Mercury P. & P. Co., 105 Cal. 284, 38 P. 903; Dean v. Ross, 105 Cal. 227, 38 P. 912; Elledge v. National City & O. Railway Co., 100 Cal. 282, 34 P. 720, 852; Hill v. McKay, 94 Cal. 5, 29 P. 406; Rosenberg v. Durfee, 87 Cal. 545, 26 P. 793; Vulicevich v. Skinner, 77 Cal. 239, 19 P. 424; Llewellyn Steam Condenser Manufacturing Co. v. Malter, 76 Cal. 242, 18 P. 271; Quinn v. Dresbach, 75 Cal. 159, 16 P. 762; St. Ores v. McGlashen, 74 Cal. 148, 15 P. 452; Wood v. Tomlinson, 53 Cal. 720; Bradley v. Lee, 38 Cal. 362; Caldwell v. Center, 30 Cal. 539; Preston v. Keys, 23 Cal. 193; Garrison v. Pearlstein, 68 Cal. App. 334, 229 P. 351; Goehring v. Rogers, 67 Cal.App. 253, 227 P. 687; Comer v. Los Angeles Ry. Corp., 66 Cal.App. 219, 225 P. 869; Markart v. Zeimer, 67 Cal.App. 363, 227 P. 683; Estate of Hewitt, 63 Cal.App. 440, 218 P. 778; Sommer v. Martin, 55 Cal. App. 603, 204 P. 33; McKinnon v. United Railroads of San Francisco, 55 Cal.App. 96, 203 P. 122; Jones v. United Railroads of San Francisco, 54 Cal.App. 744, 202 P. 919; Randolph v. Hunt, 41 Cal.App. 739, 183 P. 358; Thompson v. Southern Pac. Co., 31 Cal.App. 567, 161 P. 21; Vallejo & N. R. R. Co. v. Home Sav. Bank, 24 Cal.App. 166, 140 P. 974; Ingalls v. Monte Cristo Oil & Development Co., 23 Cal.App. 652, 139 P. 97; Petersen v. California C. Mills Co., 20 Cal.App. 751, 130 P. 169; Sterling v. Cole, 12 Cal.App. 93, 106 P. 602; Matteson v. Southern Pacific Co., 6 Cal.App. 318, 92 P. 101; Carey v. Pacific Gas & Electric Co., 75 Cal.App. 129, 242 P. 97; Marston v. Pickwick Stages, Inc., 78 Cal.

App. 526, 248 P. 930; Waack v. Maxwell Hardware Co., 210 Cal. 636, 292 P. 966; Mautino v. Sutter Hospital Ass'n, 211 Cal. 556, 296 P. 76; Bakos v. Shell Company of California, 115 Cal.App. 142, 300 P. 982; Sanchez v. Pacific Auto Stages, 116 Cal. App. 392, 2 P.2d 845; Collins v. Hodgson, 5 Cal.App.2d 366, 42 P.2d 700; Reed v. Simpson, 32 Cal.2d 444, 196 P.2d 895; Moran v. Zenith Oil Co., 92 Cal.App.2d 236, 206 P.2d 679; Dodge v. San Diego Electric Ry. Co., 92 Cal.App.2d 759, 208 P.2d 37.

In the majority opinion is found this statement: "Relying upon dictum in Clarke v. Volpa Brothers, 51 Cal.App.2d 173, 124 P.2d 377, he argues that 'where an instruction assumes the existence of a fact * * * with respect to which there is a conflict of evidence, * * * any error in this respect is not * * * cured by other charges which submit to the jury the question whether such fact exists.' 51 Cal. App.2d at page 179, 124 P.2d at page 380." It should be noted that the opinion neither states, recognizes, nor seeks to distinguish the general rule set forth in the numerous cases heretofore cited as well as in the Clarke case. The opinion implies that the instruction did not assume a fact concerning which the evidence was in sharp conflict and argues that it is, at most, merely ambiguous.

"Latent" is defined by Webster to mean: "to lie hid or concealed; not visible or apparent." Plaintiff's argument concerning the instruction is that it assumes that the danger was patent, or obvious, by telling the jury that any *apparent* condition was *plainly observable* to a reasonably prudent person. Compare plaintiff's contention with the following statement from the majority opinion: "A colloquy, occurring when the jurors returned from their deliberations to request additional instructions, clearly indicates that they did not understand the challenged instruction to state, as a matter of law, that the dangerous condition was patent." It would appear obvious that a jury, composed of laymen, must have been thoroughly baffled in learning that the condition was apparent, and readily observable, and then later learning that it was up to them to decide whether it was, or was not. The majority opinion illustrates with unusual force the good reason underlying the general rule heretofore set forth.

I would reverse the judgment.

133 Cal.App.2d 558

PEOPLE of the State of California, Plaintiff and Respondent,

v.

George R. DAVIS, Defendant and Appellant.

Cr. 5335.

District Court of Appeal, Second District, Division 1, California.

June 13, 1955.

Prosecution for abortion. The Superior Court of Los Angeles County, Charles W. Fricke, J., entered judgment of conviction and order denying new trial from which defendant appealed. The Supreme Court, Doran, J., held that evidence sustained conviction.

Judgment and order affirmed as modified and corrected.

1. Criminal Law 🔑829(13)

In prosecution for performing an abortion, failure to instruct the jury that sole purpose in permitting testimony of certain witnesses relative to proof of a conspiracy was for the limited purpose of determining whether the offense for which they were being tried was committed pursuant to the common design of such conspiracy, was not error in view of other instructions. Pen. Code, § 274.

2. Abortion 🔑11

Evidence was sufficient to sustain conviction for abortion. Pen.Code, §§ 274, 1108.

3. Criminal Law 🔑507(6)

A woman who submits to an abortion is not an accomplice of the individual procuring or conspiring to procure the miscarriage.

4. Criminal Law ⟾1184

Where judgment recites that defendant admitted the second prior conviction and that the first prior conviction was stricken but the record showed that the first prior conviction was the one admitted and the second one was stricken, the judgment should be corrected to correspond to the record, pursuant to rules on appeal. Rules on Appeal, rule 12(b).

◆

John H. Marshall, Harold J. Ackerman, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Appellant and Thela Smith were charged by information with seven counts of abortion, Penal Code, Section 274. Following a jury trial defendants were adjudged guilty of all seven counts. Defendant Davis appeals from the judgment and from the order denying a new trial.

It is contended on appeal that,

I. "The trial court committed prejudicial error in admitting evidence of the declarations or acts of the alleged co-conspirators against appellant in the absence of independent proof of the existence of a conspiracy.";

[1] II. That, "The trial court erred in failing to instruct the jury that appellant was on trial for the crime charged in the information, to wit violation of Penal Code section 274 and for no other crime, and that the sole purpose in permitting the testimony of certain witnesses relative to proof of a conspiracy was for the limited purpose of determining whether the offense for which they were being tried was committed pursuant to the common design of such conspiracy.";

[2] III. That, "The evidence is insufficient to support the conviction of appellant in that there is no evidence corroborating the testimony of the abortee-witnesses which tends to connect the defendant with the commission of the crime pursuant to Section 1108 of the Penal Code."

Briefly, it may be noted, that the seven so-called abortees testified as to the operation and the arrangements leading up to the incident. These arrangements were made with co-defendant Thela Smith. When the "abortees" arrived at the house pursuant to appointment they were prepared for the operation by Thela Smith. The description of what occurred, as testified to by the seven "abortees", was substantially the same. All were blindfolded before the doctor entered the room.

As set forth in respondent's brief and confirmed by the record, "Appellant testified, among other things, that he was an osteopathic physician, licensed in California as a drugless practitioner since 1927, and that he retired from active practice in 1947; that he saw Carol Berry (Count One) at his house one afternoon in early February, 1954; that she wanted information as to an abortion, that he was not able to help her out and that he had not seen her prior to that time; that early in February, Violet Thompson (Count Six) and her husband came to his house, that they told appellant she was pregnant and wanted an abortion, and asked if appellant could do something about it, that appellant suggested she go to term and have the baby and that he said he could not do anything about assisting them in obtaining an abortion; that George Krainbrink (Count Seven) came to appellant's house one afternoon in late January or early February stating that he had gotten a girl into trouble and wanted someone to help them out, that appellant said he was sorry but he could not do anything about it and suggested that Mr. Krainbrink and the girl get married, that he never saw Mrs. Rose Marie Nipp before the preliminary hearing; that to the best of his recollection he never saw Martha Lemonson (Count Four) before the commencement of this action; that he saw Mrs. McGinnis (Hamby), (Count Two), early in February when he went to her house in El Monte and gave her an osteopathic treatment for the flu, that he did not recall treating her for, or discussing with her, anything but her flu; that

Beverly Putman (Count Three), and Mrs. Merkel were at his house early in February, that Miss Putman did not want to go through with a pregnancy, that Miss Merkel was voluble about the methods of inducing abortions, that they asked appellant if he could help them and he told them he could not, that he did not recall seeing Mrs. Doris Putman prior to her being in court and did not think he had any transaction with her involving the payment of $500.00; that he saw neither Patricia Hendershot (Count Five), nor her husband, before they were in court; that the instruments and garments found at his house were his; that he never performed an abortion on any of the seven girls who testified in the case at bar nor referred them to anyone for an abortion; that he had known Thela Smith, the codefendant, about ten years; that he and Mrs. Smith visited a number of times; that he had no occasion to go to her house February 5th; that he was at her house February 3rd or 4th, around 1:00 p. m., but got no response when he knocked at the back door and that he went away; that he was not at her house January 29th; that he was never at the cabin depicted in People's Exhibit No. 10; that the folding table and instruments found at the cabin were his but he had not had them in his possession since he delivered a baby in Pasadena in September, 1952."

[3] Appellant's points one, two, and four above noted relate to conspiracy. In that connection it should be noted that People v. Buffum, 40 Cal.2d 709, 256 P.2d 317, refers to the subject of conspiracy in such cases as the case here considered and refutes appellant's contentions. It appears to be well settled that a woman who submits to an abortion is not an accomplice of the individual procuring or conspiring to procure the miscarriage. See also People v. Gallardo, 41 Cal.2d 57, 257 P.2d 29; People v. Davis, 43 Cal.2d 661, 276 P.2d 801. As to corroborative evidence, see People v. Berger, 128 Cal.App.2d 509, 275 P.2d 799; People v. Allen, 104 Cal.App.2d 402, 231 P.2d 896; People v. Califro, 120 Cal.App.2d 504, 261 P.2d 332.

The record reveals that the jury was clearly instructed that defendants were charged with abortion in each count of the information. Also with regard to the subject and application of the law of conspiracy, the jury was fully informed. It does not appear, from a review of the record that the jury could have been confused.

[4] There appears to be an error in the judgment. The judgment recites that appellant admitted the second prior conviction and that the first prior conviction was stricken. However, the record shows that the first prior conviction was the one admitted and the second one was stricken. Pursuant to the rules on appeal, Rule 12(b), the judgment should be corrected to correspond to the record as above noted.

It appears that the evidence is sufficient to support the conviction; that the instructions adequately cover the subject of conspiracy and that no prejudicial errors were committed.

It is ordered that the judgment be corrected by striking therefrom the following language in paragraph one thereof:

> "and admitted the second prior conviction as alleged to-wit: Abortion, a felony, Superior Court of the State of California, Los Angeles County, August 19, 1953; first prior conviction having been stricken", and in lieu thereof substitute the following:

> "and admitted the first prior conviction as alleged to-wit: Income Tax Evasion, a felony, District Court of the United States, in and for the Southern District of California, September 17, 1947; second prior conviction having been stricken".

As so modified and corrected, the judgment and order are, and each is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

133 Cal.App.2d 501

E. E. FIRESTONE et al.,
Plaintiffs and Respondents,
v.
John WAHL, Defendant and Appellant.
Civ. 4960.

District Court of Appeal, Fourth District, California.

June 8, 1955.

Action to recover purchase price of fertilizer delivered to defendant's ranch pursuant to an order signed by defendant, who had leased the ranch to his son, who had likewise purchased some fertilizer from the plaintiffs. From adverse judgment of the Superior Court, Kern County, Gordon L. Howden, J., the defendant appealed. The District Court of Appeal, Mussell, J., held that judgment imposing liability upon defendant for reasonable value of fertilizer delivered pursuant to the defendant's order was not against the law and the facts.

Judgment affirmed.

1. Sales 🔑342

In action to recover purchase price of fertilizer, which was delivered to defendant's ranch pursuant to an order signed by defendant in his own name and which was used by defendant's son, who had leased the ranch, judgment imposing liability upon defendant for reasonable value of fertilizer was not against the law and the facts. West's Ann.Civ.Code, § 1729(4).

2. Payment 🔑41(2)

In action to recover purchase price of fertilizer delivered to defendant's ranch pursuant to an order signed by defendant, who had leased the ranch to his son, who likewise had purchased some fertilizer from the plaintiffs, $800 payment made by son, who stated that he wanted to pay "that much on the bill" was properly applied to the purchase price of fertilizer bought by the son.

◆

Conron, Heard & James, Bakersfield, for appellant.

Mack, Bianco & King, Bakersfield, for respondents.

MUSSELL, Justice.

This action was brought to recover the purchase price of 60 tons of fertilizer and 20 tons of Ammo Shell sulphate delivered to defendant's ranch in Kern county.

[1] The trial court found that between January 21, 1953, and January 30, 1953, plaintiffs sold and delivered to defendant 40 tons of fertilizer of the reasonable value of $3,090; that it was not true that the defendant ordered an additional 20 tons of fertilizer and 20 tons of Ammo Shell sulphate; that said additional fertilizer and sulphate was ordered by John A. Wahl, defendant's son; that it was not true that the defendant paid $800 on his account but that the $800 alleged in the complaint to have been paid to his account by John Wahl was paid by his son on account of the fertilizer purchased by him. Judgment was entered in favor of plaintiffs for $3,090, interest and costs, and defendant appeals.

In 1950 appellant leased his ranch to his sons, Earl and John A. Wahl, who operated as partners under the name of "Wahl Bros.", and farmed the land in 1951 and 1952. At the end of the 1952 crop year the partnership was dissolved and the land was leased to and farmed solely by John A. Wahl.

In 1945 one Isaac Gunther became the owner of and thereafter and until January 5, 1953, conducted a farm machinery, seed and fertilizer sales and service business in Bakersfield under the name "Growers Supply Company". On January 5, 1953, Gunther sold his business to plaintiffs and until that time appellant was a customer of his and did business with him regularly. On December 8, 1952, appellant signed and delivered to Gunther a purchase order for 40 tons of fertilizer to be shipped to his son, John A. Wahl, at a later date. In this connection Gunther testified that this order was taken by him for appellant's account; that appellant then had an account with the Growers Supply Company and that he, Gunther, had no John A. Wahl account on his books; that he introduced appellant to E. E. Firestone, one of the purchasers of his business, and told Firestone that appellant was the man that "ordered the fertilizer order"; that appellant did not at that time inform Firestone that he was an agent of his son, John A. Wahl, or that it was to be charged to him.

The 40 tons of fertilizer ordered by appellant was delivered to the Wahl ranch some time in January, 1953. Between December 8, 1952, and January 21, 1953, John A. Wahl, dealing with Gunther and George A. Newcomer, the local representative of Sunland Industries, plaintiff's fertilizer supplier, obtained an analysis of his soil and ordered through said Newcomer 20 tons of fertilizer and 20 tons of Ammo Shell sulphate. Newcomer informed plaintiffs of these orders and they assumed the duty of filling them, and, under an arrangement with Sunland Industries, became entitled to the proceeds therefrom. Newcomer never dealt with appellant but dealt exclusively with John A. Wahl. These orders were charged to appellant's account and not to John A. Wahl. Newcomer arranged for the delivery of the 40 tons ordered by appellant pursuant to instructions from Gunther and for the second 40 tons on instructions of plaintiffs.

E. E. Firestone, one of the plaintiffs, testified that he was introduced to appellant by Gunther and at the time Gunther said that "Mr. Wahl was one of the good old accounts and that he had an order placed with the firm for fertilizer."; that he received a request from appellant to deliver the fertilizer specified in the order of December 8, 1952, shortly after he had taken over Gunther's business; that after the fertilizer was delivered he contacted appellant relative to the payment of the bill; that appellant came to the store quite frequently and talked to him about the account; that the first time appellant indicated that the account was not his was in December, 1953, at about the time this action was commenced; that the first time he contacted appellant about the payment of the account appellant stated to him that he had applied for a crop mortgage, which, when it came through, was not sufficient and that it would be some time before he could pay the fertilizer account; that he would pay it as soon as he could but he did not know how long it would be; that on later occasions appellant made similar statements about paying the bill and stated that he would pay it when he had a chance; that appellant offered to sell his home to Firestone and stated that if Firestone was interested in the house, the bill could apply on it; that on May 13, 1953, he received a check for $800 from John A. Wahl bearing the notation to apply "on acct. of fert."; that John A. Wahl told him that he wanted to pay that much on the bill; that he credited this amount to the account which is the basis of this action.

Appellant first contends that the judgment of the trial court imposing liability upon appellant for the reasonable value of the 40 tons of fertilizer delivered to John A. Wahl pursuant to the purchase order signed by appellant is against both the law and the facts. We are not in accord with this contention. The uncontradicted evidence is that appellant purchased 40 tons of fertilizer from the Growers Supply Company and signed a purchase order therefor. Its conditions were performed by the delivery of the merchandise, whereupon appellant became liable for the reasonable value thereof. Jules Levy & Bro. v. A. Mautz & Co., 16 Cal.App. 666, 669, 117 P. 936; Dickerman v. Ohashi Importing Co., 63 Cal.App. 101, 106–107, 218 P. 458; Civil Code, Section 1729, Subd. 4. It was stipulated by the parties that the reasonable value of the fertilizer delivered was the sum fixed by the trial court and there was no issue as to the amount. The 40 tons of fertilizer involved was delivered to appellant's ranch and used by his son. However, appellant signed the order in his own name and it does not appear from the record that appellant or Gunther intended to charge appellant's son therefor. Appellant then had an account with Growers Supply Company and Gunther was dealing with appellant, not his son. There is substantial evidence that the parties did not intend to hold John A. Wahl responsible for the purchase.

As was said in London v. Zachary, 92 Cal.App.2d 654, 657, 207 P.2d 1067, 1069:

> "Assuming that appellant did act as an agent he is liable unless it is made to appear on the face of the instrument that the parties intended to bind only the principal and not the agent. Patterson v. John P. Mills organization, 203 Cal. 419, 421, 264 P. 759; Otis Elevator Co. v. Berry, 28 Cal.App.2d 430, 432, 82 P.2d 704. If an agent who signs an agreement in his own name would avoid personal liability he must on the writing itself indicate his intention to bind the principal only."

In Southern Pacific Co. v. Grangers' Business Ass'n, 115 Cal.App. 256, 259, 1 P.2d 477, 478, the court said:

> " 'The rule has been long and continuously settled that an agent who signs his own name instead of that of the principal when he intends to bind the latter, becomes himself liable, the contract being considered his own. This is true where he * * * is known to be or avowedly acts as such * * *. No person in making a contract is considered to be the agent of another, unless he stipulates for his principal by name, stating his agency in the instrument which he signs. To exclude the personal liability of an agent, who signs his own name, an intention to bind the principal must appear upon the face of the instrument for although parol evidence is admissible to show that the parties also intended the principal to be bound, it is not admissible to show that they intended the agent not to be bound.' 1 Cal.Jur. 819. 'To exclude the personal liability of an agent who signs a contract in his own name, the capacity in which he signs must appear upon the face of the instrument. If, upon the face of the instrument, the agent signs his own name only, without referring to any principal, then he will be held bound personally although he was known to be or avowedly acted as agent.' " See also Otis Elevator Co. v. Berry, 28 Cal.App.2d 430, 432, 82 P.2d 704, to the same effect.

[2] Appellant contends that the court erred in applying the $800 paid by John A. Wahl to the purchase price of the fertilizer bought by the said John A. Wahl. The evidence is that John A. Wahl was paying on the account without specifying whether it was his own or that of his father, and stated to Firestone that he wanted to pay "that much on the bill". It may be inferred that he intended to pay for the merchandise which he, John A. Wahl, had ordered. Under the circumstances shown by the record herein we see no prejudicial error in the allocation of this payment as made by the trial court.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

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133 Cal.App.2d 519

COUNTY OF SAN DIEGO, a political subdivision of the State of California, Petitioner,

v.

Frank A. GIBSON, as Chairman of the Board of Supervisors of the County of San Diego, Respondent,

The San Diego County Hospital Medical Research Foundation, a California Corporation, Real Party in Interest.

Civ. 5141.

District Court of Appeal, Fourth District, California.

June 9, 1955.

Proceeding in mandamus to compel chairman of county board of supervisors to execute a contract for purpose of securing certain medical and teaching services in county hospital. The District Court of Appeal, Barnard, P. J., held that contract between county board of supervisors and charitable corporation, comprised of members of county medical association, whereby corporation is to provide medical and teaching services in county hospital, was within power of county as defined in statute providing for medical care and treatment of indigent sick and dependent poor.

Writ issued.

1. Hospitals ⚷6

Contract between county board of supervisors and charitable corporation, comprised of members of county medical association, whereby corporation was to provide medical and teaching services in county hospital, was within powers of county as defined in statute providing for medical care and treatment of indigent sick or dependent poor. Welfare and Institutions Code, §§ 202, 2500; West's Ann.Corporations Code § 9200.

2. Officers ⚷11.1

Contract between county board of supervisors and charitable corporation, comprised of members of county medical association, whereby corporation was to provide medical and teaching services in county hospital, did not violate civil service provision of county charter. Welfare and Institutions Code, § 2500.

3. Physicians and Surgeons ⚷4

Contract between county board of supervisors and charitable corporation, comprised of members of county medical association, whereby corporation was to provide medical and teaching services in county hospital, did not provide for corporate practice of medicine by corporation. West's Ann.Bus. & Prof.Code, § 2008; Welfare and Institutions Code, § 2500.

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James Don Keller, Dist. Atty., Joseph B. Harvey, Deputy Dist. Atty., San Diego, for petitioner.

Robert E. Andreen, San Diego, for respondent.

Olney R. Thorn, Byron F. White, San Diego, for real party in interest.

BARNARD, Presiding Justice.

This is a proceeding in mandamus to compel the respondent, as chairman of the board of supervisors, to execute a contract for the purpose of securing certain medical and teaching services in the county hospital. There is no dispute as to the facts and the issuance of a writ is opposed solely on the ground that this contract cannot for several reasons, be legally made.

Briefly stated, the following facts appear in the petition. The petitioner maintains and operates a county general hospital, as required by Section 2500 of the Welfare and Institutions Code. The board of supervisors, herein referred to as the board, has determined that it is necessary to operate this hospital as a teaching hospital in order to adequately staff the institution, to maintain a proper standard of medical care, and to adequately care for persons lawfully admissible to the hospital. There are no medical schools in the area from which a staff of instructors might be drawn. Medical specialists engaged in private practice have heretofore, on a voluntary basis, been used to provide training and teaching facilities to internes, nurses, technicians, and other employees of the hospital; to provide research and library facilities which would otherwise be unavailable to the county, all of which are necessary to the operation of the hospital as a teaching hospital in order to attract qualified internes, residents, nurses and other personnel; to render medical care and services to patients in the hospital; and to supervise the medical care and services given to the patients by the hospital employees. Such medical care and supervision is highly skilled professional work, and is rendered by specialists of long experience in private practice. The members of this volunteer medical staff comprise approximately ¾ths of the members of the San Diego County Medical Society, an organization composed of all the doctors practicing in the San Diego area.

The members of this volunteer medical staff are unwilling to become employees of the county, and have informed the board that they are no longer willing to render such teaching services, or to render medical services to patients lawfully admitted to this hospital, unless compensation for such services is paid by the county. They have also informed the board that such compensation is desired solely for the purpose of using the sums so realized in order to secure, for benevolent and charitable purposes, proper medical treatment and facilities for the indigent sick of the county; to foster and promote the latest medical techniques and treatment for the benefit of said indigent sick; to advance the knowledge and practice of medicine through educational and research programs for the benefit of the indigent sick and the general public; and to secure the services of graduates of medical schools and licensed physicians in the treatment of the indigent sick through interne and residenceship programs at this hospital. For the purpose of receiving and administering said compensation for these purposes the members of the volunteer staff have formed a nonprofit charitable corporation under the provisions of Section 9200 of the Corporations Code. This corporation is named the San Diego County Hospital Medical Research Foundation, and will be referred to as the Foundation. This Foundation has been granted exemption from franchise taxes and from contribution deductions, as a charitable corporation, by the State Franchise Tax Board, under the provisions of the Revenue and Taxation Code.

In order to secure for this hospital the services of a large and experienced staff of instructors and medical practitioners at a cost which will involve no curtailment of medical services, to secure for this hospital the latest developments of medical research, and to secure the other benefits derived from a teaching hospital, the board has authorized the negotiation of a contract with said Foundation and, by resolution duly adopted, has approved the contract in question and directed the respondent as chairman of the said board to sign and execute it on behalf of the county of San Diego. The respondent, as chairman of said board, having refused to sign said contract, the board directed the institution of this action to compel him to sign the same.

A copy of the proposed contract is attached to the petition. In brief, it provides that it shall continue in force for one year. The Foundation agrees to provide an adequate number of qualified instructors from its physician members and to instruct the residents and internes at the hospital in the latest methods and techniques in the treatment of the sick, and to teach and instruct the student nurses in training at said hospital. It also agrees that its members will, in addition, furnish medical care and service to patients in the hospital, including the supervision of such medical and surgical care by the residents and internes of the hospital, and including both in-patients and out-patients. The county agrees to pay to the Foundation a stated fee for these teaching services for this year. It also agrees to pay to the Foundation the sum of $2.50 per day of hospital care or $2.50 per clinic visit for the supervision and direction of the care of each patient, subject to the limitation that no payment is to be made for services in caring for persons who are unable to pay for their medical care without causing them great hardship, and who do not have relatives legally responsible for the payment of the cost of such care; and subject to the further limitation that when a physician member of the Foundation performs services for a patient other than one coming within the first limitation, the county shall make, in addition to the per diem rate, a payment in accordance with the schedule of fees of the California Physicians Service, which schedule is attached to the contract. The Foundation further agrees to reimburse the county for any expenses incurred in determining the charges which shall accrue under this contract.

[1] It is first contended that the petitioner is prohibited by Section 202 of the Welfare and Institutions Code from entering into this contract for the care and treatment of the indigent sick or dependent poor. That section prohibits the board from contracting for the care of such persons except under certain circumstances.

One of these exceptions applies to cases "(2) which require treatment or the use of facilities not immediately available in the county hospital." It further provides that in such a case "the board may secure for the indigent sick, and other persons admissible to the county hospital, at an agreed rate, hospital service or any portion thereof from any public or private hospital, * * * or other suitable facility * * *".

The contract here in question rather clearly appears to be one between the board and "a suitable facility" for the purpose of securing hospital service or a portion thereof, and involving treatment or the use of facilities which would not otherwise be immediately available in this county hospital. The services involved are reasonably necessary both in permitting the hospital to function as a teaching institution and to enable the hospital to render to the persons lawfully admitted thereto the necessary treatment and care and the facilities required for that purpose. We therefore hold that this contract is one within the powers of the county, as defined in Section 202 of the Welfare and Institutions Code. County of Los Angeles v. Ford, 121 Cal. App.2d 407, 263 P.2d 638.

[2] It is next contended that this contract violates Article XVII of the county charter. It is argued that it is therein provided that all classified positions must be filled under the Civil Service regulations, and that the services here in question are classified positions since they are not included in the list of unclassified positions.

The Civil Service provisions of this charter list certain positions as Unclassified Service, and provide that all positions not specifically included therein shall constitute Classified Service to which the Civil Service provisions shall apply. It is further provided, however, that in the event of the creation of a new position or in case of a vacancy in any position "requiring peculiar and exceptional qualifications of a scientific, professional or expert character", and upon satisfactory evidence that competitive examinations to qualify applicants for said position are impractical, the requirement for competitive examinations may be waived.

The contention thus made is sufficiently answered in the case of County of Los Angeles v. Ford, 121 Cal.App.2d 407, 263 P.2d 638, and the cases therein cited. That there are situations in which services may be obtained outside of Civil Service was recognized in Stockburger v. Riley, 21 Cal. App.2d 165, 68 P.2d 741, and State Compensation Ins. Fund v. Riley, 9 Cal.2d 126, 69 P.2d 985, 111 A.L.R. 1503; and was confirmed in City & County of San Francisco v. Boyd, 17 Cal.2d 606, 110 P.2d 1036 and Kennedy v. Ross, 28 Cal.2d 569, 170 P.2d 904. This is a sitution of that character which was sufficiently provided for in this charter provision to the effect that the Civil Service provisions should not apply to any position requiring exceptional qualifications of a scientific and professional character, where satisfactory evidence discloses that competitive examinations to qualify applicants are impracticable. The members of the Foundation, whose services are in question, are skilled professional men engaged in the practice of a highly technical profession and they are not to become employees of the county, in any real and practical sense, within the meaning of the Civil Service provisions of the charter. These provisions were not intended to cover or apply to such services as are here in question, and we find nothing therein which would justify a court in holding that this proposed contract violates those provisions or would be illegal because thereof.

[3] Finally, it is contended that this contract provides for the corporate practice of medicine by the Foundation, citing Section 2008 of the Business and Professions Code and People ex rel. State Board of Medical Examiners v. Pacific Health Corporation, 12 Cal.2d 156, 82 P.2d 429, 119 A.L.R. 1284. There is nothing in Section 2008 which prohibits this contract, and the facts in the instant case meet all of the requirements laid down in the Pacific Health Corporation case. Under established principles it cannot be held that this contract provides for the corporate practice of medicine by the Foundation.

County of Los Angeles v. Ford, 121 Cal. App.2d 407, 263 P.2d 638; Complete Serv. Bur. v. San Diego Med. Soc., 43 Cal.2d 201, 272 P.2d 497.

Let the peremptory writ issue as prayed for.

GRIFFIN and MUSSELL, JJ., concur.

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133 Cal.App.2d 550

Dorr STUART and Letty Stuart, husband and wife, Plaintiffs and Cross-Defendants, Appellants,

v.

Melvin Lawrence HARPER and Marjorie Harper, Defendants and Cross-Complainants, Respondents.

Civ. 20781.

District Court of Appeal, Second District, Division 1, California.

June 13, 1955.

Hearing Denied Aug. 11, 1955.

Action for personal injuries and property damages arising out of automobile collision between plaintiffs' automobile, which had been halfway turned around after failing to climb hill, and defendants' automobile which came over crest of hill. Defendants filed cross-complaint. The Superior Court of Los Angeles County, Alfred E. Paonessa, J., entered verdict and judgment in favor of defendants and plaintiffs appealed. The District Court of Appeal, Doran, J., held inclusion in instruction of statute prohibiting turning of automobile in place where such vehicle could not be observed by vehicles approaching in either direction within two hundred feet was not prejudicial error where it appeared from the evidence that collision occurred very close to crest of hill.

Judgment affirmed.

1. Appeal and Error ⚷1056(6)

In action for personal injuries and for property damages arising out of automobile collision, where entire notes of investigating officer were read to jury, and where the officer admitted that part of the notes were somewhat lighter in appearance, but that they had been written with same pencil, and where there was other evidence from which plaintiffs could be found at fault, plaintiffs sustained no prejudicial harm from trial court's exclusion of officer's notes, which plaintiffs sought to have admitted as impeaching evidence.

2. Appeal and Error ⚷1064(1)

In action for personal injuries and property damages arising out of automobile collision between plaintiffs' automobile which had been halfway turned around after failing to climb hill, and defendants' automobile which came over crest of hill, trial court's inclusion in its instructions of statute prohibiting turning around of automobile in place where such vehicle could not be observed by vehicles approaching in either direction within two hundred feet was not prejudicial error, where it appeared from evidence that collision occurred very close to crest of hill. Vehicle Code §§ 525(c), 542.

3. Appeal and Error ⚷1064(1)

In action for personal injuries and property damages arising out of automobile collision between plaintiffs' automobile which had been halfway turned around after failing to climb hill, and defendants' automobile which came over crest of hill, where trial court gave adequate instructions as to negligence, contributory negligence and burden of proof, trial court's instruction that each party was entitled to presumption of law that every person takes ordinary care of his own concerns and that he obeys the laws, which was so worded to benefit both parties, could not be deemed prejudicial.

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William G. Junge, Hunter & Liljestrom, Los Angeles, for appellants.

Joseph C. Radzik, Los Angeles, Marlin H. Shirley, Pomona, for respondents.

DORAN, Justice.

This action for personal injuries and property damage arose out of an automobile collision which occurred on the westerly slope of the so-called Kellogg Hill between Pomona and Los Angeles, on February 10, 1953, at about 11:30 p. m. Mr. and Mrs. Stuart filed the original complaint; thereafter a cross-complaint was filed by Mr. and Mrs. Harper. There was a jury trial which resulted in a verdict and judgment in favor of the Harpers and against the Stuarts in the sum of $7,700.00, from which the Stuarts now appeal.

As stated in appellants' brief, "Respondents (Harpers) were traveling from Pomona to Los Angeles. Westbound traffic goes over the crest of the hill, then goes on down to another area, then comes to a rise, and then goes down a second hill. * * * At the place of the accident the highway had a center divided line area and two westbound lanes separated by a single line. According to Mr. Harper's testimony, at the time of the collision Appellant's car was partly in both of the westbound lanes at an angle, and the lefthand side of Respondent's car came in contact with the lefthand side of Appellant's side. When Mr. Harper first observed the Stuart automobile it was not moving."

The respondents' version of the accident is that the Stuarts had been eastbound "and were going uphill on Kellogg Hill when they began having mechanical trouble with their car. * * * then the Stuarts being unable to make it up the hill, coasted backwards making a semi-circle in an effort to turn around and go back to Los Angeles. In making this maneuver, they were in a position where they were headed in a general southwesterly direction at about a 30 or 45 degree angle with the traffic lanes with their car blocking the westbound traffic lane next to the center dividing strip at the moment the Harper's westbound automobile came over the crest of the hill in this same traffic lane, and after its brakes were applied, collided with the left rear (principally on the side) of the Stuart car with the right front of their own car. * * * The U-turn made by the Stuart automobile was made within 200 feet of the crest of the second hill and the crest did obscure visibility of westbound vehicles. Further, the U-turn was made across a dividing strip in violation of Vehicle Code, Section 525(c)".

Appellants present three issues, the first of which is that "It was error for the trial court to refuse appellants' request to introduce Deputy Sheriff Jessup's notebook into evidence". It is appellants' argument that the question of liability turned on the question "Did Appellant turn around at the intersection of Via Verde or did he back his car across the center dividing strip and attempt to proceed westerly in that manner?"; and that the cross-complainants' case depended largely upon alleged admissions concerning this matter made by Stuart to the officers.

[1] Officer Jessup was questioned concerning notes made at the time, and the fact (admitted by Jessup) that part of the notations "were somewhat lighter in appearance", which might indicate that the notes had been "doctored" after the event. Appellants contend that the notebook should have been admitted as impeaching evidence. In this same connection it appears that Mr. Stuart had been acquitted in a criminal trial at West Covina of a charge growing out of the same occurrence, for which reason appellants argue that the officers "were out to 'get' Mr. Stuart because they had been rebuffed by the trial court's decision", and that Officer McArthur had stated, "as far as I am concerned, you are guilty, and you will take my advice and stay out of Pomona, because we have got your number". This was denied by the officer.

The trial court refused to admit in evidence the officer's notes in reference to the accident, saying: "You have read the entire thing in evidence". Appellants now argue that "If the trial court had permitted into evidence Officer Jessup's notes, and if upon examining them the jury had come to the conclusion that because of the dissimilarity between the light and dark penciled notes and because of the variation between his testimony about the sequence of securing the information and the way it was written down in the book, that Officer Jessup had made them at a different time, contrary to his testimony on the stand, the jury would have been justified in disregarding his testimony regarding the alleged admissions of Mr. Stuart". A part of these notes read, "Fuel failure, and let the vehicle roll backwards down the hill, then turned around by coasting". It was this latter notation, says appellants' brief, "which was lighter in appearance than the balance of the notes, as though written by a different pencil".

There is no merit in this contention. As stated by the trial court, the entire notes made by the officer were read into evidence, and Officer Jessup had admitted that a part thereof appeared "somewhat lighter in appearance", for which the officer could give no reason but stated that the entries were made with the same pencil. Appellants' assumption that the jury would have believed the Stuarts' testimony but for this refusal to admit the officer's notes in evidence, is not borne out by the record. As respondents' brief points out, "the case turned on several salient points long before Officer Jessup took the stand". Skidmark photographs, pictures showing damage to the automobiles, oral testimony and other evidence was before the jury, from which a reasonable conclusion could be reached that Mr. Stuart was in fault. In view of these facts, appellants can have sustained no prejudice from the trial court's exclusion of the officer's notes.

[2] Appellants' contention that "It was error for the trial court to give California Vehicle Code, Section 542", which provides that "No vehicle shall be turned so as to proceed in the opposite direction upon any curve, or upon the approach to, or near the crest of, a grade, where such vehicle cannot be seen by the driver of any other vehicle approaching from either direction within 200 feet", is likewise untenable. The respondents' brief correctly points out that there was a conflict of evidence as to the exact point where Mr. Stuart attempted to turn around, that "The reason the officers could not specify the point of impact in relation to the second crest is because the accident occurred on an open highway at night and there were no signposts or other artificial objects in the immediate vicinity". From the photographs and other evidence disclosed by the record, the jury could and evidently did believe that the accident occurred "very close to the crest—close enough to be dangerous—and that the crest did obstruct the visibility of westbound drivers". The entire question resolved itself to one of fact, and the verdict of the jury is not without support. The giving of the instruction in question cannot be deemed prejudicial error.

[3] It is further contended that "It was error for the trial court to instruct the jury that each party was entitled to the presumption of law that every person takes ordinary care of his own concerns and that he obeys the law". As respondents state, even "Assuming that the presumption instruction was academically erroneous, it would require a healthy imagination to perceive any prejudicial effect". The judge had correctly instructed the jury that the first issue to be decided was "Was either party negligent?" As already indicated, there were two widely varying versions and theories as to the conduct, movement and position of the Stuart vehicle, and the instruction in question was so worded as to benefit either or both parties. There were other adequate instructions as to negligence, contributory negligence, burden of proof, etc., and in view of the entire charge, the instruction given cannot be deemed prejudicial.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

133 Cal.App.2d 512

Earle J. CHURCH and Irene H. Church, his wife, Plaintiffs and Appellants,

v.

Julia Ann GOLDSTON, Hardy Howard Goldston, as administrator of the estate of Julia Ann Goldston, deceased, substituted as Defendant and Respondent.

Civ. 4919.

District Court of Appeal, Fourth District, California.

June 9, 1955.

Action by farmer against neighbor to establish, by prescription, easement twenty feet in width over neighbor's property and to prevent erection and maintenance of fence by neighbor on neighbor's property line. The Superior Court, Fresno County, Arthur C. Shepard, J., entered judgment granting sixteen foot easement on one portion of neighbor's land and twelve foot easement on another portion, and permission to neighbor to maintain fence provided that intermittant gates be built to permit access by farmer to easement, and farmer appealed. The District Court of Appeal, Griffin, J., held that finding of trial court limiting width of easement to sixteen feet and twelve respectively was supported by the evidence, and that there was no indication that there was any substantial change in the easement for purpose for which it was acquired or that plaintiff would suffer any particular or unusual hardship by reason of fence, therefore fencing of land with gate privileges was authorized.

Judgment modified and affirmed as modified.

1. Easements ⟹**61(9)**

In action by farmer against neighbor to establish, by prescription, easement twenty feet in width over defendant's property and to prevent erection and maintenance of fence by neighbor on neighbor's property line, finding limiting width of easement to sixteen and twelve feet was supported by evidence.

2. Easements ⟹**58(3)**

Where neighbor constructed fence enclosing easement of roadway farmer had over neighbor's land, and evidence did not indicate that there was any substantial change in easement for purpose of getting machinery to fields or that farmer would suffer any particular or unusual hardship by reason of fence, fencing of land with gate privileges was authorized.

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Lawrence W. Kennedy, Matt Goldstein, Fresno, for appellants.

Dwelle & Dwelle, Leroy J. Reinhardt, Fresno, for respondent.

GRIFFIN, Justice.

Plaintiffs brought this action to establish, by prescription, an easement 20 feet in width over and upon defendant's property, about five miles southeast of Kerman, and to prevent the erection and maintenance of a fence by defendant on defendant's property line. The judgment resulted in a grant of a 16-foot easement on the west side and 12-foot on the south side of this land, and the permission to maintain a fence, as indicated, but with a provision that intermittent gates be built to permit access by plaintiffs to said easement. Plaintiffs appeal from that portion of the judgment locating the easement, decreasing the width claimed, and permitting the establishment of the fence as described, on the theory that plaintiffs were, by said judgment, restricted in their enjoyment of the former easement.

Plaintiffs own considerable agricultural acreage which surrounds the west and south sides of defendant's agricultural acreage. Since 1919 fences have existed on defendant's land approximately 30 feet east of the west boundary and 32 feet north of the south boundary of defendant's property. In 1946, defendant purchased this property, and in March, 1953, moved the fence over to the property line and plowed up the roadway along the fence lines here involved, which were used by plaintiffs for the purpose of transporting machinery, etc., and in caring for and removing their agricultural products.

A number of witnesses testified with respect to the use of the easement over the years, as well as the extent, the size, and location of it. One witness testified that the distance from the old fence line to the property line was about 29 feet, and the leveled portion of the roadway running north and south was, at the time of trial, approximately 20 feet wide and the traveled portion was "12 or 16 ft. wide or more", but he was not sure because he did not measure it; that the width of the dirt road on the south portion of defendant's property "might have been 10 feet approximately". Another witness testified he farmed defendant's property from 1935 to 1947; that there was a private roadway along the west side of defendant's property about 30 feet wide on the west side of the old fence line "just a car trail" through the property; that later in 1937, the lessees on the Church property, thinking it was on the Church property, graded it down a little, as indicated in a photograph (Exhibit 2); and that after the grading the two roads compared favorably. Other witnesses placed the width of the west boundary roadway at 28 to 30 feet, and the south roadway at 16 to 20 feet in the year 1950. Photographs in evidence appear to indicate that the present traveled portion of the claimed easement on the west side of defendant's property, in many places, would not exceed 16 feet in width and 12 feet on the south side. It is plaintiffs' claim that at times large farm machinery required a greater width.

[1, 2] It cannot be said that the finding of the trial court limiting the width of the easement to 16 feet and 12 feet respectively, is without evidentiary support. It does not appear to us that the removal of the former fence line over to defendant's property line would materially restrict plaintiffs' enjoyment of the former easement, as claimed. The court provided in the order that a sufficient number of access gates be maintained by defendant to allow plaintiffs the customary use of the easement. The evidence shows that during a portion of the period in which this prescriptive right was acquired, the surrounding territory was open agricultural land and the easement was mainly used for the purpose of transporting farm machinery from one field to another. The record does not indicate that there was any substantial change in the easement, for the purpose for which it was acquired, or that plaintiffs would suffer any particular or unusual hardship by reason of this limitation, particularly where plaintiffs' own land was and is available for their road purposes. Accordingly, the fencing of the land with gate privileges was authorized. O'Banion v. Borba, 32 Cal.2d 145, 195 P.2d 10; 28 C.J.S., Easements, § 98, p. 780; 17 Am.Jur. p. 1011, sec. 120 et seq.

Some argument is made that by the court's order a dead-end or cul-de-sac was created with reference to ingress and egress to and from plaintiffs' property near the southeast corner of defendant's ranch. The merits of this claim are not clear from the record before us. Counsel for defendant have seen fit to submit the case upon plaintiffs' opening brief and have not aided us in answering plaintiffs' claims on this appeal. However, the conclusion reached by our research is that the judgment intended that plaintiffs' claimed easement at this point was to be 12 feet wide and of sufficient width and depth to furnish suitable access to the road that crosses over plaintiffs' land at that point. Any other construction would be unreasonable and would defeat the purpose of the easement sought. If it is otherwise construed by plaintiffs or defendant the judgment should be modified accordingly. The judgment also recites that among the gates ordered erected one was to be placed at the "*northeast* corner of said 80 acres". This is apparently an error in description as the undisputed evidence shows it should have been the "*northwest* corner of said 80 acres".

The judgment is modified accordingly, and affirmed as modified. Defendant to recover costs on appeal.

BARNARD, P. J., and MUSSELL, J., concur.

133 Cal.App.2d 515

In the Matter of Tommy Lewis WILLIAMS, Person under the age of 21 years.

Roy F. LEWIS and M. Viola Lewis, Appellants,

v.

June WILLIAMS, Respondent.

Civ. 4959.

District Court of Appeal, Fourth District, California.

June 9, 1955.

Proceeding on petition to have child declared free from custody and control of parents. The Superior Court, Kern County, W. L. Bradshaw, J., denied petition, and petitioners appealed. The District Court of Appeal, Mussell, J., held, inter alia, that where trial court, in proceeding on petition to have child declared free from custody and control of parents, determined that mother had not abandoned child, failure to make an order on issue of abandonment by father was not error.

Order affirmed.

1. Infants ⚿16.8

In proceeding on petition to have child declared free from custody and control of parents, evidence supported determination that mother had not had clear intent to abandon child. Welfare and Institutions Code, § 701(a).

2. Infants ⚿16

Where, although child had been made ward of court as one in need of control over whom no parent or guardian was exercising control, mother had had no clear intent to abandon child, and it appeared that mother was unable financially to care for child during part of time involved and that her request to obtain possession of child had been denied, petitioners were not entitled to have child declared free of parents' custody under statute providing that child may be declared free from custody from cruel or neglectful parents if child has been a ward of court and parents deprived of his custody for cruel treatment or neglect for one year previous to filing of petition. Welfare and Institutions Code, § 701(b).

3. Infants ⚿16.12

Where trial court, in proceeding on petition to have child declared free from custody and control of parents, determined that mother had not abandoned child, failure to make an order on issue of abandonment by father was not error.

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T. R. Claflin, Bakersfield, for appellants.

Morris B. Chain, Bakersfield, for respondent.

MUSSELL, Justice.

On May 29, 1953, Roy F. and M. Viola Lewis filed a petition in the Juvenile Court of Kern county to have the child here involved declared free from the custody and control of his parents. A citation was issued requiring the parents to show cause why the child should not be declared free from their custody. The citation was published and personally served on the mother. A hearing was had on the order to show cause following which, on March 3, 1954, the court entered its order denying the petition on the ground that there was insufficient evidence of clear intent on the part of the mother to abandon said minor. Petitioners appeal, contending that the court failed to take into account subdivision (b) of section 701 of the Welfare and Institutions Code and that it made no order on the issue of the abandonment by the father.

June May Harmon, aged 17 years, married Dudley Gabriel Williams, a native of South Africa, on April 28, 1948, and Tommy Lewis Williams, the child here involved, was born in Ocean Beach, California, on June 18, 1949. His father was taken into custody by the Immigration Officers and deported to South Africa some time in September, 1950. He has not returned to the United States and his residence is unknown.

On June 30, 1951, the mother, June May Williams, left the child with Mrs. Mary Russell, a friend of the family, while she went to Oakland, California, to seek employment. She gave Mrs. Russell $40 to take care of the baby until she could get a job. At the hearing herein on the order to show cause she testified that she worked two weeks in Oakland as a waitress and then returned to Bakersfield on the advice of her brother that he would help her get a place for the child; that when she called for the boy, Mrs. Russell told her that the County Welfare Department had taken him and that she could never get him back, that she was an unfit mother and would never get the baby back again. She testified further that about a week later she went to Atlanta, Georgia, where she stayed about four months; that while in Atlanta she was arrested for the theft of a ring and spent some time in jail; that she then went to Arkansas to live with her aunt and uncle on a farm, stayed there six or seven months and then came back to California; that before she returned to California she tried to get her baby back but the Welfare Department would not let her have him; that when she returned to California she visited the child two or three times a month in the home of petitioners, Roy and Viola Lewis, until December, 1952, when they moved from Kern county to Burbank, California; that she did not see her child again until August, 1953; that during her visits to the Lewis home, where the child had been placed by the Welfare Department, she discussed paying for his care and was informed by Mr. and Mrs. Lewis that they did not need her money; that she obtained a divorce from the father of the child, married one Jack Brasher in June, 1953, and at the time of the hearing herein she and her husband were living with her father.

There was evidence that the child was made a ward of the court in September, 1951, on the report and recommendation of the Probation Department that the child was in need of control and that there was then no parent or guardian exercising control over him.

Appellants' first contention is that the court failed to take into account subdivision (b) of section 701 of the Welfare and Institutions Code. Section 701 of said code, subdivisions (a) and (b), reads as follows:

> "(a) [*Minor left in another's custody.*] Who has been left by either or both of his parents in the care and custody of another without any provision for his support, or without communication from either or both of his parents, for the period of one year with the intent on the part of such parent or parents to abandon such person. Such failure to provide, or such failure to communicate for the period of one year, shall be presumptive evidence of the intent to abandon. Such person shall be deemed and called a person abandoned by the parent or parents abandoning him.
>
> "(b) *Who has been cruelly treated or neglected* by either or both of his parents, if such person has been a ward of the juvenile court, and such parent or parents deprived of his custody because of such cruel treatment or neglect, for the period of one year continuously immediately prior to the filing of a petition praying that he be declared free from the custody and control of such cruel or neglectful parent or parents."

[1] In In re Sanders, 88 Cal.App.2d 251, 254, 198 P.2d 523, this court held, in considering subdivision (a) of said section, that while said section provides that a failure to provide or failure to communicate for the period of one year, as provided in said section, is presumptive evidence of an attempt to abandon, this presumption may be overcome by opposing evidence and the question of whether an intent to abandon has existed for a period of one year is a question of fact for the trial court. In the instant case there was substantial evidence to support the trial court's determination that the evidence was insufficient to show a clear intent on the part of the mother of said child to abandon him, and its determination cannot be disturbed on appeal. Berniker v. Berniker, 30 Cal.2d 439, 444, 182 P.2d 557.

[2] Appellants' argument that the court failed to take into account subdivision (b) of said section is without merit. The report

of the Probation Officer indicates that the child was made a ward of the court on the filing of a petition under subdivision (b) of said section. However, there is substantial evidence to the effect that the mother was unable financially or otherwise to care for her child during part of the time involved and that her request to obtain possession of the child was denied by the Welfare Department.

[3] The contention of appellants that the court erred in not making an order on the issue of abandonment by the father is likewise without merit. It was held in In re Edwards, 208 Cal. 725, 735, 284 P. 916, that a minor having two parents is not an abandoned child when he is abandoned by one only of said parents.

The order is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

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133 Cal.App.2d 577

James W. GAULT, Plaintiff and Respondent,

v.

Allan C. FREITAS and Frank C. Freitas, Individually and as copartners, doing business under the firm name and style of Stockton Livestock Transportation, Defendants and Appellants.

Civ. 8574.

District Court of Appeal, Third District, California.

June 13, 1955.

Action for personal injuries sustained in a collision between a truck driven by plaintiff and a truck and trailer unit operated by one of defendants at a road intersection. From an order of the Superior Court, Stanislaus County, Sherrill Halbert, J., granting plaintiff a new trial after a jury's verdict for defendants, defendants appealed. The District Court of Appeal, Van Dyke, P. J., held that plaintiff's contributory negligence in failing to look to his right, from which such unit was approaching, while traversing 30 feet to intersection from point at which he looked to right without seeing any vehicle approaching within 100 feet from intersection, was not question of law, but fact question for jury.

Order affirmed.

Automobiles 🔑245(80)

Contributory negligence of driver of truck, colliding with truck and trailer unit at road intersection, in failing to look to his right, from which such unit was approaching, while traversing 30 feet to intersection from point at which he looked to right without seeing any vehicle approaching within 100 feet from intersection, was not question of law, but fact question for jury, which could find that truck driver could reasonably assume that he had right of way over truck and trailer unit and that driver thereof would observe truck before entering intersection and yield right of way to truck

C. Ray Robinson, by W. W. Gudmundson, Merced, for respondent.

Jones, Lane, Weaver & Daley, by Daniel Lane, Stockton, for appellants.

VAN DYKE, Presiding Justice.

This is an appeal from the order granting a new trial in a personal injury action. The grounds of the order were errors in law occurring at the trial and insufficiency of the evidence to sustain the jury's verdict in favor of the defendant. The sole question urged on appeal, however, is that plaintiff-respondent was guilty of contributory negligence as a matter of law. Appellants concede that their appeal is without merit if respondent's conduct was such as to leave the issue of contributory negligence to be solved by the jury as a question of fact.

The accident out of which this action arose occurred in Stanislaus County at the intersection of Eastin and Orestimba

Roads. The day was clear and dry, but considerable dust was being raised by trucks traveling on Eastin Road, which road was under construction. The respondent was driving a flatbed truck south on Eastin Road. A truck and trailer unit being operated by appellant Allan Freitas was proceeding east on Orestimba. Neither driver saw the other until an instant before the impact. It is conceded that the evidence would support a conclusion that Freitas was guilty of negligence which proximately caused the accident. However, appellants maintain that respondent was guilty of contributory negligence as a matter of law; that he failed to exercise any degree of care in looking for approaching traffic and drove blindly into the intersection. The record does not support this charge. Respondent testified that when he was within 30 feet of the intersection he was traveling at a speed of about 15 miles an hour; that at that point he looked to his right down Orestimba Road, but did not observe appellants' oncoming truck and trailer. He could see, he said, for approximately 100 feet west on Orestimba and no vehicle was within that distance of the intersection. Beyond that he said he could not see due to dust drifting from Eastin Road across Orestimba and obscuring his vision. Respondent testified he did not again look to his right before entering the intersection. From these facts it cannot be held as a matter of law that he was guilty of contributory negligence. Having made his observations when and as he did, it cannot be said as a matter of law that he was required to look again as he traversed the last 30 feet. He was not obligated to keep a constant watch to his right. Senegram v. Groobman, 30 Cal.App.2d 514, 515, 86 P.2d 859. The jury could find that it was reasonable for respondent to assume that he had right of way over the driver of any vehicle on Orestimba Road which was approaching the intersection through the dust cloud, and was more than 100 feet away when respondent was within 30 feet of that intersection; and that such driver would, before entering the intersection, observe his truck and yield the way to it. Fugelsang v. Steiner, 115 Cal.App. 167, 174, 1 P.2d 553. Whether or not under all the circumstances respondent was under a duty to again look to his right at some point closer to the intersection than 30 feet was a question of fact and not of law. Hill v. County of Fresno, 140 Cal.App. 272, 275–278, 35 P.2d 593; Mytinger v. Weir, 45 Cal.App.2d 698, 700–701, 115 P.2d 18. It follows that the trial court did not abuse its discretion in granting a new trial.

The order appealed from is affirmed.

PEEK and SCHOTTKY, JJ., concur.

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133 Cal.App.2d 447

LOS ALTOS SCHOOL DISTRICT OF SANTA CLARA COUNTY, a political subdivision of the State of California, Plaintiff and Respondent,

v.

H. S. WATSON, also known as Howard S. Watson; The President and Board of Trustees of Santa Clara College, a corporation; J. J. Mora; Los Altos Country Club Properties, Inc., a corporation; W. Lewis Stevens; Alice D. Stevens; John Doe, et al., Defendants and Appellants.

Civ. 16298.

District Court of Appeal, First District, Division 1, California.

June 7, 1955.

Rehearing Denied July 7, 1955.

Hearing Denied Aug. 3, 1955.

Condemnation proceeding instituted by school district. The Superior Court, County of Santa Clara, Thomas P. O'Donnell, J., entered final order of condemnation and the landowners appealed therefrom. The District Court of Appeal, Fred B. Wood, J., held that even if fact of receipt of reports by the school district from the County Planning Commission and from the State Department of Education was essential to support the final order of condemnation, recital in final order of condemnation that all acts required of plaintiff have been duly done and performed and that plaintiff was entitled to final judgment of condemnation would satisfy reviewing court, upon appeal on judgment roll only, that reports had been received.

Order appealed from affirmed.

1. Eminent Domain 🔑241, 262(1)

Final order of condemnation must be distinguished from final judgment rendered in condemnation proceeding, in that former is special order made after final judgment, and issue of sufficiency of findings to support judgment is not within purview of appeal from the final order. West's Ann. Code Civ.Proc. §§ 963, 1253.

2. Eminent Domain 🔑262(1)

Where notice of appeal from order which was final order of condemnation but which was entitled "Final Judgment of Condemnation" was timely as appeal from final order but was filed more than 60 days after entry of the judgment, issue of sufficiency of findings to support judgment was not within purview of appeal. West's Ann. Code Civ.Proc. §§ 963, 1253.

3. Eminent Domain 🔑191(2)

Statute providing that complaint in condemnation proceeding should contain statement of right of plaintiff does not require plaintiff to allege it is empowered by a valid resolution or any resolution of its board to proceed in condemnation, and complaint need only show legal right or authority of plaintiff to exercise the power of eminent domain. West's Ann.Code Civ. Proc. § 1244, subd. 3.

4. Eminent Domain 🔑193

Allegation of complaint in condemnation proceeding that taking was sought pursuant to provisions of title 7, part 3 of Code of Civil Procedure is, as against general demurrer, sufficient compliance with statute requiring statement of right of plaintiff in such an action. West's Ann. Code Civ.Proc. § 1244, subd. 3.

5. Eminent Domain 🔑191(1)

Complaint in condemnation proceeding need not allege that property is located in manner which will be most compatible with greatest public good and least private injury. West's Ann.Code Civ.Proc. §§ 1242, 1244, subd. 3.

6. Eminent Domain 🔑196

In a condemnation proceeding, landowner has burden of proof as to whether property is located in manner which will be most compatible with greatest good and least private injury, and in absence of evidence, action of school district in selecting a site must be presumed correct and lawful.

7. Eminent Domain 🔑191(2)

In condemnation proceeding, it was not necessary for school district to allege in complaint that it had received statutory reports from County Planning Commission and from State Department of Education or, if reports were adverse, that 30 days had elapsed since their receipt, and if landowners desired to raise issue containing such reports they should have attempted to do so by answer, if issue could be raised at all. West's Ann.Code Civ.Proc. § 1244, subd. 3; West's Ann. Education Code §§ 18403, 18404.

8. Eminent Domain 🔑169

Institution of eminent domain proceeding by school district is not conditioned upon obtaining of statutory reports from County Planning Commission and from State Department of Education, and such reports antedate only acquisition of title. West's Ann.Code Civ.Proc. § 1244, subd. 3; West's Ann. Education Code §§ 18403, 18404.

9. Eminent Domain 🔑320

School district cannot acquire title in eminent domain proceeding until after rendition of judgment determining right to condemn and fixing amount of compensation to be paid, and not until payments have been made and final order of condemnation has been filed in office of County Recorder. West's Ann.Code Civ.Proc. § 1253.

10. Eminent Domain 🔑262(1)

Even if fact of receipt of reports by school district from County Planning Commission and from State Department of

Education was essential to support final order of condemnation, recital in final order of condemnation that all acts required of plaintiff had been duly done and performed and that plaintiff was entitled to final judgment of condemnation would satisfy reviewing court, upon appeal on judgment roll only, that reports had been received. West's Ann. Education Code, §§ 18403, 18404.

11. Eminent Domain ⚿169, 259

Statute requiring County Planning Commission and State Department of Education to report to school district as to proposed acquisition of school site merely required those bodies to report and did not require investigation preliminary to report, and sufficiency of investigations, even if justiciable, would not be considered by reviewing court on appeal in absence of record appropriate for consideration of such question. West's Ann. Education Code, §§ 18403, 18404.

◆

Atkinson, Farasyn & London, Mountain View, for appellants.

Howard W. Campen, County Counsel of Santa Clara County, Wade H. Hover, Deputy County Counsel of Santa Clara County, San Jose, for respondent.

FRED B. WOOD, Justice.

[1, 2] In this proceeding in eminent domain the defendant has taken a timely appeal from the final order of condemnation as that term is used in section 1253 of the Code of Civil Procedure.

He is complaining of an asserted insufficiency of the findings of fact upon which the judgment which determined the right to condemn and fixed the amount of damages is based. Such a question is not within the purview of this appeal, particularly in view of the fact that the notice of appeal was filed more than 60 days after entry of the judgment.[1]

However, we will discuss the point defendant raises because it bears some relation to the final order of condemnation.

Defendant assigns as reversible error the failure of the trial court expressly to find on the question whether plaintiff had obtained reports from the county planning commission and the state department of education concerning the site and its acquisition, reports required by sections 18403 and 18404 of the Education Code.

Those sections declare that "before *acquiring title* to property for a new school site" the school district board shall advise the planning commission having jurisdiction (in this case, the county planning commission) and the state department of education of the proposed acquisition and "shall not *acquire title* to the property" until it has received the report of each or until 30 days after receipt of the report if the report does not favor the acquisition. (Emphasis added.)

Defendant contends the findings of fact are fatally defective because they are silent on the subject of these reports. There are several answers to this contention.

The findings were completely responsive to all of the issues framed by the complaint and the answer.

[3–7] The subject of these reports was not a matter which subdivision 3 of section 1244 of the Code of Civil Procedure requires a complaint in eminent domain to contain. A "statement of the right of the plaintiff" as used in section 1244 does not, for example, mean that plaintiff must allege it was empowered by a valid or any resolution of its board to proceed in condemnation. Central Pacific Ry. Co. v. Feldman, 152 Cal. 303, 308, 92 P. 849. It "has reference only to a statement of the legal right or authority of the plaintiff to exercise the power of eminent domain, and, as against a general demurrer, the complaint before us sufficiently complied with the mandate of the statute by alleging, in effect, that the taking was sought pursuant to the provisions of Title 7, Part 3, of the Code of Civil Procedure." Kern Co. Union High School Dist. v. McDonald, 180 Cal. 7, 10, 179 P. 180, 182. It is not necessary to plead compliance with section 1242 in respect to the location of the site; i. e., when the complaint and answer are silent, no issue is presented on the question whether or not the property is "located in the manner which will be most compatible with the greatest public good and the least private injury." If it becomes an issue the defendant has the burden of proof. In the absence of evidence, the act of the school district in selecting a site must be presumed correct and lawful. Montebello Unified School District of Los Angeles County v. Keay, 55 Cal.App.2d 839, 131 P.2d 384. Accordingly, we believe it is not necessary to allege in the complaint that the reports mentioned in sections 18403 and 18404 of the Education Code have been received and, if they are adverse, that 30 days have elapsed since their receipt. If a defendant desires to present an issue concerning such reports he should be required to do so by answer, which this defendant did not do.

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[1] The parties have failed to observe the distinction between the "judgment" and the "final order of condemnation", see San Francisco Unified School Dist. v. Hong Mow, 123 Cal.App.2d 668, 670, paragraphs [1] and [3], 267 P.2d 349. They discuss this as if it were an appeal from the final judgment instead of an appeal from a special order made after final judgment, as those terms are used in section 963 of the Code of Civil Procedure.

[8, 9] Moreover, we think a defendant could not properly raise such an issue at that stage of the proceeding, if at all. The institution of an eminent domain proceeding is not conditioned upon the obtaining of such reports. They antedate *acquisition of title* not the mere commencement or maintenance of a condemnation suit. The school district can not "acquire title" until after rendition of judgment determining the right to condemn and fixing the amount of compensation to be paid, and thereafter not until the "payments have been made" and the "final order of condemnation" has been "filed in the office of the Recorder of the county." Thereupon, "the property * * * shall vest in the plaintiff." Code Civ.Proc. § 1253; Russakov v. McCarthy Co., 206 Cal. 682, 687, 275 P. 808.

[10] Finally, if the fact of the receipt of the reports in question is a matter for determination in such a proceeding as this, a recital in the final order of condemnation that "all acts required of plaintiff have been duly done and performed, and that plaintiff is now entitled to a Final Judgment [order] of Condemnation" should satisfy all requirements, especially when, as here, the appeal is upon the judgment roll only. Also, it happens that the record before us has been augmented (upon the motion of the respondent) to include certain evidence introduced at the trial which demonstrates that the state department of education reported on June 9, 1953, and the county planning commission on June 19, 1953, each favorably to the acquisition. The trial started June 15th; verdict was rendered June 26th; findings were filed July 17th; judgment was entered July 20th; and the final order of condemnation was filed August 13, 1953.

[11] During oral argument counsel for appellant raised an additional question. He challenged the sufficiency of the investigations made by the county planning commission and the state department of education, respectively. This point is without merit. The statute merely requires these bodies to "report." It does not indicate what investigation, if any, either of them must make before formulating its report, a report which is merely advisory, not binding upon the local board. Even if the sufficiency or adequacy of those investigations were justiciable, defendant has not furnished the kind of record which is appropriate for the consideration of such a question upon appeal.

The order appealed from (the final order of condemnation, which bears the designation "Final Judgment of Condemnation" and was dated and filed August 13, 1953) is affirmed.

PETERS, P. J., and BRAY, J., concur.

133 Cal.App.2d 555

Dora ZEIDMAN, Plaintiff and Appellant,
v.
Margaret Hulsey ANTICOUNI, Defendant and Respondent.
Civ. 20842.

District Court of Appeal, Second District,
Division 1, California.
June 13, 1955.

Action for damages resulting from an automobile collision. The Superior Court, Los Angeles County, George A. Dockweiler, J., entered judgment for the defendant and the plaintiff appealed. The District Court of Appeal, Doran, J., held that an instruction that a presumption of due care applied to both plaintiff and defendant, was adequate and did not mislead jury to the prejudice of the plaintiff.

Judgment affirmed.

1. Appeal and Error 🔑1064(1)
Automobiles 🔑246(60)

In action for damages resulting from automobile accident, instruction that told jury a presumption of due care applied to both plaintiff and defendant, was adequate as a matter of fact and law and did not mislead jury to the prejudice of plaintiff.

2. Automobiles 🔑244(11, 35)

In action for damages as a result of collision at intersection between plaintiff's westbound automobile and defendant's southbound automobile, evidence regarding whether defendant entered intersection with right of way and whether defendant was proceeding at lawful rate of speed immediately prior to collision, was sufficient to sustain verdict for defendant.

◆

Berk & Bise, Jerry Berk, Los Angeles, for appellant.

King & Mussell, Stanley Mussell, Jr., San Bernardino, for respondent.

DORAN, Justice.

This is an appeal from the judgment. The action is for damages resulting from an automobile collision. The jury returned a verdict for defendant.

As recited in appellant's brief, "The auto collision in question occurred on February 20, 1952, at approximately 2:20 A.M., at the intersection of Washington Boulevard and Western Avenue, in the City of Los Angeles. Decedent Benjamin Zeidman, operating a Plymouth automobile, was proceeding in a general westerly direction along and upon Washington Boulevard, and the defendant, Margaret Hulsey Anticouni, operating a Ford station wagon, was proceeding in a southerly direction along and upon Western Avenue. That death of Benjamin Zeidman resulted from this collision, is admitted. The issues, in general, concern themselves with the negligence of the defendant, and the contributory negligence of the decedent, which issues, when refined, amounted to whether the defendant, and/or the decedent, entered the aforementioned intersection with the right of way; whether the defendant and/or decedent were proceeding at a lawful rate of speed at the time immediately prior to the collision. * * *."

"Plaintiff requested, among other instructions, the following, to wit:

" 'The presumption is that every man obeys the laws, and the presumption in this case is that plaintiff's husband, Benjamin Zeidman, was travelling at a lawful rate of speed, and entered the intersection while the signals controlling westbound traffic on Washington Boulevard were "green" or "go". This presumption is in itself a species of evidence, and it shall prevail and control your deliberations until, and unless it is overcome by satisfactory evidence.'

"The Court amended said requested instruction to read:

" 'The presumption is that every person obeys the law with respect to the traffic signals. This presumption is in itself a species of evidence, and it shall prevail and control your deliberations until, and unless it is overcome by satisfactory evidence.'

"There was no other instruction, covering the point as to the presumption of due care by the decedent, given by the Court."

Appellant argues, "This instruction was not given. Had it been given, it would have, by its very terms, become a species of evidence, that decedent had traveled at a lawful rate of speed and that he did enter the intersection while the signal guiding his travel was 'green' or 'go'.

"It would have then become a question for the Jury as to whether the presumption, weighed with or against the evidence introduced by the respondent and her witnesses, would prevail or be overcome, but this question was not presented to the Jury, because the instruction, as requested was not given. This is precisely the error complained of."

Appellant contends that,

"1. The Court committed prejudicial error in refusing to give the plaintiff's instruction as submitted and by giving the instruction as amended by the Court, plaintiff was substantially deprived of the presumption of due care.

"2. The Court committed prejudicial error in giving to the jury, the instruction as amended, which told the jury that a presumption of due care applied to the defendant."

Respondent, on the other hand, points out that,

"The instruction as amended obviously extended the benefit of the presumption to both parties. Moreover, at appellant's request, the Court gave the following instruction:

" 'The law presumes that Benjamin Zeidman, now deceased, in his conduct at the time of and immediately preceding the accident here in question, was exercising ordinary care and was obeying the law.

" 'These presumptions are a form of *prima facie* evidence and will support findings in accordance therewith, in the absence of evidence to the contrary. When there is other evidence that conflicts with such a presumption, it is the jury's duty to weigh that evidence against the presumption and any evidence that may support the presumption to determine which, if either, preponderates. Such deliberations, of course, shall be related to. and in accordance with, my instructions on the burden of proof.'

"This latter instruction applied specifically to the decedent's conduct only." In this connection respondent argues that, "appellant was not deprived of the instruction of due care".

[1, 2] There are, of course, many cases on the subject involved but it would serve no useful purpose to quote from them for the law is well settled. Obviously, appellant's contention that the modification of the instruction misled the jury is of course an assumption. As a matter of fact and as a matter of law, it appears that the jury was adequately instructed on the subject and that no prejudice could have resulted from the modification as argued by appellant.

That the evidence supports the verdict there can be no question and a review of the record reveals no prejudicial errors

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

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133 Cal.App.2d 584

Melba LEWIS and Nell Lewis, Plaintiffs and Appellants,

v.

W. G. HENDRICKS, Defendant and Respondent.

Civ. 4955.

District Court of Appeal, Fourth District, California.

June 13, 1955.

Hearing Denied Aug. 11, 1955.

Action by husband and wife against osteopathic physician and surgeon for malpractice and for performing operation on wife without her consent. From adverse judgment of the Superior Court, Kern County, Robert B. Lambert, J., the husband and wife appealed. The District Court of

Appeal, Griffin, J., held that instruction to the effect that surgeon might be liable if operation was performed without wife's consent and instruction that no verdict could be rendered against surgeon unless he was guilty of negligence were flatly contradictory and prejudicial when there was sufficient evidence to raise jury question as to whether wife consented to the operation.

Judgment reversed.

1. Appeal and Error ⚷1064(1)
Trial ⚷243

In action by husband and wife against osteopathic physician and surgeon for malpractice and for performing operation on wife without her consent, instruction to effect that surgeon might be liable if an operation was performed without wife's consent and instruction that no verdict could be rendered against surgeon unless he was guilty of negligence were flatly contradictory and prejudicial when there was sufficient evidence to raise a jury question as to whether wife consented to the operation.

2. Trial ⚷243, 295(1)

Instructions are to be construed together, but where instructions are flatly contradictory, as where jury is instructed upon a specific set of facts to bring in a verdict in favor of plaintiff or defendant and is elsewhere instructed in general terms not to do so, instructions are conflicting and prejudicial.

◆

Broaddus & Golden, John J. Golden, Ukiah, for appellants.

Lamb, Hoge & Killion, San Francisco, for respondent.

GRIFFIN, Justice.

[1] Plaintiffs, husband and wife, brought this action against defendant, an osteopathic physician and surgeon, for damages. The first three causes of action allege that defendant has been guilty of malpractice upon Mrs. Lewis. The other three are based on the claim that defendant performed an operation upon her without her consent. A jury verdict was returned in favor of defendant. On this appeal, the one question involved is the giving of certain instructions offered by defendant which plaintiffs claim were prejudicially erroneous.

Before the selection of the jury, the trial court, in explaining the nature of the action to the jury, stated that it was what is commonly known as a malpractice case, and that the complaint alleges that the defendant was negligent. No mention was made of the last three counts pertaining to the lack of consent. The court, in instructing the jury, at plaintiffs' request, in effect instructed it in several different instructions that by undertaking professional service to a patient, a physician and surgeon impliedly represents that he possesses that degree of learning and skill ordinarily possessed by physicians and surgeons of good standing, practicing in the same locality; that it is his duty to use the care ordinarily exercised in like cases by reputable members of the profession practicing in the same locality; and that a violation of any of these duties is a form of negligence called malpractice. It then concludes with the clause:

> "If you would find that the defendant failed in any of the duties I have mentioned, and that such failure was a proximate cause of injury to the plaintiff, then your verdict must be in plaintiff's favor."

The court then gave plaintiffs' requested instruction that:

> "When an adult patient is in possession of her faculties and in such physical health as to be able to consult about his condition, and no emergency exists making it impracticable to confer with her, her consent is necessary to authorize a surgical operation upon herself.
>
> "If a surgeon performs an operation on such a person without her consent, the surgeon's acts in so doing are an assault and battery, and he will be liable in damages for any injury proximately resulting from the operation. "(B.A.J.I., 1950 Supp. 214–P.)"

It should be here noted that the court refused to give defendant's proffered instruction on this same subject matter, i. e.,

> "* * * if you find that the plaintiff * * * consented to the performance upon her by defendant of an abortion, your verdict must be against the plaintiffs and in favor of the defendant."

This contained a written notation of the court: "Refused: No Evidence". Then follows a series of instructions pertaining to the care ordinarily required of a physician and surgeon which were offered by defendant and given by the court, and each of these instructions concluded with a statement which in effect told the jury that unless the evidence shows the defendant negligent, it would be "insufficient to warrant a verdict for the plaintiffs", or "no judgment against the defendant can be sustained", without indicating any distinction between the first three and the remaining three causes of action.

It is plaintiffs' claim that there was evidence before the jury which was sufficient to support a verdict for plaintiffs under either theory indicated; that accordingly, the instructions complained of, in effect told the jury to disregard the issue pertaining to lack of consent; and that before a recovery could be had upon either theory it was necessary to show negligence of the defendant. There is merit to this contention if the evidence would sustain a finding on the theory of lack of consent to the performance of an operation by defendant, and defendant did in fact perform some form of operation upon Mrs. Lewis. Pierce v. Paterson, 50 Cal.App.2d 486, 123 P.2d 544; Starr v. Los Angeles Ry. Corp., 187 Cal. 270, 280, 201 P. 599; Gillette v. City & County of San Francisco, 41 Cal.App. 2d 758, 765, 107 P.2d 627.

Defendant's only answer to the claim is that plaintiffs offered and the court gave similar instructions to those offered and given by defendant, and accordingly plaintiffs cannot be heard to complain. The difficulty with this position is that plaintiffs' instructions told the jury that if defendant was negligent, as indicated in the instructions, they should find in favor of the plaintiffs, which would be a correct instruction as to the first three counts, notwithstanding the remaining three counts, but defendant's instructions in effect told the jury that if defendant was not negligent the jury must find a verdict for defendant, notwithstanding the three remaining counts.

We will therefore consider the evidence pertaining to these last three counts. Defendant lived in Bakersfield. Plaintiffs lived in Willits, California. On June 26, 1951, Mrs. Lewis was treated by defendant in Bakersfield for thyroid trouble and was given a vaginal examination. In August, 1951, defendant examined her again and she was told she might be pregnant or she might have a tumor. On September 11, 1951, defendant examined her again, due to her constant pain. X-rays were taken and, according to her story, she had a vaginal examination of some description, with a speculum, as well as colonic treatment, and she described some instrument defendant had in his hand at the time as containing a knife-blade and that the use of it was causing her such great pain she asked him what he was doing and he said he was removing blood clots so she could menstruate properly; that the pain continued and he finally gave her an injection in the arm but it did not relieve the pain and the doctor continued with the work he was doing and she noticed a number of blood-coated gauze packs being discarded; that it seemed to her it took hours to perform this work although it actually required about 1½ hours; that after performing all this work the defendant told her to remain in a hospital in Bakersfield for about four days because he thought she was having a miscarriage; that she refused to follow these instructions and returned home. On September 18th, 1951, she was examined by a doctor in Lake County and that doctor found a laceration of the cervix about ¼ inch wide and extending the entire circumference of the cervix, and that in his opinion this laceration of the cervix was caused by some "*external*" force of terrible amount and was apparently quite new but showed some evidence of healing. At that time she was given an anaesthetic. A curettement was performed and the fetus was removed. That doctor described her as a very pale girl, running a high fever, and testified that there was a distinct odor from her and extreme tenderness was noted in the lower part of the abdomen; that a mass in the abdomen was located near the uterus which contained a considerable amount of blood; that a sterile pelvic examination was performed; that the afterbirth and portions of the pregnancy were coming out through the opening and the entire vagina was filled with blood; that the laceration of the cervix was noted; that the afterbirth had deteriorated terribly and had been damaged to a great degree and had disintegrated; that the uterus was infected; that in his opinion the fetus had been dead somewhere between 3 and 10 days; and that thereafter a hysterectomy was performed. He testified he was unable to diagnose her complaints as of September 11, 1951, but stated that if she complained of cramps and was spotting on September 11, 1951, this would indicate a pregnancy was not going well at that time.

Defendant testified he performed no abortion and did nothing to produce an abortion, nor did he operate on Mrs. Lewis, nor was there any intention of his or of Mrs. Lewis that an operation was to be performed at that time. Defendant concedes that there was sufficient evidence to submit to the jury the question of defendant's negligence in reference to the first three causes of action, but contends there was no evidence that defendant performed any operation upon Mrs. Lewis, and accordingly no consent was required for the acts performed by him; that no cause of action was proven in relation to the last three counts; and accordingly the court was correct in instructing the jury as it did.

[2] From the testimony produced the jury might reasonably infer that the defendant did in fact use a knife and brought about the condition found; that this constituted an operation within the meaning of the law; that Mrs. Lewis did not know that such an operation was contemplated; and that defendant performed it without her consent. At least, there was sufficient evidence to permit this question to be submitted to the jury under proper instructions. Plaintiffs were endeavoring to recover in this action upon two distinct and separate theories. The jury was told in effect that no verdict could be rendered against defendant unless it found defendant guilty of negligence. In another instruction it was told that defendant may be liable in damages if an operation on such person is performed without her consent. It has been often held that instructions are to be construed together, but where the instructions are flatly contradictory, as is the case where the jury is instructed upon a specific set of facts to bring in a verdict in favor of the plaintiff or defendant and is elsewhere instructed in general terms not to do so, instructions must be held to be conflicting and prejudicial because it cannot be ascertained upon what theory the verdict was returned. Starr v. Los Angeles Ry. Corp., supra.

Judgment reversed.

BARNARD, P. J., and MUSSELL, J., concur.

R. H. FLICKINGER, Plaintiff and Respondent,

v.

SWEDLOW ENGINEERING CO., Inc., a corporation, and Fireman's Fund Indemnity Co., a corporation, Defendants and Appellants.

Civ. 20806.

District Court of Appeal, Second District, Division 2, California.

May 25, 1955.

Rehearing Denied June 13, 1955.

Hearing Granted July 20, 1955.*

Action by one partner against contractor and its surety to recover benefits due under contract between contractor and subcontractor, which contract had been assigned to partnership. The Superior Court, Los Angeles County, J. F. Moroney, J., gave judgment for partner. Defendants appealed. The District Court of Appeal, McComb, J., held that where partnership had not obtained contractor's license at any time during performance of any work under contract, the partner, as assignee of unlicensed partnership, was precluded from recovering by licensing statute.

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* Opinion vacated 289 P.2d 214.

Judgment reversed.

See also, 105 Cal.App.2d 226, 233 P.2d 86.

1. Licenses ⚷39.43

A partnership which furnishes labor and material as a contractor is required to have a license as a person under statute making it unlawful for any person to engage in business of contractor without license. West's Ann.Bus. & Prof.Code, §§ 7025, 7026, 7028, 7029.

2. Licenses ⚷39.44

A partnership which furnishes labor and material as a contractor cannot recover for services rendered where it fails to allege and prove that it was a duly licensed contractor at all times during the time of the performance of acts or contracts for which recovery is sought, pursuant to Business and Professions Code. West's Ann. Bus. & Prof.Code, §§ 7025, 7026, 7028, 7029, 7031.

3. Licenses ⚷39.43

The statutory requirement that partnership which furnishes labor and material as a contractor, must have a contractor's license is not satisfied by the issuance of a license to one of the partners. West's Ann. Bus. & Prof.Code, § 7025.

4. Licenses ⚷39.43

An assignee of an unlicensed contractor who has performed work may not recover upon the contractor's claim for the reason that the contractor did not have a valid license. West's Ann.Bus. & Prof. Code, § 7028.

5. Licenses ⚷39.43

Where plaintiff in action to recover moneys due under contract for highway construction project was assignee of a partnership which was a sub-contractor on project and which did not have a contractor's license, licensing statute precluded plaintiff from recovering in the action, as the partnership could not maintain the action itself, although both partners were licensed engineers. West's Ann.Bus. & Prof.Code, §§ 7025, 7026, 7028, 7029, 7031.

6. Contracts ⚷107, 138(1)

A contract made contrary to the terms of a law designed for the protection of the public and prescribing a penalty for the violation thereof is illegal and void, and no action may be brought to enforce such contract and whenever illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case.

7. Constitutional Law ⚷70(1)

It is the province of the courts to enforce the law as determined by the Legislature and not to make it, and where the law is clear and unambiguous, courts cannot change it under the theory of interpreting it.

Laurence J. Rittenband and Anderson, McPharlin & Conners, by Kenneth E. Lewis, Los Angeles, for appellants.

C. J. Walker, Los Angeles, for respondent.

McCOMB, Justice.

Defendants appeal from a judgment in favor of plaintiff after trial without a jury in an action arising out of work done on construction of a portion of a public highway for the State of California.

Facts: Plaintiff, a subcontractor, filed the present action against defendant Swedlow Engineering Company, Inc., the general contractor, and defendant Fireman's Fund Indemnity Company, the general contractor's surety.

It was alleged in plaintiff's second amended complaint that on the 29th day of January, 1948, plaintiff, R. H. Flickinger, a duly licensed engineer, entered into a written contract with defendant Swedlow Engineering Company for the performance of a certain portion of contract work upon the public highway for the State of California.

Thereafter by oral assignments the benefits of the written contract were assigned to a partnership composed of Flickinger and Welker. Mr. Welker was a duly licensed engineer. On April 20, 1948, a new oral contract was entered into whereby certain of the work previously contemplated under the original contract was undertaken by Swedlow Engineering Company rather than by plaintiff or the partnership composed of Flickinger and Welker.

No engineering license in the name of the partnership of Flickinger and Welker was obtained at any time during the performance of any of the work. Such a license, however, was obtained more than six months after the work was completed and three days before the complaint in the present action was filed.

The trial court found:

A.

"That each and all of the allegations contained in Paragraph VI of the Second Amended Complaint are true except that said oral assignment was made in the month of March, 1948, on or about the 15th day of said month, and that in consideration of said assignment, said partnership agreed with plaintiff to assume the obligations of said agreement and to furnish such partnership funds and equipment as might thereafter be necessary in the performance of the work as agreed to be done by plaintiff for said Swedlow Engineering Co., Inc., under said agreement of January 29, 1948.

"The Court further finds that during all of the time mentioned in plaintiff's Second Amended Complaint, plaintiff was and now is a duly licensed contractor under the laws of the State of California; that Ralph Welker, at all times since November 24, 1947, has been and now is a duly licensed contractor under the laws of the State of California, and that at all times since May 9, 1949, the said partnership of Flickinger & Welker has been and now is a duly licensed contractor under the laws of the State of California."

B.

"That each and all of the allegations contained in Paragraph VIII of the Second Amended Complaint are true except that the plaintiff and said partnership duly performed all of said conditions and performed all of the work for said defendant, Swedlow Engineering Co., Inc., under said written agreement and oral agreement."

This is the sole question necessary for us to determine:

Did the trial court err in permitting plaintiff to maintain the present action since it is conceded that the partnership of Flickinger and Welker, which performed with plaintiff all the work for which recovery was sought, had not obtained a contractor's license pursuant to the provisions of sections 7025, 7026, 7028 and 7029 of the Business and Professions Code?

Yes. The Business and Professions Code reads in part as follows:

"§ 7025. Person. 'Person' as used in this chapter includes an individual, a firm, copartnership, corporation, association or other organization, or any combination of any thereof."

"§ 7026. Contractor defined. The term contractor for the purposes of this chapter is synonymous with the term 'builder' and, within the meaning of this chapter, a contractor is any person, who undertakes to or offers to undertake to or purports to have the capacity to undertake to or submits a bid to, or does himself or by or through others, construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, railroad, excavation or other structure, project, development or improvement, or to do any part thereof, including the erection of scaffolding or other structures or works in connection therewith. The term contractor includes subcontractor and specialty contractor."

"§ 7028. Engaging in business without license. It is unlawful for any person to engage in the business or act in the capacity of a contractor within this State without having a license therefor, unless such person is particularly exempted from the provisions of this chapter."

"§ 7029. Acting in joint venture or combination without additional license therefor. It is unlawful for any two or more licensees, each of whom has been issued a license to engage separately in the business or to act separately in the capacity of a contractor within this State, to jointly submit a bid or otherwise act in the capacity of a contractor within this State without first having secured an additional license for acting in the capacity of such a joint venture or combination in accordance with the provisions of this chapter as provided for an individual, copartnership or corporation."

"§ 7031. Allegation and proof of license in action on contract. No person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action in any court of this State for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that he was a duly licensed contractor at all times during the performance of such act or contract."

[1, 2] In passing upon the foregoing sections, the courts have held that a partnership which furnishes labor and material as a contractor is required to have a license as a "person" under the provisions of section 7025 of the Business and Professions Code. Likewise it is settled that such a partnership cannot recover for services rendered where it fails to allege and prove that it was a duly licensed contractor at all times during the time of the performance of the acts or contract for which recovery is sought, pursuant to the provisions of the Business and Professions Code set forth, supra. (Kirman v. Borzage, 65 Cal.App.2d 156, 158 [1], 150 P.2d 3 (hearing denied by the Supreme Court); Loving & Evans v. Blick, 33 Cal.2d 603, 607 [1], 204 P.2d 23; Albaugh v. Moss Construction Co., 125 Cal. App.2d 126, 131 [6], 269 P.2d 936.)

[3] Also it is settled that the foregoing requirement is not satisfied by the issuance of a license to one of the partners. (Kirman v. Borzage, supra, 65 Cal.App.2d 158 [2], 150 P.2d 3.)

[4] An assignee of an unlicensed contractor who has performed work may not recover upon the contractor's claim for the reason that the contractor did not have a valid license. (Shields v. Shoaff, 116 Cal. App.2d 306, 308 [1, 2], 253 P.2d 1002.)

[5] Applying the foregoing rules to the conceded facts in the present case it is evident that plaintiff should not have been permitted to recover in the instant action. The partnership which the court found performed a portion of the work was not licensed at any time during the performance of the work and not until more than six months after the work had been performed. Hence under the clear provisions of section 7031 of the Business and Professions Code such partnership could not maintain this action, and under the authorities above cited plaintiff as assignee of the partnership was not in any better position to maintain the action than the partnership itself.

Plaintiff relies upon the decision of the Supreme Court in Gatti v. Highland Park Builders, Inc., 27 Cal.2d 687, 166 P.2d 265. However, such decision is not applicable to the facts of the present case and is distinguishable from such case as is pointed out by Mr. Justice Spence in Loving & Evans v. Blick, supra, 33 Cal.2d 607, 204 P.2d 25, where, speaking for the court, he says:

"There can be no question but that this case presents a clear violation of the statutes regulating the contracting business. Thus, while respondent Loving at all times possessed an individual contractor's license, his respondent partner Evans did not, and the partnership, as such, failed to procure such a license. As appellant maintains, it has been repeatedly declared in this state that 'a contract made contrary to the terms of a law designed for the protection of the public and prescribing a penalty for the violation thereof is illegal and void, and no action may be brought to enforce such contract' (citing cases); and that 'whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case.' (Citing cases.)

"To overcome the force of these settled principles, respondents unavailingly seek to align their status under the licensing regulations with that prevailing as a distinguishable consideration in Gatti v. Highland Park Builders, Inc., supra, 27 Cal.2d 687, 166 P.2d 265. There a judgment in favor of plaintiff contractors was affirmed although no license in the name of the partnership under which they had been operating had been issued to the two plaintiff contractors as such. But in the Gatti case these factors were material to its disposition: (1) At the time the contract was performed, both plaintiffs possessed contractor's licenses in their own names as individuals; and (2) during the performance of the contract, a joint contractor's license was issued to plaintiffs and a third party not concerned in the action so that 'thereby any matters which might form the basis of legitimate inquiry by the licensing board as a condition precedent to the issuance of an *additional* partnership or joint venture license to plaintiffs, though involving a third party, where necessarily considered, and favorable action was taken thereon.' 27 Cal.2d page 689, 166 P.2d page 266. Accordingly, it was concluded, 27 Cal.2d at page 690, 166 P.2d at page 266, that plaintiff contractors had 'substantially complied with the statutory requirements,' for otherwise their legitimate claim would be defeated on a 'technical ground, resting on an unnecessarily strict construction of the statutory provision for the *additional* joint contractor's license and denying any effect to the combination license in fact issued to plaintiffs and a third person as above recited, [and] the legislative scheme in relation to the licensing of contractors, intended "for the safety and protection of the public," would become an unwarranted shield for the avoidance of a just obligation.' As was further said in the Gatti case, 27 Cal.2d at page 690, 166 P.2d at page 267, 'similar considerations' with respect to a contractor's claim prevailed in Citizens State Bank of Long Beach v. Gentry, 20 Cal.App.2d 415, 67 P.2d 364, and 'justified the denial of [a] motion for a nonsuit, predicated on a rigid application of the licensing requirement,' where the 'contractor's license expired while the work was in progress but was renewed in the name of a corporation, organized by and bearing the contractor's name, and in which he was the dominant and controlling factor; and where the work was completed under the auspices of the corporation.' But no comparable situation is presented here, for under the undisputed facts the contracting partnership of Loving and Evans did not hold a license 'until after the termination of [the] job' in question and though from 'all times from the initial negotiations * * throughout the progress of the work and until the completion thereof,' respondent Loving 'held a contractor's license,' his partner, respondent Evans, during all of said times 'did not have such a contractor's license.' Thus, it is apparent that the licensing regulations enacted 'for the safety and protection of the public,' by prohibiting inexperienced persons from engaging in contracting work, were at no time here material permitted to function in determining the qualifications of respondent Evans therefor. Such disregard of the public policy underlying the state's licensing requirements cannot be correlated with the rationale governing the Gatti and Gentry cases, and it renders the entire transaction between respondents and appellant 'illegal and void,' for completion of the contract 'necessarily would involve the performance of illegal acts.' (Wise v. Radis, supra, 74 Cal.App. 765, 776, 242 P. 90, 94.)"

The foregoing quotation from the Supreme Court in Loving & Evans v. Blick, may be paraphrased and applied to the facts of the instant case thus:

[6] There can be no question but this case presents a clear violation of the statutes regulating the contracting business. Thus, while plaintiff R. H. Flickinger at all times possessed an individual contractor's license the partnership composed of Flinckinger and Welker did not, and the partnership as such failed to procure such a license until six months after the work had been completed. As defendant maintains it has been repeatedly declared in this state " 'a contract made contrary to the terms of a law designed for the protection of the public and prescribing a penalty for the violation thereof is illegal and void, and no action may be brought to enforce such contract' " and that " 'whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case.' "

To overcome the force of these settled principles plaintiff unavailingly seeks to align his status under the licensing regulations with that prevailing as a distinguishable consideration in Gatti v. Highland Park Builders, Inc., 27 Cal.2d 687, 166 P.2d 265, 266. There a judgment in favor of plaintiff contractors was affirmed although no license in the name of the partnership under which they had been operating had been issued to the two plaintiff contractors as such. But in the Gatti case these factors were material to its disposition: (1) At the time the contract was performed, both plaintiffs possessed contractor's licenses in their own names as individuals; and (2) during the performance of the contract, a joint contractor's license was issued to plaintiffs and a third party not concerned in the action so that "Thereby any matters which might form the basis of legitimate inquiry by the licensing board as a condition precedent to the issuance of an *additional* partnership or joint venture license to plaintiffs, though involving a third party, were necessarily considered, and favorable action was taken thereon." Accordingly, it was concluded at page 690 of 27 Cal.2d, at page 266 of 166 P.2d that plaintiff contractors had "Substantially complied with the statutory requirements", for otherwise their legitimate claim would be defeated on a "technical ground, resting on an unnecessarily strict construction of the statutory provision for the *additional* joint contractor's license and denying any effect to the combination license in fact issued to plaintiffs and a third person as above recited, [and] the legislative scheme in relation to the licensing of contractors, intended 'for the safety and protection of the public,' would become an unwarranted shield for the avoidance of a just obligation." As was further said in the Gatti case, 27 Cal. 2d at page 690, 166 P.2d at page 266, "similar considerations" with respect to a contractor's claim prevailed in Citizens State Bank of Long Beach v. Gentry, 20 Cal.App. 2d 415, 67 P.2d 364, and "justified the denial of [a] motion for a nonsuit, predicated on a rigid application of the licensing requirement," where the "contractor's license expired while the work was in progress but was renewed in the name of a corporation, organized by and bearing the contractor's name, and in which he was the dominant and controlling factor; and where the work was completed under the auspices of the corporation."

No comparable situation is presented here for under the undisputed facts the partnership of Flickinger and Welker did not hold a license "until after the termination of [the] job" in question, and though from "all times from the initial negotiations * * * throughout the progress of the work and until the completion thereof" plaintiff Flickinger "held a contractor's license, the partnership of Flickinger and Welker did not have such a contractor's license." Thus it is apparent that the licensing requirements enacted "for the safety and protection of the public" by prohibiting inexperienced persons from engaging in contracting work, were at no time here material permitted to function in Gatti and Gentry cases and it renders the correlated with the rationale governing the the city's licensing requirements cannot be disregard of the public policy underlying nership of Flickinger and Welker. Such determining the qualifications of the part- entire transaction between plaintiff and defendants "illegal and void", for completion of the contract "necessarily would involve the performance of illegal acts." (Wise v. Radis, 74 Cal.App. 765, 776, 242 P. 90, 94.)

[7] It is evident that the public policy involved herein has been determined by the Legislature in section 7031 of the Business and Professions Code. It needs no citation of authority to support the proposition that it is the province of the courts to enforce the law as determined by the Legislature and not to make it, or where, as here, the law is clear and unambiguous, to change it under the theory of interpreting it.

There is this additional distinction between the present case and the facts in Gatti v. Highland Park Builders, Inc., supra. In the Gatti case it was held that a manifest and equitable result would follow the enforcement of the statute to defeat the plaintiff's legitimate claim on a technical ground. In the case at bar we do not have such a situation. An examination of the record discloses that plaintiff and defendant Swedlow Engineering Company, Inc., in a prior action, #558300, in the Superior Court of Los Angeles County, litigated the *facts* now in issue and the judgment in such action has become final, but due to certain "technical" rules of pleading and procedure the trial judge in the present case declined to consider that the previous action constituted a bar to plaintiff's claim in this case.

Thus, contrary to the situation in the Gatti case where the enforcement of a technical requirement would result, so the court held, in an injustice, we find that in the instant case the enforcement of such a requirement which has been prescribed by the legislature, brings about a just result.

In view of our conclusions it is unnecessary to discuss other questions presented.

The judgment is reversed.

MOORE, P. J., and FOX, J., concur.

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133 Cal.App.2d 478

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

James Edward JAMES and Lonnie George Johnson, Defendants and Appellants.

Cr. 5333.

District Court of Appeal, Second District, Division 2, California.

June 8, 1955.

Prosecution for assault by means of force likely to produce great bodily injury. Defendants were found guilty in Superior Court, Los Angeles County, Edwin L. Jefferson, J., after trial without a jury, and appealed. The District Court of Appeal, McComb, J., held that evidence sustained the conviction.

Affirmed.

1. Criminal Law 🔑1144(13)

On defendant's appeal on ground of insufficiency of evidence, from judgment of guilt of assault by means of force likely to produce great bodily injury, evidence would be viewed in light most favorable to the people. Pen.Code, § 245.

2. Assault and Battery 🔑92

Evidence sustained conviction of assault by means of force likely to produce great bodily injury. Pen.Code, § 245.

3. Assault and Battery 🔑71

Defendant who aided and abetted codefendant in commission of crime by helping to drag victim into alley and bending over victim after victim had been assaulted by codefendant, was properly convicted as principal. Pen.Code, §§ 31, 245.

4. Criminal Law 🔑351(3)

Where defendant having knowledge of commission of crime without being accused immediately thereafter takes flight to avoid arrest, such action constitutes some evidence of consciousness of guilt.

5. Assault and Battery 🔑92

In prosecution for assault by means of force likely to produce great bodily injury, evidence, including testimony that defendant helped drag victim into alley after victim had been assaulted by codefendant, sustained conviction of defendant as principal. Pen.Code, §§ 31, 245.

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Edmund G. Brown, Atty. Gen., James C. Maupin, Deputy Atty. Gen., for respondent.

Jefferson & Jefferson, Los Angeles, for appellants.

McCOMB, Justice.

From a judgment of guilty of violating section 245 of the Penal Code (assault by means of force likely to produce great bodily injury), after trial before the court without a jury, defendant appeals.

[1] *Facts:** At approximately 12:45 a. m. on July 3, 1954, defendants were walking

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* The evidence is viewed in the light most favorable to the People (respondent). See People v. Pianezzi, 42 Cal.App.2d 270, 277 [2] 108 P.2d 685 (hearing denied by the Supreme Court) and cases cited in 17 West's California Digest (1951), Criminal Law 🔑 1144(13), p. 280.

west on Fifth Street in Los Angeles. The complaining witness, Mr. Harris, who was also walking west passed defendants and stopped. Defendant Johnson struck him in the face, knocking him to the sidewalk, whereupon both defendants picked up Mr. Harris and dragged him into an alley at 521 East Fifth Street.

Police Officer Adams saw the assault, followed the two men into the alley where he found them bending over Mr. Harris who was lying between two parked cars. As Officer Adams approached, defendants began to run, but when he identified himself as a police officer, they stopped and were placed under arrest.

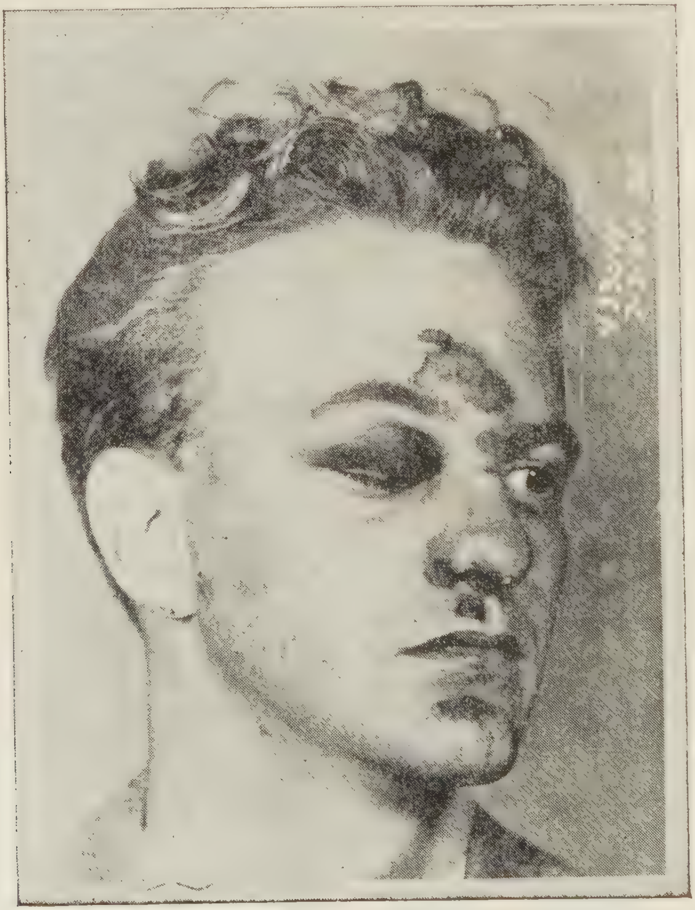
Mr. Harris was taken to the receiving hospital where he was treated for a possible nose fracture. He had a black eye, a few loose teeth and was bleeding about the face.

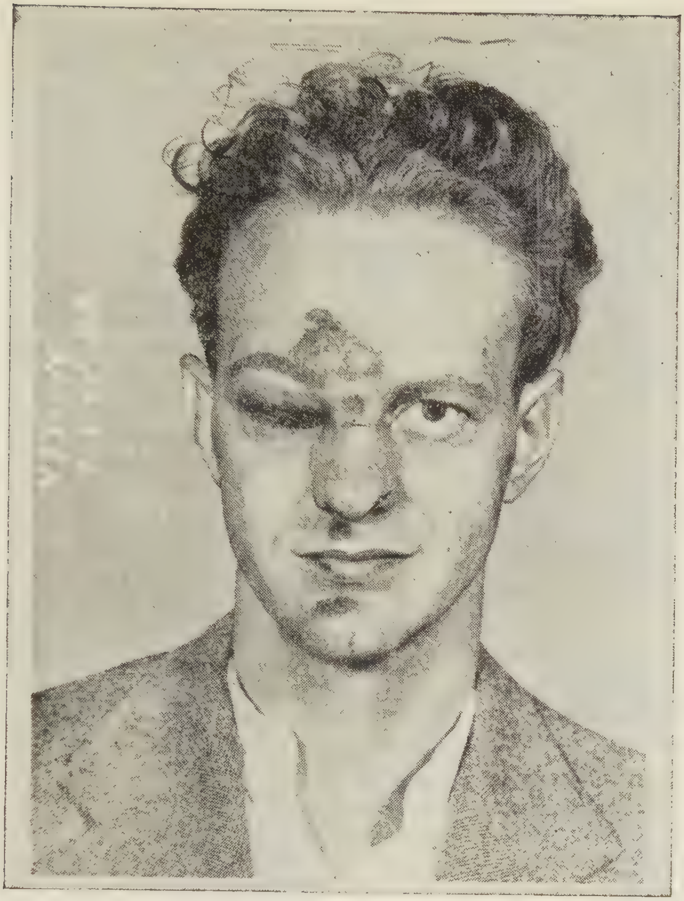
[2] *Questions:* First: ***Was there substantial evidence to support a judgment of conviction of assault by means of force likely to produce great bodily injury?***

Yes. The evidence of Police Officer Adams, coupled with the following two photographs, which were taken of Mr. Harris approximately one hour after the assault, clearly sustain the trial court's finding that defendants were guilty of violating section 245 of the Penal Code in that they assaulted the complaining witness with intent to produce great bodily injury, and in fact had done so.

Further discussion of the evidence would serve no useful purpose. (See Thatch v. Livingston, 13 Cal.App.2d 202, 203, 56 P.2d 549.)

People v. Fuentes, 74 Cal.App.2d 737, 169 P.2d 391, 393, relied on by defendants, is





not here in point for in such case the appellate court determined from the evidence that the injury inflicted did not create "great bodily injury." It is evident in the present case the injury did create "great bodily injury."

[3–5] Second: *Was the evidence sufficient to sustain a judgment of guilty as to defendant James E. James?*

Yes. This defendant contends that the evidence is insufficient to sustain the conviction against him because there is no evidence to show that he struck Mr. Harris, but merely that he was present when his codefendant struck him. This argument is devoid of merit. In the present case the evidence disclosed that defendant James, though he did not strike Mr. Harris, aided and abetted and assisted his codefendant, who did strike him, in carrying the victim into the alley and when the police officer arrived both defendants were bending over their victim.

Section 31 of the Penal Code reads in part as follows: "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, * * * are principals in any crime so committed."

Clearly under this provision of the Code defendant James was a principal since he aided and abetted his codefendant in the commission of the crime by dragging the victim into the alley and bending over him after he had been assaulted.

Likewise it is established that where a defendant having knowledge of the commission of a crime without being accused immediately thereafter takes flight to avoid arrest, such action constitutes some evidence of consciousness of guilt. (People v. Waller, 14 Cal.2d 693, 701 [5] et seq., 96 P.2d 344, and cases cited in 15 West's Calif.Dig. (1951) Crim.Law, 🔑351(3) p. 320.)

The uncontradicted evidence in the instant case discloses that when the police officer called to James, both he and his codefendant started to flee and stopped only when they were informed that Mr. Adams was a police officer.

The record discloses that defendants had a fair and impartial trial.

Affirmed.

FOX, J., concurs.

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133 Cal.App.2d 524

John RODIN and Earl Kelley, Plaintiffs and Appellants,

v.

AMERICAN CAN COMPANY, a corporation, Larsen & Larsen, Inc., a corporation, Vince Santelmo and George Fortier, Defendants and Respondents.

No. 16361.

District Court of Appeal, First District, Division 1, California.

June 10, 1955.

Rehearing Denied July 8, 1955.

Hearing Denied Aug. 3, 1955.

Action by subcontractor's employees against contractor and owner for injuries sustained when owner's portable elevator, which employees, with permission of owner and contractor, were using failed in that pressing "stop" button failed to stop elevator's descent. The Superior Court, City and County of San Francisco, Clarence W. Morris, J., rendered judgment of nonsuit on plaintiffs' opening statement, and plaintiffs appealed. The District Court of Appeal, Bray, J., held, inter alia, that complaint which alleged, in part, that movable construction elevator upon which plaintiffs were injured did not have safeguards required by Administrative Code, and that absence of these safeguards caused accident, stated a cause of action, for violation of regulations, against defendants who had supplied elevator for use of plaintiffs and their fellow employees.

Judgment reversed.

1. Negligence 🔑24

One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom supplier should expect to use chattel with consent of other or to be in vicinity of its probable use, for bodily harm caused by use of chattel in manner for which and by person for whose use it is supplied, if supplier (1) knows, or should realize, that chattel is or is likely to be dangerous for use for which it is supplied; (2) has no reason to believe that those for whose use chattel is supplied will realize its dangerous condition; and (3) fails to exercise reasonable care to inform them of its dangerous condition or of facts which make it likely to be so.

2. Negligence 🔑121(2)

Res ipsa loquitur applies where there is a basis of experience, either common to community or brought out in evidence, from which it may reasonably be concluded that accident is of the kind which does not ordinarily occur unless someone has been negligent, and it appears that accident was caused by an agent or instrumentality within exclusive control of defendant and that it was not due to any voluntary action or contribution on part of plaintiff.

3. Appeal and Error 🔑927(3)

On appeal from judgment of nonsuit, reviewing court would indulge in every reasonable inference from plaintiff's statement favorable to him.

4. Negligence 🔑121(2)

"Control" within rule that res ipsa loquitur applies only where agency or instrumentality was within exclusive control of defendant refers to authority to authorize use of agency or instrumentality.

See publication Words and Phrases, for other judicial constructions and definitions of "Control".

5. Carriers 🔑314(2)

Complaint by subcontractor's employees against owner for injuries sustained when owner's portable elevator, which employees, with permission of owner and contractor, were using, failed in that pressing "stop" button failed to stop elevator's descent, stated a cause of action against owner in res ipsa loquitur.

6. Negligence 🔑20

A company may expressly or impliedly adopt an appliance of another company, and invite others to use it, and, if they do, the company owes to such invitees a duty to exercise reasonable care to see to it that the appliance is safe.

7. Negligence 🔑108(1)

Complaint by subcontractor's employees against contractor for injuries sustained when owner's portable elevator, which employees, with permission of owner and contractor, were using, failed in that pressing "stop" button failed to stop elevator's descent, stated a cause of action against contractor in res ipsa loquitur.

8. Carriers 🔑293

Movable machine consisting of an electrical apparatus elevating a railed platform which is attached to it and from which workmen may stand to work on portion of a building under construction or from which they may step off onto building was not an "elevator" within statute relating to elevators, but was a "construction elevator" within statute relating to standards for such machines. Labor Code, §§ 7200, 7301.

See publication Words and Phrases, for other judicial constructions and definitions of "Construction Elevator" and "Elevator".

9. Carriers 🔑314(2)

Complaint which alleged, in part, that movable construction elevator upon which plaintiffs were injured did not have safeguards required by Administrative Code, and that absence of these safeguards caused accident, stated a cause of action against defendants who had supplied elevator for use of plaintiffs and their fellow employees. Labor Code, §§ 6312, 6500, 7200–7203, 7301.

10. Trial 🔑109

Under circumstances presented in case wherein nonsuit was based upon opening statement, trial court should have permitted plaintiffs to enlarge their statement.

11. Trial 🔑109

Question of permitting counsel to enlarge opening statement is one primarily in discretion of trial court, but that discretion should be exercised with liberality so that a plaintiff who really has a cause of action is not denied opportunity to present it to jury merely because counsel did not state in detail all facts he proposed to give.

12. Trial 🔑109

An order granting nonsuit upon opening statement can be upheld only where it is clear that counsel has undertaken to state all of facts which he expects to prove, and it is plainly evident that facts thus to be proved will not constitute a cause of action.

Forrest M. Greenberg, Miller, Kroloff & Brown, Stockton, for appellants.

Barfield & Barfield, San Francisco, for respondents American Can Co. and Vince Santelmo.

Roos & Jennings, San Francisco, for respondents Larsen & Larsen and George Fortier.

BRAY, Justice.

A judgment of nonsuit in favor of all defendants based upon plaintiffs' opening statement was entered. Plaintiffs appeal.

Questions Presented.

1. Did the opening statement show a cause of action against either defendant: (a) For negligence? Corollary to this question—was res ipsa loquitur applicable? (b) For violation of express rules of law?

2. Did the trial court abuse its discretion in denying plaintiffs' request to enlarge upon the opening statement?

Record.

Each plaintiff brought an action against all defendants for personal injuries predicated, in a first count, on defendants' alleged negligence, and in a second count on defendants' alleged wilful misconduct through failure to comply with certain safety orders of the Industrial Accident Commission. The gist of plaintiffs' opening statement follows. Defendant American Can Company entered into a contract with defendant Larsen & Larsen, Inc., general contractors, for the construction by the latter of a plant for the former at Stockton. Defendant Larsen let a subcontract to Pahl-Harry Co., plumbing contractors, for the plumbing work. Plaintiffs were employees of the latter company and at the time of the accident were working on this particular job. Their foreman instructed them to repair some pipes at the top of the building. Defendant Can Company owned a portable elevator or hoist, called a "telescoper." It is electrically operated. One of the employees of defendant Can Company had given permission to defendant Larsen and Pahl-Harry Co. to use it. The Can Company not only gave such permission but saw employees of the two mentioned companies actually using it. Defendant Larsen likewise gave permission for its use by Pahl-Harry employees and saw plaintiffs using it. It did not comply with the safety rules of the Industrial Accident Commission in that it lacked several devices thereby required. Plaintiffs had used the elevator once or twice before but had not been instructed how to use it. To get to the pipes which needed repairing, plaintiffs moved the elevator into position. They then went up in the elevator without any difficulty. They finished their work there (apparently standing on the elevator platform) and started to descend. The elevator is operated by three buttons. One is pressed to go up, one to come down, and a third to stop. As the elevator descended it hit one of the girders on the building. Plaintiff Rodin yelled "Stop it." Plaintiff Kelley pressed the "stop" button. It would not work. There was no emergency equipment as required by law to take care of the situation. Although plaintiff Kelley pressed the "stop" button the elevator kept on going down and pressing against the girder. Finally the elevator fell over backwards, throwing both plaintiffs 18 or 20 feet to the concrete floor, seriously injuring both. Although plaintiff Kelley tried vainly to stop the elevator, the equipment did not work. There should have been emergency equipment provided. Neither the owner, defendant Can Company, nor the general contractor, defendant Larsen, provided any operator to run the elevator, nor were the men who were using it given any instructions, but were left on their own in its use. The facts related will show negligence and a wilful failure to comply with the section of the law applying to this type of equipment.

1. Were Causes of Action Stated?

(a) *Negligence.*

(1) *Against defendant American Can Co.*

It owned the telescoper. The complaint charges that it and the other defendants so carelessly and negligently did "keep, maintain, control and operate" the telescoper "as to cause" plaintiffs "to be hurled from said elevator and onto the pavement * *." In the opening statement it is stated that defendant Can Company owned the telescoper, gave permission to both defendant Larsen and plaintiffs' employer Pahl-Harry Co. to use it, and saw employees of the two companies using it. Leaving aside the question of compliance with safety rules, which will be discussed later, the statement charges the accident to the failure of the elevator to stop when the proper button was pressed after it struck a girder. There is no claim that defendant Can Company knew of the defective condition of the elevator, if it was defective. Unless res ipsa loquitur applies there is no showing that defendant did "keep, maintain, [or] control" the machine negligently. The evidence shows that it did not "operate" it.

Primarily, what duty did defendant Can Company owe plaintiffs? That duty is stated in Restatement of Torts, § 388, p. 1039:

[1] "One who supplies directly or through a third person a chattel for another to use, is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be in the vicinity of its probable use, for bodily harm caused by the use of the chattel in the

manner for which and by a person for whose use it is supplied, if the supplier

"(a) knows, or from the facts known to him should realize, that the chattel is or is likely to be dangerous for the use for which it is supplied;

"(b) and has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition; and

"(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be so."

See Martin v. Food Machinery Corp., 100 Cal.App.2d 244, 223 P.2d 293, where the above rule was applied to the owner of a building under construction, who built a scaffold adjacent to it, which broke, injuring the plaintiffs who were employees of the general contractor.

Applying the rule to the facts of our case, it is obvious that there is no showing (in the absence of res ipsa loquitur) of the requirements of (a), (b), or (c). There is no showing that defendant Can Company knew or should have known that the machine was dangerous or likely to be dangerous. There is no showing of what was wrong with the telescoper.

Another way of expressing defendant Can Company's duty here is the following from Miller v. Pacific Constructors, Inc., 68 Cal. App.2d 529, 545, 157 P.2d 57, 65: "The general rule in that regard is that an owner or occupier of premises, who, by invitation express or implied, whether the invitation is pursuant to a written contract or otherwise, induces, or knowingly permits, a workman to enter the premises for the performance of *duties mutually beneficial to both parties,* is required to use reasonable care to protect the workman by supplying him with a reasonably safe place in which to work and to furnish and maintain appliances in connection therewith which are reasonably safe for the purposes embraced therein. [Citation.]" (Emphasis added.)

Here the statement contained no showing that the telescoper as furnished by defendant was not reasonably safe for the purpose for which it was intended to be used.

Res Ipsa Loquitur.

This brings us to the question of whether res ipsa loquitur applies, for if it does, then it would be the duty of defendant to explain the cause of the accident.

[2] The conditions under which res ipsa loquitur applies are: (a) "There is a basis of experience, either common to the community or brought out in evidence, from which it may reasonably be concluded that the accident is of a kind which does not ordinarily occur unless someone has been negligent." (b) "It must be caused by an agency or instrumentality within the exclusive control of the defendant." (c) "It must not have been due to any voluntary action or contribution on the part of the plaintiff." Prosser, 37 Cal.L.Rev. 233; Prosser on Torts, p. 295; Ybarra v. Spangard, 25 Cal.2d 486, 489, 154 P.2d 687, 162 A.L.R. 1258.

[3] Were these conditions present here? We think they were. (a) Ordinarily an elevator, even a portable one (this had devices to fasten the elevator shaft to the ground so that the structure will not move), properly operated, will stop when the "stop" button is pressed. Even though the elevator struck a girder, it should respond to the pressing of the "stop" button unless the girder struck some part of the mechanism connecting with the "stop" button. Inasmuch as under the nonsuit rules we must indulge in every reasonable inference from the plaintiffs' statement favorable to them, and because plaintiffs were later denied the opportunity to amplify their statement, we must assume that the striking of the girder did not affect the "stop" button mechanism. Therefore the owner and supplier of the telescoper must explain what caused the "stop" button to fail to work. A situation similar to what happened here occurred in Kiernan v. Herbert M. Baruch Corp., 20 Cal. App.2d 289, 66 P.2d 748. There, under one version of the accident it was caused by a piece of marble which was being held by the plaintiff while riding in a construction elevator, catching on the timber of the shaft. The elevator dropped before it could be stopped with the brake. The court stated

that the evidence left in doubt whether the operator of the elevator was negligent or the apparatus failed. It was then held that the doctrine of res ipsa loquitur was properly applied.

[4] (b) The elevator was in the exclusive control of defendant Can Company. Even though it had been turned over to the use of Larsen and Pahl-Harry Co., the control of the elevator itself was in the Can Company. Control, in the sense used in the doctrine, does not mean whoever happens to be occupying the machine at the particular time. It means control in the sense of who has authority to authorize its use. The Can Company had that control, even though it shared it with Larsen. In Biondini v. Amship Corp., 81 Cal.App.2d 751, at pages 767–768, 185 P.2d 94, at page 104, we said concerning res ipsa loquitur: "The law does not prohibit the application of the doctrine against two or more defendants where there is joint control. [Citations.] It was for the jury to say whether either or both of these defendants had 'control' of the scaffold, and if it should find that either or both had such control it should be instructed that the doctrine under discussion is applicable to that defendant or defendants."

(c) As stated before, if the striking of the girder was not the cause of the stop mechanism failing to work (and we must assume for the purposes hereof that it was not) then the accident was not due to the voluntary action or contribution of plaintiffs.

[5] It was apparent from plaintiffs' opening statement that a cause of action against defendant Can Company was stated.

(2) *Against Larsen.*

[6] Larsen's duty is expressed in the following statement from Biondini v. Amship Corp., supra, 81 Cal.App.2d 751, 185 P.2d 94, where a scaffold built by the general contractor gave way, injuring the plaintiff, an employee of a subcontractor: "A company may expressly or impliedly adopt an appliance of another company, and invite others to use it, and, if they do, the company owes to such invitees a duty to exercise reasonable care to see to it that such appliance is safe." 81 Cal.App.2d at page 763, 185 P.2d at page 101. See also Miller v. Pacific Constructors, Inc., supra, 68 Cal.App.2d 529, 157 P.2d 57. In their statement plaintiffs base their claim against Larsen upon the fact that Larsen, being the general contractor, and having undertaken jointly with defendant Can Company to supply the telescoper, and having given Pahl-Harry Co. employees permission to use it, came within the above mentioned rule. However, there was nothing in plaintiffs' statement unless res ipsa loquitur applies to show that the appliance was not safe, nor that Larsen had failed to exercise reasonable care to see that the appliance was safe.

[7] But res ipsa loquitur does apply. Under plaintiffs' statement, Larsen, as general contractor, having jointly with defendant Can Company furnished to plaintiffs' employer the telescoper, and owing to the latter and his employees the duty of exercising reasonable care to see that the appliance was safe, was in joint control with defendant Can Company. As was said in the above quotation from Biondini v. Amship Corp., 81 Cal.App.2d 751, 768, 185 P.2d 94, it was for the jury to determine whether this was true and if true to apply the doctrine. The statement shows that both defendants furnished the appliance expressly or impliedly for the use of the Pahl-Harry Co. employees. The failure of the elevator to stop threw the burden on the respective defendants to explain the failure and to show it was not due to its or their negligence.

The facts as related, raising as they do the doctrine of res ipsa loquitur, showed prima facie a duty on the part of the defendants to reasonably protect the plaintiffs against the danger and injury complained of, their failure to do so, and that the injuries were sustained as a result of that omission.

Hard v. Hollywood Turf Club, 112 Cal.App.2d 263, 246 P.2d 716, relied upon by defendant Larsen, is not applicable. There the defective scaffold was supplied by the plaintiffs' employer, a subcontractor, and not by the general contractor. Here it is alleged in the complaint and stated in the opening statement that it was supplied by Larsen, the general contractor. The Hard case holds that a general contractor "is not liable for injuries caused by defective scaffolds or other instrumentalities *unless he has supplied them.*" 112 Cal.App.2d at page 275, 246 P.2d at page 724. (Emphasis added.) Likewise, in Hayden v. Paramount Productions, Inc., 33 Cal.App.2d 287, 91 P.2d 231, the general contractor did not supply the instrumentality which caused the injury to the subcontractor's employee.

(b) *Violations.*

[8] Section 7301, Labor Code: "No elevator shall be operated in any place of employment in this State unless a permit for the operation thereof is issued by the division, and unless such permit remains in effect and is kept posted conspicuously *in the elevator car.*" (Emphasis added.) Section 7200 defines a "construction elevator" as including "any means used to hoist persons or material of any kind on a building under course of construction, when operated by any power other than muscular power." In view of the language of section 7301 and of the separate reference in section 7200 to construction elevators, it is obvious that section 7301 does not refer to the type of elevator used here. The telescoper is a movable machine consisting of an electrical apparatus for elevating a railed platform which is attached to it. This platform may be raised to the height of the machine. From this platform workmen (apparently no more than two could occupy it at the same time) may stand to work on any portion of the building within reach, or they may step off it on to any portion of the building reachable. It may be moved around inside or outside the building and has clamps to brace it against the floor or ground.

It is obvious that it is a "means" operated by power other than muscular "to hoist persons or material of any kind on a building under course of construction." Because of the word "on" in the definition, defendants would have it apply only to hoists *attached* to some portion of the building. But it is not the hoist which is to be "on" the building. It is persons or materials which are to be hoisted "on" the building. It is contended that the telescoper type of hoist was not intended by section 7200 because (1) sections 7201, 7202 and 7203 require a system of signals and assume an operator of the hoist, and (2) because the Labor Board has provided certain requirements which obviously were not intended for this type of hoist. (1) While the provisions of section 7201 through 7203 obviously do not apply to this type of hoist, that fact does not change the clear wording of section 7200 and the obvious intent of the Legislature to consider as construction elevators all power hoists of men and materials used in the construction of a building. The definition is a broad one, and a reasonable interpretation of sections 7201–7203 is that they apply only to the larger type of hoist requiring signals.

The same thing is true of the regulations in the Administrative Code.[1] It is obvious that all the regulations do not apply to a telescoper, as some of them are intended only for the type of hoist requiring an operator. Thus the requirement of subsection (b) of section 1541 requiring elevators to be in charge of experienced operators does not apply, but (c), (d) and (h) do apply. (No violation of (h) is claimed.) In fact, it is equally as important to have these protections on a small hoist as on a large one. These subsections provide:

"(c) Every machine used to hoist men shall be equipped with a control that will return to stop position when the hand of the operator is removed from the control lever and which will cut off the power from the machine and apply the brakes when the control lever is in the stop position. Friction gearing or clutch mechanism shall not be used.

"(d) The brake shall be an automatic brake that will be applied in the event the power fails and when the power is shut off. In addition to the above brake, a hand operated or foot brake shall be provided, attached to the drum, capable of holding a fully loaded cage. * * *

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[1] These regulations were promulgated under authority of Labor Code sections 6500 and 6312. Section 1541, article 9, title 8, Administrative Code, provides that the provisions therein mentioned must be complied with, if any persons are to ride on a construction elevator.

"(h) The speed of the 'cage' shall not exceed two hundred feet (200′) per minute."

Administrative Code, title 8, article 8, section 1536, provides in part: "(a) No employer shall permit any person to ride in any elevator provided for hoisting material, except when oiling or repairing guides, unless such elevator be constructed to comply with the requirements of section 1541."

While the telescoper strictly speaking has no "cage," it is clear that what is intended is the portion of the hoist upon which the men are elevated,—here, the platform.

[9] The telescoper not having the safeguards required by sections 1536(a) and 1541(c) and (d), and it being claimed that the absence of these safeguards caused the accident, a cause of action was stated against both defendants supplying the telescoper for the use of plaintiffs and their fellow employees. In Armenta v. Churchill, 42 Cal.2d 448, at page 455, 267 P.2d 303, at page 307, the Supreme Court said, discussing a safety rule of the Division of Industrial Safety: "* * * *its violation would constitute negligence per se* [citations]; and the question of whether such negligence proximately contributed to the deceased's death would be one of fact for the jury." (Emphasis added.)

2. Enlarging Statement.

After plaintiffs finished the opening statement, defendants moved for a nonsuit. Considerable discussion between court and all counsel followed. Plaintiffs then referred to the rule in Martin v. Food Machinery Corp., supra, 100 Cal.App.2d 244, 248, 223 P.2d 293, to the effect that a contractee who agreed to provide a contractor with a particular instrumentality for the purposes of the stipulated work is ordinarily liable for injuries therefrom to the employee of the contractor. The court then said that nothing plaintiffs had stated brought this case within the ruling of the Martin case. Thereupon, plaintiffs' counsel asked an opportunity to enlarge his opening statement. More discussion followed. The court then said that if counsel were an inexperienced lawyer the court might permit the statement to be enlarged, but that characterization did not apply to counsel, and then: "Now I am going to assume that as this case rolls on, you're going to enlarge upon all of that and bring in evidence here to establish these things which you now say the authorities support you in? I am afraid, Mr. Miller, the Court has no alternative but to grant the motion of these defendants." Again counsel requested permission to enlarge on his opening statement.

[10, 11] It is true that at no time did counsel state what matters he desired to state, but he was given no opportunity to do so. The court was exceedingly abrupt with him. The action of the court on a motion for nonsuit based upon the opening statement is akin to that on a request that a demurrer to a complaint be sustained without leave to amend. A reasonable opportunity should be given to set up a cause of action if there is one. While the question of permitting counsel to enlarge his opening statement is one primarily in the discretion of the trial court, that discretion should be exercised with liberality so that a plaintiff who really has a cause of action should not be denied the opportunity to present it to a jury, merely because his counsel did not state in detail all the facts he proposed to prove. Under the circumstances of this case, the court should have permitted plaintiffs to enlarge their statement.

[12] An order granting a nonsuit upon the opening statement of a party " '* * * can be upheld only where it is clear that counsel has undertaken to state all of the facts which he expects to prove, and it is plainly evident that the facts thus to be proved will not constitute a cause of action * * *' ". Bias v. Reed, 169 Cal. 33, 37, 145 P. 516, 518. Applying that test here, the action of the trial court in granting the nonsuit cannot be upheld.

The judgment is reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; EDMONDS and SCHAUER, JJ., dissenting.

133 Cal.App.2d 463

Frank BORGHI, Jr., Keith Whipple and LeRoy A. Broun, Petitioners,

v.

The BOARD OF SUPERVISORS OF COUNTY OF ALAMEDA, California, Chester E. Stanley, Francis Dunn, Leland W. Sweeney, Kent D. Pursel, Emanuel P. Razeto, members thereof; the City of Hayward, a body corporate and politic and a political subdivision of the State of California, the City Council of the City of Hayward and Frank R. Biggs, Art Phillips, John J. Purchio, Bob Wright, and W. O. Wilson, members thereof, Respondents.

Civ. 16691

District Court of Appeal, First District, Division 1, California.

June 8, 1955.

As Corrected on Denial of Rehearing July 8, 1955.

Proceeding on petition by committee for incorporation of city for writ of mandate to compel county Board of Supervisors to proceed on petition filed with it for incorporation of such city. The District Court of Appeal, Bray, J., held that action of city council seeking to annex certain territory in approving circulation of petition for consent to commence proceedings for annexation gave that body exclusive control over such territory, and county Board of Supervisors had no power to proceed with subsequent petition for incorporation of city including part of territory involved.

Writ denied.

1. Municipal Corporations 🔑12(1), 33(1)

As between incorporation proceeding and annexation proceeding, legislative body which first obtains jurisdiction retains it exclusively until final determination of particular proceeding, and this is also the rule between rival annexation proceedings.

2. Municipal Corporations 🔑12(8), 34

Rule that when petition for annexation has been received by legislative body of city and until annexation has been defeated by its electors, no other legislative body shall submit question of annexation of any part of territory described in petition to its electors, is also applicable to rivalry between annexation and incorporation proceedings. West's Ann.Gov.Code, § 35115.

3. Municipal Corporations 🔑33(5)

When city council approves circulation of petition for consent to commence proceedings for annexation, exclusive jurisdiction is obtained by such city. West's Ann.Gov.Code, §§ 35106, 35108 to 35115.

4. Municipal Corporations 🔑12(8), 33(5)

In annexation proceedings, it is not preliminary proceedings which Legislature has determined shall give control, but point when governing body has approved circulation of petition for annexation, and in incorporation proceedings it is point where petitioners for incorporation have completed their work, namely, payment of costs fixed by board, and board is obligated to call election. West's Ann.Gov.Code, §§ 34303 to 34309.

5. Municipal Corporations 🔑12(4)

It is essential to jurisdiction of board that proper petition for incorporation signed by requisite number of qualified signers be presented.

6. Municipal Corporations 🔑12(2), 33(5)

Action of city council seeking to annex certain territory in approving circulation of petition for consent to commence proceedings for annexation gave that body exclusive control over such territory, and county Board of Supervisors had no power to proceed with subsequent petition for incorporation of city including part of territory involved. West's Ann.Gov.Code, §§ 34303 to 34309, 35106, 35108 to 35115.

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LeRoy A. Broun, Centerville, for petitioners.

John W. Scanlon, City Atty., Robert P. Berkman, Asst. City Atty., Hayward, for respondents City Council, City of Hayward.

J. F. Coakley, Dist. Atty., R. Robert Hunter, Chief Asst. Dist. Atty., Richard H. Klippert, Bernard M. King, Deputy Dist. Attys., Alameda County, Oakland, for respondents Board of Sup'rs, Alameda County.

BRAY, Justice.

The question here is the priority between an annexation proceeding and an incorporation proceeding covering portions of the same territory. It is raised by a petition for writ of mandate in which "the Executive Committee of the Steering Committee for the incorporation of Union City" as a city of the sixth class, seeks an order compelling the Board of Supervisors of Alameda County to proceed on the petition filed with it for the incorporation of said Union City. The city of Hayward and its governing body, which were proceeding with the annexation of certain areas included within the incorporation proceeding, are joined as respondents. All respondents demurred on the ground that the petition for the writ of mandate shows that the incorporation has priority in law, that is, that the exclusive jurisdiction to deal with the territory was acquired by the board of supervisors in the incorporation proceeding.

Record.

February 10, 1955, Hayward City Council was petitioned for consent to the commencement of annexation proceedings, Treeview Annex. Findings and recommendation of Hayward Planning Commission, report and recommendations of the Alameda County Boundary Commission were presented to the council. *Resolution consenting to the commencement of the annexation proceedings adopted.*[1]

February 11th, notice of intention to circulate petition for annexation published. Government Code, § 35111.

March 1st, 2 p. m., Board of Supervisors of Alameda County. Petition for incorporation of certain unincorporated territory (of which the proposed Treeview Annex is a part) presented. *Resolution adopted directing the county clerk to report to the board on the sufficiency of the petition*, such report to be made on March 3, 1955.[2] Gov.Code, §§ 34303, 34306.

March 1st, 8 p. m. Hayward City Council. Resolution adopted acknowledging receipt of notice of intention to circulate the petition for annexation and affidavit of publication and giving approval to circulate petition for annexation. Gov.Code, § 35113. A letter notifying the board of supervisors of this action was presented to that board on March 3rd, at which time the clerk of the board reported the sufficiency of the petition for incorporation. Thereafter said board, because of the overlapping of territory and because it was advised that the annexation proceedings had obtained priority, refused to proceed further in the incorporation matter.

Priority.

[1, 2] The parties agree that as between an incorporation proceeding and an annexation proceeding, the legislative body which first obtains jurisdiction retains it exclusively until the final determination of the particular proceeding. This is the rule between rival annexation proceedings, People ex rel. Forde v. Town of Corte Madera, 1952, 115 Cal.App.2d 32, 251 P.2d 988, and between annexation and incorporation proceedings, People ex rel. City of Pasadena v. City of Monterey Park, 1919, 40 Cal.App. 715, 181 P. 825; 2 McQuillin, Municipal Corporations, 320; 62 C.J.S., Municipal Corporations, § 52, p. 150. Section 35115, Government Code, provides that when a petition for annexation has been received by the legislative body of a city and until annexation has been defeated by its electors, no other legislative body shall submit the question of annexation of any part of the territory described in the petition to it electors. In the interests of orderly government it necessarily follows that the

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[1] Respondents claim initially that the adoption of this resolution gave the city of Hayward and the annexation proceedings exclusive jurisdiction over the territory involved. The annexation proceedings are pursuant to Annexation Act of 1913, Title 4, Div. 2, Part 2, Chap. 1, Art. 2, § 35106 et seq., Gov.Code.

[2] It is the adoption of this resolution which petitioners claim gave the Alameda County Board of Supervisors and the incorporation proceedings exclusive jurisdiction over the territory. This proceeding is pursuant to Title 4, Div. 2, Part 1, Chap. 1, § 34300 et seq., Gov. Code.

same rule must apply to rivalry between annexation and incorporation proceedings. So the question here is, as between the rival proceedings, when was jurisdiction first acquired in the particular proceeding?

The first step taken was the granting of permission by the Hayward City Council to the circulation of an annexation petition. Did this give that body the exclusive jurisdiction of the proposed territory so as to exclude all other proceedings dealing with it? We think not, primarily for the reason that the Legislature in sections 35113 and 35115, in effect, has fixed later steps in the proceeding as the point when such jurisdiction attaches. Section 35106, Government Code (pursuant to which the Hayward City Council consented to the commencement of the annexation proceedings), provides: "The consent of the city legislative body shall be obtained before any proceedings are commenced pursuant to this article." (No procedure is provided for obtaining this consent.) Then follow sections 35108 and 35109 relating to the necessity of a report of the planning commission being received before consent may be given. Apparently, these sections contemplate that upon being asked for consent, the legislative body will request a report from the commission. However, in this case, the report of the planning commission was received by the Hayward City Council the same day and apparently at the same time the request for consent was received. Section 35110 prohibits annexation of territory of another city. Section 35111 requires publication by the proponents of a notice of intention to circulate a petition for annexation. Section 35112 provides for filing after publication a copy of this notice and an affidavit of publication. Then we come to section 35113, which for the first time in the plan provided by the Code for annexing territory mentions the effect of these proceedings on other proceedings. After providing that the legislative body may adopt a resolution acknowledging receipt of the notice of intention to circulate a petition for annexation, and approving circulation of the petition, it states: "A petition asking for the annexation of any portion of the territory described in the notice, shall not be filed with any other city for 50 days after the adoption of such a resolution." Then follows section 35114 providing that 21 days after the publication of the notice provided for in section 35111 the petition may be circulated. Section 35115 provides that when a petition for annexation has been received by the legislative body and until such annexation has been defeated by the electors, no other petition for the annexation of any portion of the territory included in the first petition shall be presented to the legislative body of any other city and no other legislative body shall submit the question of annexation to its electors. Thus the code contemplates that upon the adoption by a city council of the resolution provided for in section 35113, exclusive jurisdiction over the territory exists for 50 days.[3] Then if the petition for annexation is filed the exclusive jurisdiction continues unless the annexation is defeated by the voters. § 35115.

[3] The reference in section 35115 to a petition "received" is not to the consent required by section 35106, where there can be no petition for annexation filed or "received." The petition contemplated by section 35106 is the type of petition which was filed here—a petition for consent to commence proceedings for annexation. When that consent is gained, then a notice of intention to circulate a petition for annexation is published. Then the city council approves the circulation of the petition. It is then that exclusive jurisdiction attaches. It continues if the petition for annexation is thereafter filed. Section 35106 says that *before* any proceedings are *commenced* the *consent* must be obtained. Thus the giving of consent is a preliminary requirement which cannot confer exclusive jurisdiction

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[3] In Johnson v. City of San Pablo, 132 Cal.App.2d 447, 283 P.2d 57, the action of the San Pablo City Council under section 35113 was considered the date upon which exclusive jurisdiction would have attached had the proceedings been regular.

on the consenting body over the territory as to which proceedings actually may or may not be commenced. If exclusive jurisdiction attached at the time of giving consent, why the necessity of section 35113 or section 35115?

In Foth v. City of Long Beach, 1954, 125 Cal.App.2d 520, 528, 270 P.2d 868, 873, appears the language "An annexation proceeding is commenced when the consent of the city legislative body is obtained. § 35106." That language was not a determination of the meaning of that section as that question was not before the court. It was merely a prefatory remark and cannot be authority here. The sole question before the court there was whether protestants had been given a fair hearing before the city council. The interpretation of that section was not involved. Nor are authorities from other states, such as Town of Greenfield v. City of Milwaukee, 1951, 259 Wis. 77, 47 N.W. 2d 292, holding that it is the first procedural step which controls, applicable here. In none of those states are the statutes similar to ours.

The next proceeding in time was the petition for incorporation filed at 2 p. m. March 1st with the board of supervisors. Section 34303 provides "Proceedings [for incorporation] are initiated by filing with the board of supervisors * * * a petition * * *." Section 34303.5 provides that no petition for incorporation may be circulated or *filed* with the board of supervisors and that neither the board nor the clerk shall *accept any such petition for filing,* until the proposal for incorporation has been submitted to and reported upon to the proponents by the county boundary commission. Sections 34304, 34304.5 and 34305 prescribe the form and contents of the petition. Section 34306, the board shall cause its clerk to ascertain if the petition has the requisite number of qualified signers and if it correctly described the proposed boundaries, and report within 30 days. Section 34307 provides that the board is without jurisdiction to proceed further if the clerk's report shows that the petition does not have the requisite number of qualified signers or that the boundaries are inaccurately described. Section 34308 is to the effect that if the clerk's report shows that the petition complies with the law in certain respects "the board shall *direct its clerk to accept the petition for filing* and to file it *when the petitioners have deposited* with him the *amount of money* fixed by the board to defray the costs of the publication of the petition and the notice of election." (Emphasis added.) Section 34309: "*If the money is deposited* with the clerk within fifteen days after he is directed to accept the petition for filing, he shall thereupon file the petition."

There seems to be a conflict between the provisions of section 34303 and of section 34308. Section 34303 says the "Proceedings are initiated" by "filing" with the board a petition for incorporation. Section 34308 says that if the report of the clerk shows the petition to be proper in certain respects, the board shall direct the clerk to accept the petition for filing and file it *when* he shall have received certain moneys. Section 34309 provides that if he receives the moneys within 15 days he shall thereupon *file* the petition. The substance of sections 34303, 34308 and 34309 were originally in section 2, Statutes of 1883, chapter 49. As amended by Statutes of 1927, page 544, the section provided that the petition shall first be "presented" to the board, after publication for two weeks giving the time at which it was to be "presented." When "presented" the board must hear it. In 1933, Stats. 1933, chap. 394, § 2, the section was amended in certain respects, one of which was the elimination of the requirement that the petition be published, but the section still used the word "presented," and read in other respects practically the same as sections 34308 and 34309. In codifying section 2 the language inserted in section 34303 was changed to "Proceedings are initiated by filing with the board of supervisors at a regular meeting a petition * * *."

In its 1935 report (and in each biennial report thereafter) the California Code Commission has stated that it has adopted a policy "not to make substantive changes, but to confine its work to a compilation, consolidation, and clarification of the existing law."[4] The same policy is expressed in section 2, Government Code. Having in mind that statement and policy, the provisions of the statute codified, as well as the provisions of sections 34308 and 34309, to the effect that while the clerk is directed to accept the petition *for filing* he may not *file* it until the required money is paid, it is clear that the meaning of the word "filing" is not technical filing but is "presenting." A check of the Code Commission records fails to show any indication of an intent to make any change in the law as it was prior to codification nor any indication that the draftsman thought that the language used would result in a substantive change.

That the word "filing" in section 34303 really means "presenting" is shown by the provisions of section 34303.5, which states that no petition may be "filed" with the board, nor shall the clerk "accept * * * for filing" any petition until the boundary commission has reported to the proponents. Significantly, section 34308 dealing with the action of the board after it has referred the petition to the clerk and received a favorable report uses the language of section 34303.5 in providing that the board may now direct the clerk to "accept * * * for filing" the petition. However, he must not *file* it until he has received the money required by the board. The procedure contemplated by the code would include the "presenting" of the petition for incorporation to the board, accompanied by the boundary commission report theretofore obtained by the proponents, the clerk's report as ordered by the board, the payment of the money, and then, for the first time, the actual *filing* of the petition.

[4] This brings us to the question of whether the statement in section 34303 that the proceedings are *initiated* by presenting the petition, having in mind the later provision that the actual *filing* does not take place until certain requirements are met, was intended to confer upon the board complete control over the proposed territory. We do not think so. In annexation proceedings, as we have shown, it is not the preliminary proceedings which the Legislature has determined shall give control, but the point when the governing body has approved the circulation of the petition for annexation. In incorporation proceedings it is the point where the petitioners for incorporation have completed their work, namely, the payment of the costs fixed by the board—and the board is obligated to call the election.

[5] It is significant that when the incorporation sections were amended in 1933 they eliminated the provision that the affidavit of three qualified electors certifying to the genuineness of the signatures on the petition for incorporation was prima facie evidence of the requisite number of signers, and in place thereof provided that the board must cause the clerk to determine this question and report back, § 34306. Essential to the jurisdiction of the board is a proper petition signed by the requisite number of qualified signers. People ex rel. Boardman v. Town of Linden, 107 Cal. 94, 99, 40 P. 115.

The statements in People ex rel. Forde v. Town of Corte Madera, supra, 115 Cal. App.2d 32, 38, 251 P.2d 988, 991, "The rule conferring priority on the first city to file is part of the public policy of the state", (held in People ex rel. City of Pasadena v. City of Monterey Park, supra, 40 Cal.App. 715, 181 P. 825, to be declaratory of the existing common law) and "priority is granted to that city first instituting proceedings", are not contrary to the determination made in this case. It is that very rule we are applying here. The question which is not passed upon in either of the last mentioned cases is when a city "files" or institutes proceedings. This we have determined in annexation proceedings is when under section 35113 the legislative body adopts a resolution acknowledging receipt of the notice of intention to circulate a petition for annexation, and approving its circulation. In proceedings to incorporate a city, it is when, under section 34308, the clerk, following the direction of the board of supervisors, has received the petitioner's money and has filed the petition for incorporation.

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[4] Report of California Code Commission, 1949, page 8.

Conclusion.

[6] The Hayward City Council's consent to the commencement of annexation proceedings (February 10th), the presentation to the board of supervisors of the petition for incorporation (March 1st, 2 p. m.) gave neither board the exclusive jurisdiction of the territory included in the respective petitions. Under the provisions of section 35113 the action of the Hayward City Council on March 1st, 8 p. m. gave that body the exclusive control over the territory. Therefore the Board of Supervisors of Alameda County has no power to proceed with the petition for incorporation of Union City.

The alternative writ is discharged and the peremptory writ is denied.

PETERS, P. J., and FRED B. WOOD, J., concur.

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133 Cal.App.2d Supp. 804

Sam COOK, Plaintiff and Respondent,

v.

Paul GOLDSMITH, Defendant and Appellant.

C. A. 8710.

Appellate Department, Superior Court, Los Angeles County, California.

May 26, 1955.

Action by landlord to recover rent. The Municipal Court of the Los Angeles Judicial District entered judgment for landlord, and tenant appealed. The Superior Court, Appellate Department, Los Angeles County, Patrosso, J., held that landlord's action for rent for property which tenant vacated before lease expired and which landlord later relet to third party was premature, where filed before expiration of defendant's lease.

Judgment reversed.

1. Landlord and Tenant 🔑227

Where lessees vacated property before lease had terminated, and lessor later relet to another party before expiration of original lease, action instituted by lessor, before expiration of lease, for rent for period between evacuation by lessee and rental to third party was premature.

2. Landlord and Tenant 🔑194(1)

Upon surrender of possession by lessee before expiration of lease term, lessor has three remedies: (1) to consider lease as still in existence and sue for unpaid rent as it becomes due, (2) to treat lease as terminated and retake possession for his own account, or (3) to retake possession for lessee's account and relet premises, holding lessee for difference between lease rentals and what it was able in good faith to procure by reletting.

3. Landlord and Tenant 🔑227

Where lessor elected to retake possession of property vacated by lessee before expiration to lease for lessee's account and relet premises, holding lessee for difference between lease rentals and what it was able in good faith to procure by reletting, cause of action does not accrue until expiration of term in absence of express covenant providing otherwise, even if lessor sues only for rental accrued up to time of filing of action.

Nessen & Becker, Los Angeles, for appellant.

Zeman & Hertzberg, Los Angeles, for respondent.

PATROSSO, Judge.

Action to recover rent under a lease in which plaintiff recovered judgment, and defendant appeals.

Insofar as material to a determination of the controversy, the facts may be briefly stated. On December 1, 1949, the parties executed a written lease of the premises in question for a term of three years, commencing December 1, 1949, at a monthly rental of $175. The defendant entered into and occupied the premises until sometime in March 1951, when they removed from the premises, claiming that the same had deteriorated to such an extent that they were not usable for the purpose of which they were let. Following the vacation of the premises by the defendant, plaintiff took possession thereof, made certain alterations and repairs therein, and undertook to rent the same, with the result that they were rented to others during the months of May and June, 1952. The defendant paid all rent accrued prior to March 1, 1951, but refused to pay any rent thereafter, and the present action was instituted August 26, 1952, seeking recovery of rental from April 1, 1951 to and including the month of May, 1952.

[1] Defendant contends that the act of plaintiff in taking possession of the premises following the vacation thereof by defendant constituted an acceptance of the surrender of the premises, which operated to discharge defendant from further liability thereunder, whereas, plaintiff asserts that in taking possession of the premises he merely did so as agent for and on behalf of the defendant, and as a consequence defendant remains liable for the rent reserved under the lease less only rental received during the balance of the term thereof as a result of the reletting of the premises by plaintiff. In reply defendant contends that the remedy elected by plaintiff is not available to him by reason of his failure to give notice to the defendant that he was taking possession for defendant's benefit and not in his (plaintiff's) own right, Siller v. Dunn, 1930, 103 Cal.App. 154, 158, et seq., 284 P. 232; Dorcich v. Time Oil Co., 1951, 103 Cal.App.2d 677, 683, 230 P.2d 10; Yates v. Reid, 1950, 36 Cal.2d 383, 385, 224 P.2d 8, holding this to be the rule except where there is a provision in the lease waiving the requirement of such notice), and, moreover, that the action was, in any event, premature, as it was filed prior to the expiration of defendant's lease. The latter contention is well taken and requires a reversal; thus obviating any necessity for considering defendant's further contention that the evidence is insufficient to sustain the trial court's finding that the plaintiff's action in taking possession of the premises and reletting the same did not constitute an acceptance of the surrender thereof by the defendant.

[2, 3] It is undoubtedly true, as plaintiff contends, that "Upon surrender of possession by the lessee before the expiration of the lease term, the lessor had three remedies: (1) To consider the lease as still in existence and sue for the unpaid rent as it became due for the unexpired portion of the term; (2) to treat the lease as terminated and retake possession for its own account; or (3) to retake possession for the lessee's account and relet the premises, holding the lessee for the difference between the lease rentals, and what it was able in good faith to procure by reletting." Kulawitz v. Pacific, etc., Paper Co., 1944, 25 Cal.2d 664, 671, 155 P.2d 24, 28. However, it is equally well settled that where, as here, the lessor elects to avail himself of the third of these remedies, the action does not accrue until the expiration of the term in the absence of an express covenant providing otherwise, which is not the situation here. Treff v. Gulko, 1932, 214 Cal. 591, 598, 599, 7 P.2d 697; De Hart v. Allen, 1945, 26 Cal.2d 829, 833, 161 P.2d 453. Nor is the rule otherwise where, as here, the lessor sues only for the rental accrued up to the time of the filing of the action. Treff v. Gulko, supra, 214 Cal. at page 592, et seq., 7 P.2d 697.

The judgment is reversed.

SHAW, P. J., and SWAIN, J., concur.

133 Cal.App.2d 402

Fred J. CARON and John B. Oliver, co-partners doing business as Caron & Oliver Equipment Center, Plaintiffs,

v.

Parley G. ANDREW, John Doe Andrew, Individually and as co-partners doing business as Andrew Brothers, Farm Service Company, a corporation, Farm Service Company, a co-partnership composed of Parley G. Andrew and Best Fertilizer Company, Best Fertilizer Company, a corporation, Best Fertilizer Company, a co-partnership composed of L. A. Barry, Parley G. Andrew and Farm Service Company, Enrico Picchi, Julia Picchi, Frediano E. Picchi, Josephine M. Picchi, H. H. Grimes, Ruth Grimes, Norman Dean and Betty Dean, Defendants.

H. H. Grimes and Ruth Grimes, Cross-complainants, Cross-appellants and Respondents.

Farm Service Company, a corporation, Cross-defendant, Appellant and Respondent.

Enrico Picchi, Julia Picchi, Frediano E. Picchi and Josephine M. Picchi, Cross-complainants and Respondents,

Farm Service Company, a corporation, Cross-defendant and Appellant.

Civ. 8595

District Court of Appeal, Third District, Division 3, California.

June 3, 1955.

Rehearing Denied June 22, 1955.

Hearing Denied July 27, 1955.

Action by equipment company to recover compensation for use of leveling machinery. Owners of property on which equipment was used cross-complained against excavating contractor and its surety for damages allegedly arising out of breach of leveling contract. The Superior Court, San Joaquin County, George F. Buck, J., entered judgment for property owner on cross-complaint and contractor's surety appealed and one property owner appealed contending that larger award should have been made. The District Court of Appeal, Van Dyke, P. J., held that where surety of defaulting excavating contractor entered upon work, assumed contract of principal and undertook to complete after principal's breach, such surety rendered itself liable for damages proximately flowing from its own succeeding breach and such liability was not limited to limitation of bond.

Affirmed in part, in part affirmed as amended.

See, also, Cal.App., 284 P.2d 550.

1. Evidence 🔑8

It is matter of common knowledge that lands lying between protected levees of San Joaquin River and its tributaries are subject to inundation by flood waters which over-top or break levees.

2. Contracts 🔑303(1)

Where party has agreed without qualification to perform act which is not in its nature impossible of performance, he is not excused by difficulty of performance or by fact that he himself becomes unable to perform.

3. Contracts 🔑309(1)

Impossibility which will excuse performance of contract must consist in nature of thing to be done and not inability of obligor to do it.

4. Contracts 🔑309(1)

If thing to be done is not naturally or necessarily impossible under all circumstances, positive contract to do it is binding, though performance is rendered impractical, or even impossible, by some unforeseen cause over which promisor has no control but against which he might have provided in his contract.

5. Contracts 🔑303(3)

Where excavating contractor undertook unconditionally to level ranch land by certain date unless owners should agree in writing to extension, and where consent of owners was only condition of contract excusing performance within stipulated time and no request for extension was made, inundation of land due to flood did not operate to excuse failure of performance.

6. Contracts 🔑322(3)

Principal and Surety 🔑161

On cross-complaint against excavating contractor and its surety for damages allegedly arising out of breach of contract to level ranch land, evidence was sufficient to support court's finding that subject matter of contract had not been materially altered, nor burdens of contractor or surety increased, by anything done by property owners outside of their rights under contract and without consent of contractor or surety.

7. Appeal and Error ⚿1010(1)

Findings of court with respect to affirmative allegations of defense must be sustained on appeal unless evidence adduced at trial is such as to compel court as matter of law to find allegations to be true.

8. Principal and Surety ⚿72, 142

Upon breach by principal, surety is, unless otherwise specifically provided in contract, free to rest upon contract of suretyship and if it does it cannot be held beyond limit of its bond and it may invoke any defense open to it as surety.

9. Principal and Surety ⚿81

If upon breach by principal surety elects to and is permitted under contract or by permission obtained after breach to step into place of its principal and perform that principal's contract, it then makes itself subject to principal's liabilities.

10. Principal and Surety ⚿72, 81

Where surety of defaulting excavating contractor entered upon work, assumed contract of principal and undertook to complete after principal's breach, such surety rendered itself liable for damages proximately flowing from its own succeeding breach and such liability was not limited to limitation of bond.

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Aiken, Kramer & Aiken of Oakland, for appellant and cross-respondent Farm Service Company.

J. Kingsley Chadeayne of Tracy, for respondent and cross-appellant H. H. Grimes.

Rutherford, Jacobs, Cavalero & Dietrich, of Stockton, for respondents Picchi.

VAN DYKE, Presiding Justice.

In July, 1950, H. H. Grimes and Fred E. Picchi were engaged in purchasing a tract of land known as the "Hunt Ranch" in San Joaquin County. It comprised 759 acres of land located on the east side of the San Joaquin River and between that river and Walthall Slough. They intended to own the land severally. While the purchase was being consummated Grimes and Picchi entered into a contract with Andrew Brothers, a copartnership, whereunder the parties contracted for the leveling of the entire ranch by Andrew Brothers; the work to be finished by December 1, 1950. Shortly after this contract was signed, the property was acquired, the title being taken in two groups of people, one group headed by H. H. Grimes, the other by Fred Picchi. Hereafter we shall refer to the Grimes group as "Grimes", to the Picchi group as "Picchi" and to the Andrew Brothers as "Andrews". Farm Service Company, a corporation, hereafter called "Farm Service", guaranteed the faithful performance of the work by Andrews, the penalty of the bond being in the amount of $26,000, one-half the contract price for the leveling. Andrews entered upon the performance of the work and obtained some machinery from Fred Caron and John Oliver, hereafter called "Caron", on a lease purchase agreement. Caron began an action against Andrews and their surety, Farm Service, and also against Grimes and Picchi. They sought compensation for the use of their machinery, asking also for the declaration and foreclosure of a materialman's lien upon the real property. Both Grimes and Picchi cross-complained against Andrews and Farm Service for damages alleged to have arisen out of the breach of the leveling contract. Judgment was rendered, granting Caron a sum in compensation for the use of their machinery and denying them a lien. Judgment was also given in favor of Grimes and Picchi against Farm Service. Motions for new trial as to all judgments were made by the parties against whom the judgments were rendered, and were denied as to the judgments in favor of Grimes and Picchi, but granted as to the judgment in favor of Caron. A further trial was held as to Caron and judgment was rendered in Caron's favor, which judgment is the subject of a separate appeal. It was stipulated during the proceedings that Andrews had been adjudicated bankrupt and so no judgment was rendered against them. Farm Service appeals from the judgments against it and Grimes also appeals, contending that a larger award should have been made. The Grimes appeal is on the judgment roll alone.

The court made findings as follows: That Andrews entered upon the lands and partially performed the work called for in the leveling contract; that on October 25, 1950, Andrews defaulted, abandoned the work, left the premises and never returned for the purpose of completing the work; that after the abandonment of the work by Andrews and on November 15, 1950, Farm Service, in performance of the terms of its surety agreement "did enter upon the performance of the contract of July 14, 1950 [the leveling contract]" with the consent and permission of Grimes and Picchi and "did then undertake the performance and completion of said contract of Andrew Brothers as guarantors"; that on February 24, 1951, Farm Service ceased work and thereupon was served with a written demand by Grimes and Picchi for the completion of the work of leveling; that Farm Service thereupon advised Grimes and Picchi that it would not complete the contract; that thereafter Farm Service quit the premises and never returned; that thereafter Grimes and Picchi entered into agreements with others to complete the land leveling; that the actual and reasonable cost of completion to Grimes was the sum of $29,736.38; that Grimes had paid for the work done by Andrews and Farm Service a total of $19,346, making the whole cost of leveling the Grimes land the sum of $49,082.38, as opposed to $29,162, his share of the contract price, leaving Grimes damaged in the sum of $19,920.38 by failure of Andrews and Farm Service to complete the contract. Similar findings with respect to Picchi fixed the damages of Picchi in the amount of $4,960. In addition to the foregoing damages, special damages were awarded both Grimes and Picchi. Grimes was awarded further damages in the sum of $6,060 for loss of use of land and $2,500 for attorney's fees, as provided for in the leveling contract in event of breach. Picchi was given special damages in the sum of $1,252.50 because of leveling work improperly done by Andrews which had to be corrected, and the further sum of $1,946 for loss of crops for failure to properly level. Picchi was also awarded attorney's fees in the sum of $1,500. The damages awarded to Grimes thus totaled $28,480.38 and those awarded to Picchi totaled $9,658.50. The court limited the awards to the penalty of the bond, prorating the bond penalty of $26,000 between Grimes and Picchi in proportion to their total awards, with the result that Grimes received a judgment for $19,416.10 and Picchi received judgment for $6,583.90.

There were heavy rains in the fall of 1950. On November 20th, following an unusually heavy storm, there were several breaks in the master levees surrounding the land and the property was partially flooded. On December 5th a second flooding occurred due to further breaks in the levees and this flood almost completely inundated the property. Later in December both Grimes and Picchi requested the United States Army Corps of Engineers for aid in the repair of the levees. The request was granted and the levees were repaired. Permission was given the Army Engineers to use dirt for the repair of the master levees taken from a cross levee within the Grimes-Picchi property lines and some earth was also taken from the surface of the fields. The consent of neither Andrews nor Farm Service was obtained for this use of earth for levee repair and this situation forms the main ground of attack on the judgment by appellant Farm Service. Farm Service had affirmatively pleaded in its answer to the cross complaint of Grimes and Picchi that the lands had been flooded by waters escaping from the streams; that the lands had been under water for more than three months and that by reason of the flooding the contour thereof had been materially changed from that existing at the time the leveling agreement was made; that such conditions were not contemplated by any of the parties to the contract and had been brought about by happenings beyond their control; that the performance of the land leveling agreement had thus been made impossible. Farm Service had further pleaded that after the flooding of the lands and without its knowledge or consent Grimes and Picchi had materially altered the subject matter of the contract by wilfully removing great portions of the surface of the land for the purpose of building levees and dikes to prevent further flooding; that the removal of such large quantities of dirt constituted a material alteration of the obligation of Andrews and that by reason thereof Farm Service had been released from its obligations as surety. As to these affirmative defenses the court found that although the lands had been flooded it was not true that by reason thereof Andrews and Farm Service were unable to complete the work of leveling and that it was not true that the flooding made such completion impossible; that the flooding had not caused material changes in the contours of the land and that the flooding did not result in any change or destruction of the subject matter of the leveling contract; that it was not true that the flooding could not have been or was not anticipated or contemplated by the parties to the contract and that the agreement had been made in anticipation and contemplation that such flooding might occur; that Grimes and Picchi had not altered materially the subject matter of the leveling contract by permitting the Army Engineers to move dirt from the land and from the cross levee and that it was untrue that the removal of such dirt constituted such material alteration. The court concluded that the flooding and the dirt removal had not released Farm Service from the obligations of its surety contract.

[1-4] The principal contention of appellant Farm Service is that these findings against its affirmative defenses are not sustained by the evidence. This contention cannot be sustained. Treating first the claim that the contract became impossible of performance by reason of the levee breaks and the consequent flooding of the lands to be leveled, it is to be noted that the contract itself contains no provisions excusing performance even within the time limited by the contract in the event that the levee should break and the lands should be flooded. This is significant in view of the facts, which are in the domain of common knowledge, that lands lying behind protecting levees of the San Joaquin River and its tributaries are subject to inundation by flood waters which over-top or break through the levees. The history of lands in the Sacramento and San Joaquin Valleys, situated as were the lands which were the subject of the leveling contract, is that of partial rather than complete protection by levees and when the parties contracted they knew that these lands might be flooded prior to the time when Andrews agreed to complete the leveling, that is, prior to December 1, 1950. Flood waters at that time of the year may be unusual, but are certainly not unknown, and it would have been a simple matter to have provided for extensions of time if such floods should occur. No protecting provisions were inserted in the contract and so it must be said that Andrews and their surety accepted the hazard that such floods might occur. The record is barren of any request by Andrews or Farm Service for extensions of time to complete the work because the levees had broken, although the testimony produced by Grimes was to the effect that extensions would have been favorably considered if the same had been requested.

> "* * * [W]here a party has agreed, without qualification, to perform an act which is not in its nature impossible of performance, he is not excused by the difficulty of performance, or by the fact that he himself becomes unable to perform. The impossibility which will excuse the performance of a contract must consist in the nature of the thing to be done and not in the inability of the obligor to do it. If the thing to be done is not naturally or necessarily impossible under all circumstances, a positive contract to do it is binding, though the performance is rendered impracticable, or even impossible, by some unforeseen cause over which the promisor has no control but against which he might have provided in his contract. The rule applies as well, of course, to a foreseen possible cause over which

the party might exercise control." 12 Cal.Jur.2d "Contracts" p. 461, sec. 238.

[5] Andrews undertook unconditionally to level the land by the first of December, 1950, unless the owners should agree in writing to an extension of time. Consent of the owners was the only condition of the contract excusing performance within the stipulated time and no request for an extension was made. Under such circumstances appellant cannot excuse failure of performance by reason of the flooding of the land. In addition to the foregoing there was evidence that Andrews had slowed down the work and moved equipment away from the job before the first flooding occurred and that the first flooding was temporary in its effect and did not necessarily stop the progress of all work. The court found that Andrews abandoned the work on October 25th, whereas the first flood occurred on November 20th following. By that time, according to the court's findings, Farm Service had undertaken the completion of it. This new undertaking by the surety likewise was found by the court to have occurred without the surety having exacted any stipulation that it would be relieved if, due to the lateness of the season, the contract could not be completed by reason of unseasonal rainfall, or flooding.

[6] Turning now to the contention that Grimes and Picchi, by permitting the Army Engineers to repair the levees and for that purpose to use the cross levee and soil from other portions of the fields, had materially altered the work to be done without the consent of the surety, we find the following to have been the situation. Most of the soil borrowed by the engineers for levee repair was taken from a cross levee of considerable size which lay within the surrounding levees and evidently constituted a secondary protection. This levee was approximately 40 feet wide at the base, 20 feet wide at the top and 8 feet high. It contained more than 31,000 cubic yards of earth. A great deal of this material was used by the Army Engineers and in fact the cross levee furnished the great mass of material taken by them to repair the levees. Farm Service contends that since the levee was in place when Andrews contracted and was available for use in leveling the lands by furnishing fill material for low portions that its removal for levee repair materially altered the work to be done by Andrews. But it was not a levee which the landowners were required to make available to Andrews for such uses. The contract itself specified that "levees contained within master levees are to be removed except as specified by owners". The trial court properly construed the contract, therefore, as giving to the owners, Grimes and Picchi, the right to withhold the cross levees, including the one in question, from use by Andrews. When, therefore, Grimes and Picchi permitted the Army Engineers to use portions of the cross levee they did not deny to Andrews any right accorded by the contract. There was evidence that, in addition to borrowing fill dirt from the levee, the Army Engineers were permitted to make additional borrowings from the surface of the fields in several places. But there was also evidence that the borrowing actually made did not result in any necessary added expense to the work of leveling. On the whole record, therefore, there is support for the findings of the court that the subject matter of the contract was not materially altered, nor the burdens of Andrews or Farm Service increased, by anything done by Grimes or Picchi outside of their rights under the contract and without the consent of Andrews or Farm Service.

[7] In testing the sufficiency of the record to support the findings of the trial court, it must be borne in mind that the findings had to do with affirmative defenses interposed by appellant Farm Service. The burden of proving these affirmative allegations was upon appellant and the findings of the court in respect thereto must be sustained on appeal unless the evidence adduced at the trial was such as to compel the court as a matter of law to find these allegations to be true. Roesch v. De Mota, 24 Cal.2d 563, 570–571, 150 P.2d 422, 425. Said the court:

> "In substance the trial court found and concluded that the plaintiffs and those equally charged with them in sustaining the burden had not proved payment by a preponderance of evidence. The problem here is not whether the appellants on the issue of payment failed to prove their case by a preponderance of the evidence. That was a question for the trial court and it was resolved against them. The question for this court to determine is whether the evidence compelled the trial court to find in their favor on that issue."

We turn now to a consideration of the appeal of Grimes presented on the judgment roll alone, wherein Grimes contends that as a matter of law the findings of fact made by the trial court as to the actions of Farm Service after Andrews breached the leveling contract required the trial court to conclude, as a matter of law, that the damages awarded Grimes and Picchi ought to have been allowed in full in the judgment and could not be properly limited to the penalty of the bond. This contention must be sustained. In examining it, we must, of course, take the findings of the trial court as being sufficiently supported by the evidence. The pertinent findings read as follows:

> "That after the abandonment of work under said contract by said Andrew Brothers on October 25, 1950 and on November 15, 1950, defendant Farm Service Company, a corporation, in the performance of the terms of said agreement set forth in paragraph XX hereof [the contract of suretyship] did enter upon the performance of the contract of July 14, 1950, between said Frediano E. Picchi and H. H. Grimes as Owners and said Andrew Brothers as Contractors, with the consent and permission of cross-complainants Picchi and Grimes and did then undertake the performance and completion of said contract of Andrew Brothers as guarantors and under and pursuant to the provisions of said agreements mentioned and set forth in paragraphs XIX and XX hereof; that thereafter and on or about February 24, 1951, defendant Farm Service Company, a corporation, ceased work under and pursuant to said contracts and agreements aforementioned; that thereafter and on February 24, 1951, a written demand was made by cross-complainants * * * upon said Andrew Brothers and said cross-defendant Farm Service Company, a corporation, for the completion of the work agreed to be done and undertaken * * * and * * * Farm Service Company, a corporation, * * * advised said cross-complainants and each of them in writing that they would not complete said contracts and agreements and left the premises and did not return for the purpose of fulfilling the terms of said contracts and agreements."

[8, 9] Upon breach by the principal, the surety is, unless otherwise specifically provided in the contract, free to rest upon the contract of suretyship and if it does it cannot be held beyond the limit of its bond and it may invoke any defense open to it as surety. If, however, upon breach by the principal it elects to and is permitted under the contract or by permission obtained after breach to step into the place of its principal and perform that principal's contract, it then makes itself subject to the principal's liabilities. This latter was the course of conduct which the court found Farm Service elected to pursue. This subject was discussed by the Supreme Court of Louisiana in Klein v. J. D. & J. M. Collins, 159 La. 704, 106 So. 120, 122, the court saying:

> "Considering, first, the contentions of the surety company it may be said that, had that company, for instance, left it to the owner to complete the work upon the default of the contractors, unquestionably the company could not be held liable for more than the amount for which it had bound itself as surety, except for such additional amounts, imposed by law, such as costs of court and statutory penalties. * * * However, if the com-

> pany, upon the default of the contractors, undertook to complete the work, a different case is then presented. In that event, the company, by such new undertaking, put itself in the place of the contractors from the moment of the new undertaking, and became liable for the costs of completing the building, without reference to the amount for which it had signed as surety. In other words, in that event, from that moment on, the company occupied the position of contractor and became liable for the costs of completion accordingly, and also for damages, as fixed in the contract, which it then undertook to execute, for the delay in completing and delivering the building."

See, also, Ausplund v. Aetna Indemnity Co., 47 Or. 10, 81 P. 577, 580, 82 P. 12; Mazzera v. Ramsey, 72 Cal.App. 601, 609, 238 P. 101; Griffith v. Rundle, 23 Wash. 453, 63 P. 199, 200, 55 L.R.A. 381; U. S. Fidelity & Guaranty Co. v. Zidell-Steinberg Co., 151 Or. 538, 50 P.2d 584, 588; State v. Cornwall, 102 Or. 220, 201 P. 1072; Beers v. Wolf, 116 Mo. 179, 22 S.W. 620, 621.

In the case last cited the court said:

> "One who is in reality a surety may contract as a principal. He may waive the rights which the law throws around a surety, for such a waiver has nothing in it offensive to the law; and the surety does waive such rights when he in terms contracts and agrees to be bound as principal."

[10] Under the findings of fact made by the trial court, hereinbefore recited, Farm Service, by entering upon the work, assuming the contract of the principal and undertaking to complete it after the principal's breach, rendered itself liable for damages proximately flowing from its own succeeding breach, and this without limitation as to amount. It stepped into its principal's shoes and, as the court found, undertook to complete its principal's contract without in any way seeking to protect itself by exacting extensions of time or other conditions which would or might make its undertaking less burdensome. Having done this and having consumed several months of time, it, in turn, breached its obligations and abandoned the work, leaving it to Grimes and Picchi to extricate themselves as best they could from the difficulties thus cast upon them. Thereafter Farm Service could not shelter itself behind the limitation of its liability expressed in its bond as it might have done had it rested upon its surety contract. The contention it now makes is that notwithstanding such conduct it did have such right. That contention cannot be sustained.

For the foregoing reasons the judgment in favor of Picchi is affirmed. The judgment in favor of Grimes is affirmed so far as is concerned the amount awarded by the trial court to Grimes; and responsive to the cross appeal of Grimes the trial court is directed to amend its judgment by including therein that portion of the damages Grimes was found to have suffered not included in the present judgment in Grimes' favor.

SCHOTTKY and PEEK, JJ., concur.

133 Cal.App.2d 412

Fred J. CARON and John B. Oliver, copartners doing business as Caron & Oliver Equipment Center, Plaintiffs and Respondents,

v.

Parley G. ANDREW, John Doe Andrew, Individually and as copartners doing business as Andrew Brothers, Farm Service Company, a corporation, Farm Service Company, a copartnership, etc., et al., Defendants,

Farm Service Company, a corporation, Appellant.

Civ. 8706.

District Court of Appeal, Third District, Division 3, California.

June 3, 1955.

Rehearing Denied June 28, 1955.

Hearing Denied July 27, 1955.

Action by equipment company against excavating contractor and its surety to recover compensation for use of leveling machinery. The Superior Court, San Joaquin County, George F. Buck, J., entered judgment for equipment company and contractor's surety appealed. The District Court of Appeal, Van Dyke, P. J., held that evidence was sufficient to support trial court's finding that implied contract was entered into between surety and equipment company whereunder surety agreed to pay equipment company reasonable rental value of machines used and that surety took and retained such machinery pursuant to that contract for periods fixed in findings.

Judgment affirmed as reduced.

1. Contracts ⚷3, 4

A contract is either express or implied.

2. Contracts ⚷3

An expressed contract is one, terms of which are stated in words.

3. Contracts ⚷4

An implied contract is one, existence and terms of which are manifested by conduct. West's Ann.Civ.Code, §§ 1619–1621.

4. Contracts ⚷3, 4

Contracts are often spoken of as express or implied, but distinction involves no difference in legal effect, but lies merely in mode of manifesting assent.

5. Appeal and Error ⚷991, 996, 1011(1)

Existence of implied contract is usually question of fact for trial court, and where evidence is conflicting, or where reasonable conflicting inferences may be drawn from evidence which is not in conflict, question of fact is presented for decision of trial court.

6. Appeal and Error ⚷931(1)

On appeal, reviewing court must draw all reasonable inferences in favor of judgment.

7. Contracts ⚷4, 14

Express and implied contracts are based upon intention of parties and are distinguishable only in manifestations of assent, and making of an agreement may be inferred by proof of conduct as well as by proof of use of words.

8. Contracts ⚷4, 20

Before contract may be implied, it must be determined as question of fact whether parties acted in such manner as to provide necessary foundation for it, and evidence may be introduced to rebut inferences and show that there is another explanation for conduct, and such contract is inferred from conduct, situation, or mutual relation of parties and enforced by law on ground of justice.

9. Contracts ⚷14

Contract is implied where facts and circumstances show mutual intention to contract, and without such mutual intention there can be no contract in fact.

10. Contracts ⚷3, 4

Both express contracts and contracts implied in fact are founded upon an ascertained agreement, and are consensual in nature, substantial difference being in mode of proof by which they are established.

11. Bailment ⚷20

In action by equipment company against excavating contractor and its surety to recover compensation for use of leveling machinery, evidence was sufficient to support trial court's finding that implied contract was entered into between surety and equipment company whereunder surety agreed to pay equipment company reasonable rental value of machines used and that surety took and retained such machinery pursuant to that contract for periods fixed in findings.

◆

Aiken, Kramer & Aiken, Oakland, for appellant.

G. Clayton Wilkinson, Tracy, for respondent.

VAN DYKE, Presiding Justice.

Much of the background of this appeal is reflected in our opinion in Caron v. Andrew, 284 P.2d 544.

This appeal is from a judgment rendered in favor of respondents Caron and Oliver, copartners, against Farm Service Company, a corporation. The judgment rests upon breach of an implied contract for the payment of the reasonable rental value of two pieces of equipment suitable for use in leveling land. The equipment had been leased by respondents to Andrew Brothers. Apparently the arrangement was what is commonly called a purchase lease agreement, whereunder a rental is charged for use of equipment and the payments made are credited upon the purchase price, the title passing when the payments aggregate that price. Andrew Brothers had been using the equipment on work in or near Stockton, California, when they entered into a contract with Grimes and Picchi, owners of a tract of real property, for the leveling of that property to fit it for farming. Appellant Farm Service Company guaranteed their performance of that contract. Andrew Brothers informed respondents that they wanted to move the machinery to the farm job, and respondents, consenting, wrote a letter to them reading as follows:

> "We are herein reviewing the amounts showing as a balance on the DW 10 'Jeep' and the converted Catipillar Tractor D8. Also the Mississippi Wagon.
>
> "Our books show a balance of $5635.00 on the Jeep and Mississippi Wagon. $4010.00 on the D8.
>
> "We are to receive $2.50 per hr. of running time as payment on the DW 10 'Jeep' also $2.00 per running hr. on the D8.
>
> "It is understood that this rental is to apply on the purchase of this above mentioned equipment.
>
> "All payments are to be made direct to this office."

Andrew Brothers entered upon the performance of the land leveling contract and moved the subject machinery to the work, where it was used for a period extending from August 15, 1950, to October 25, 1950. At that time Andrew Brothers ceased work on their contract and, as the court found, appellant Farm Service Company took over the work of completing the leveling contract with the consent of Grimes and Picchi. Pursuant to those arrangements appellant went upon the property. The subject machinery was there. Some repairs were needed to fit the machines for further use and appellant undertook to make them. There was testimony by Parley Andrew, one of the Andrew Brothers, that under these new arrangements he was employed by appellant to supervise the completion of the leveling contract; and that he told respondents that appellant had undertaken to complete the work and wanted to use the machinery for that purpose and would pay for such use. Appellant knew that Andrew Brothers had used the machinery on the job, and that it belonged to respondents. Before repairs could be completed and before any leveling work was begun heavy rains set in and the machinery was placed on high ground for its protection. Mr. Dixon, an executive officer of appellant, had given instructions to one Aksland, a man skilled in land leveling whom appellant had retained as general supervisor for the work, to use the equipment that was on the job. Shortly after the rains began the river levee bordering the subject property broke, partially inundating the land, and, in a short while and before any leveling work was begun by appellant, further breaks occurred, completing the inundation. Appellant itself, in turn, abandoned the contract on February 24, 1951. Appellant returned one piece of equipment to respondents on February 10, 1951, but did not return the other until August 10, 1951. Prior to that date and on March 5, 1951, respondents began this action to obtain compensation for the retention and use of its equipment.

The trial court found that respondents were in the business of rental and repair of farm and construction equipment; that on August 14, 1950, they had delivered the equipment to Andrew Brothers for use in the leveling work; that Andrew Brothers used it during the period from August 15th to October 25th of 1950; that the equipment was not used on the leveling job after October 25th; that the equipment had been turned over to Andrew Brothers under a rental purchase agreement, confirmed on August 14, 1950, by the letter hereinbefore quoted; that the reasonable rental value of the D–8 caterpillar tractor was $700 per month and that the reasonable rental value of the DW–10 caterpillar tractor was $950 per month; that on November 15, 1950, appellant took possession of the machinery and retained it for its use and benefit with the knowledge and assent of respondents; that appellant knew the equipment belonged to respondents and had been rented by them to Andrew Brothers and that respondents expected to be paid for its use; that "under all of the circumstances of said taking and use of said equipment, said defendant [appellant] impliedly agreed with plaintiffs [respondents] to pay them the reasonable rental value of the use thereof." The court gave judgment for a total sum of $10,533.30 as being the reasonable rental value of the two pieces of equipment for the period each had been retained. It has been conceded that as to the DW–10 caterpillar tractor the period of its retention was found to have been five days in excess of what it should have been found to be and that, therefore, the judgment rendered is to be reduced in the sum of $158.30. The trial court also offset against the total rental value the sum of $260.01, which appellant had paid to repair one of the machines.

[1–10] It is the contention of appellant that the evidence is insufficient to support the trial court's findings that an implied contract was entered into between appellant and respondents whereunder appellant agreed to pay respondents the reasonable rental value of the two machines, or the findings that it took and retained the machines pursuant to that contract for the periods fixed in the findings. This contention cannot be sustained. The rules to be applied in determining whether or not an implied contract has been entered into are well settled.

> "A contract is either express or implied."
>
> "An express contract is one, the terms of which are stated in words."
>
> "An implied contract is one, the existence and terms of which are manifested by conduct." Civil Code, §§ 1619–1621.

> "Contracts are often spoken of as express or implied. The distinction involves, however, no difference in legal effect, but lies merely in the mode of manifesting assent." Restatement of the Law of Contracts, sec. 5.
>
> "It is generally held that the existence of an implied contract is usually a question of fact for the trial court. Where evidence is conflicting, or where reasonable conflicting inferences may be drawn from evidence which is not in conflict, a question of fact is presented for decision of the trial court. * * *
>
> "Further, on appeal we must draw all reasonable inferences in favor of the judgment." Medina v. Van Camp Sea Food Co., 75 Cal.App.2d 551, 556, 171 P.2d 445, 448.

"Express and implied contracts both are based upon the intention of the parties and are distinguishable only in the manifestations of assent. The making of an agreement may be inferred by proof of conduct as well as by proof of the use of words.

* * * * * *

"* * * Before a contract may be implied, however, it must be determined as a question of fact whether the parties acted in such a manner as to provide the necessary foundation for it, and evidence may be introduced to rebut the inferences and show that there is another explanation for the conduct. Such a contract is inferred from the conduct, situation, or mutual relation of the parties and enforced by the law on the ground of justice. It is implied where facts and circumstances show a mutual intention to contract, and without such mutual intention there can be no contract in fact. * * *

"Both express contracts and contracts implied in fact are founded upon an ascertained agreement, or, in other words, are consensual in nature, the substantial difference being in the mode of proof by which they are established." 12 Cal.Jur.2d "Contracts", sec. 4.

[11] When appellant, with the consent of Grimes and Picchi, undertook to com-

plete the leveling contract, the first requisite, of course, was that Grimes and Picchi make available to it such possession of the subject land as was necessary for the performance of its undertaking. Into such possession of the land appellant entered and upon the land was the equipment in question. Not only did it also take possession of the equipment that had been rented to Andrew Brothers, but it also exercised dominion over it, declared its intention to use it as Andrew Brothers had used it and embarked upon making repairs to it to fit it for such use. Certainly the trial court could hold that appellant expected to pay for it, and in the absence of appellant's having made any other arrangements with respondents, the court could find appellant expected to pay the reasonable rental value of the machinery while possessing and retaining it. It is true that inclement weather, followed by floods, prevented any actual use of these machines in leveling work, but that does not detract from the evidence that appellant intended to keep and use the machines. This concept is further strengthened by the fact that it did return the machines to respondents, one within a short time, the other after a long time. The trial court could certainly suppose that machinery of the type here involved would not be taken and retained by appellant without appellant expecting to pay substantial sums for its retention, even though in fact being unable, because of weather and flood conditions, to make the intended use of it. If appellant was not satisfied with the reasonable rental value standard of pay it should have undertaken to make an express bargain. It did not take or attempt to take an assignment to it of the contract which Andrew Brothers had on the machines and the court could, therefore, find that it had no intention of making, and did not make, any promise, measured by the provisions of that agreement. The evidence sufficiently supports the findings.

The judgment is affirmed, save that it is reduced in the conceded sum of $158.30. Respondents will recover costs.

SCHOTTKY and PEEK, JJ., concur.

CONTINENTAL CASUALTY COMPANY, Plaintiff and Appellant,

v.

PHOENIX CONSTRUCTION COMPANY, a corporation, Oilfields Trucking Company, a corporation, Transport Indemnity Company, a corporation, James E. Mason, Harvey Leming, Virginia Leming, Roger Ralph Rife, Richard Neal Rife, Lorraine Ellen Rife, Luella Rife, James Laverne Rife, and Eva Johnson as Guardian ad litem of Roger Ralph Rife, Richard Neal Rife, Lorraine Ellen Rife and James Laverne Rife, Minors, Defendants,

Phoenix Construction Company, a corporation, Oilfields Trucking Company, a corporation, Transport Indemnity Company, a corporation, Harvey Leming and James E. Mason (Defendants),

Underwriters at Lloyd's London, an unincorporated association (Plaintiff in Intervention in Certain Pleadings), Respondents,

and

Certain Underwriters at Lloyd's London, Pacific Marine Insurance Agency, Inc., E. C. Evans Agencies, Managers, and Willis Faber & Dumas, Ltd. (Plaintiffs in Intervention in Certain Pleadings).

Civ. 20414.

District Court of Appeal, Second District, Division 3, California.

June 8, 1955.

As Modified on Denial of Rehearing July 7, 1955.

Hearing Granted Aug. 3, 1955.*

Action was brought for declaratory judgment concerning liability of certain insurers. The Superior Court of Los Angeles County, Jesse J. Frampton, J., entered judgment adverse to the plaintiff, and the plaintiff appealed. The District Court of Appeal, Ashburn, J. pro tem., held that where highway construction company and trucking company, as joint venturers, entered into contract with State Highway Department for road construction job, and trucking company's truck driver negligently injured third person, highway construction company's insurer, if required to pay judgment in favor of third person for injuries, was subrogated to right of highway construction company against trucking company and trucking company's insurer.

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* Opinion vacated 296 P.2d 801.

Judgment reversed with instructions.

1. Insurance ⚷150

Where language of endorsements on policy was ambiguous, and no parol evidence was introduced in aid of construction, but there were certain stipulations made, which were not susceptible of divergent inferences, construction of endorsements became a question of law.

2. Insurance ⚷146(3)

Language of policy and of riders is presumed to be that of insurer, and, when ambiguous, is to be construed most favorably to insured, in such manner as to provide full coverage of indicated risk rather than to narrow the protection.

3. Insurance ⚷146(3)

If insurer desires to create exception to general import of principal coverage clauses of policy, burden rests on insurer to phrase exception in clear and unmistakable language, and, if insurer does not do so, any ambiguity or uncertainty is resolved in favor of insured.

4. Insurance ⚷146(1)

Courts will not sanction construction of insurer's language that will defeat very purpose or object of insurance.

5. Insurance ⚷146(3)

Exception in policy must be couched in terms that are clear to the ordinary mind or any doubts as to meaning will be resolved against insurer.

6. Insurance ⚷146(1)

Caption of policy is properly considered in construing policy.

7. Insurance ⚷146(2)

Word "comprehensive" in policy means extensive, embracing much, compromising many things, having a wide scope, and inclusive.

See publication Words and Phrases, for other judicial constructions and definitions of "Comprehensive".

8. Insurance ⚷155

Ordinary course of business was presumably followed in preparation and issuance of policy insuring highway construction company against liability, and therefore insurer presumably informed itself of activities that were sought to be covered on behalf of the company. West's Ann.Code Civ.Proc. § 1963, subd. 20.

9. Joint Adventures ⚷7

One member of joint venture was liable for the negligence of the other joint venturer's employee, to the same extent as the other joint adventurer.

10. Insurance ⚷435.24

Where highway construction company and trucking company, as joint venturers, contracted with State Highway Department for road construction work, and insurer issued to highway construction company a policy, which named trucking company as an additional insured in connection with construction operations conducted as a joint venture, but which provided that policy excluded coverage for all operations of trucking company other than highway construction, and that coverage did not apply to automobiles owned, maintained, or used by trucking company, even though used in joint venture operation, trucking company was not covered or protected by the policy in any of its own major activities, though part of the joint venture. West's Ann.Civ. Code, § 1648.

11. Insurance ⚷435.24

Where highway construction company and trucking company, as joint venturers, contracted with State Highway Department for road construction work, and insurer issued to highway construction company a policy, which named trucking company as additional insured in connection with construction operations conducted as a joint venture, policy provision that coverage did not apply to automobiles owned, maintained, or used by trucking company, even though used in joint venture operation with other named insureds was ambiguous and would be construed in favor of highway construction company.

12. Insurance ⚷435.24

Where highway construction company and trucking company, as joint venturers, contracted with State Highway Department for road construction work, and insurer issued to highway construction company a policy, which named trucking company as an additional insured in connection with construction operations conducted as a joint venture, but which provided that policy excluded coverage for all operations of trucking company other than highway construction, and that coverage did not apply to automobiles owned, maintained, or used by trucking company, even though used in joint venture operation, highway construction company, but not trucking company, was protected by policy with respect to accident involving truck owned by trucking company and driven by employee of trucking company in connection with joint venture.

13. Joint Adventures ⚿1.14

Though ordinarily a joint venture embraces only one transaction, fact that it may continue for years does not change its character.

14. Joint Adventures ⚿1.15

Fact that parties specifically designated themselves as joint venturers had persuasive force in determining their relationship.

15. Joint Adventures ⚿1.5

Whether parties to a particular contract have thereby created, as between themselves, strict relation of joint venturers or some other relation involving cooperative effort, depends on their actual intention, which is determined in accordance with ordinary rules governing interpretation and construction of contracts.

16. Insurance ⚿435.24

Where agreement between highway construction company and truck company provided for a series of separate joint ventures, and highway construction job became one of such ventures, and there was no joint ownership of properties used on the job, no express agreement for sharing of losses, and no general sharing of profits, and each company supplied its own men and equipment and operated equipment on the job, and they specifically designated themselves as joint venturers, highway construction company was a "joint venturer" and not a "partner" of the trucking company and was therefore not covered by policy, which had been issued to trucking company, and which did not name highway construction company, but included any "partner" of trucking company.

See publication Words and Phrases, for other judicial constructions and definitions of "Joint Venturer" and "Partner".

17. Insurance ⚿435.25

Where policy issued to trucking company did not name truck driver as an insured but provided under the heading "Financial Responsibility Laws" that such insurance as was afforded by policy should comply with provisions of the Motor Vehicle Financial Responsibility Law of any state or province, which shall be applicable with respect to such liability arising out of existence, ownership, maintenance or use of any automobile, to extent of coverage and limits of liability required by law, truck driver was covered by the policy. Vehicle Code, §§ 402, 410–422.7, 410(c), 411, 411.5, 415, 415(a)(2), 419, 420, 422.5, 422.5(c), 422.6(c).

18. Automobiles ⚿144

Provisions of chapter of the Vehicle Code captioned "Security Following Accident" are such as to bring them within the common acceptation of "Financial Responsibility Laws." Vehicle Code, §§ 419–422.7.

19. Automobiles ⚿55

Though, generally speaking, the procuring of a policy under the Financial Responsibility Law is optional, and not mandatory, prior to first accident and judgment, the business man-employer, in practice, must have a policy in form prescribed by the law, in order to be free of the threat of suspension of motor vehicle registration in the event of nonpayment of any judgment rendered against him and his employee and must be able to make proof that he was so insured at time of accident. Vehicle Code, §§ 410–422.7, 415.

20. Automobiles ⚿55

If driver of motor vehicle has not insured his own operation, employer, in order to avoid suspension of registration under the Financial Responsibility Law of his uninsured vehicles, must show that he himself has covered the activities of the driver and any liability arising therefrom. Vehicle Code, §§ 410–422.7.

21. Statutes 🔑223.2(20)

Chapter of the Vehicle Code captioned "Financial Responsibility Law" and chapter captioned "Security Following Accident" are in pari materia. Vehicle Code, §§ 410–418, 419–422.7.

22. Automobiles 🔑144

Though chapter of the Vehicle Code captioned "Security Following Accident" does not specifically mention a "motor vehicle liability policy," it does refer to an "automobile liability policy," and therefore its requirements embrace those of the section which is entitled "Requisites of Motor Liability Policy" and contained in the chapter captioned "Financial Responsibility Law." Vehicle Code, §§ 410–418, 415, 419–422.7.

23. Insurance 🔑152(3)

Provision in policy issued to trucking company that such insurance as was afforded by the policy should comply with provisions of the Motor Vehicle Financial Responsibility Law of any state or province, which shall be applicable with respect to any such liability arising out of the existence, ownership, maintenance, or use of any automobile during the policy period, to extent of the coverage and limits of liability required by such law, makes provisions of the Motor Vehicle Financial Responsibility Law implied terms of the policy. Vehicle Code, §§ 410–422.7.

24. Insurance 🔑171

Where primary policy issued to trucking company carried limits of $5,000 for injuries or death of one person and $10,000 for all persons injured or killed in one accident, and certificate of insurance afforded $40,000 excess insurance, and another policy furnished additional excess coverage in amount of $950,000, coverage of company's truck driver, who was involved in accident, was $1,000,000.

25. Insurance 🔑435.24

Where policy issued to highway construction company excepted from coverage automobiles of trucking company, which with highway construction company had contracted with the State Highway Department for road construction job, the exception ruled trucking company's truck driver out of coverage, in absence of some language specifically applicable to truck driver.

26. Insurance 🔑435.24

Where joint venture agreement between highway construction company and trucking company, which entered into contract with State Highway Department for road construction job, was dated January 27, 1949, and effective date of policy, which was issued to highway construction company, and which covered a hired automobile, and which provided that it did not apply to agreements entered into prior to effective date of policy, was dated April 1, 1951, trucking company's truck, which was involved in accident, was not a hired automobile within meaning of policy.

27. Insurance 🔑435.24

Where highway construction company and trucking company, as joint venturers, entered into contract with State Highway Department for road construction job, and trucking company hired truck driver to drive one of its trucks equipped with a trailer, on which was attached a concrete spreader belonging to highway construction company, and truck driver, who was customarily told where and when to manipulate truck, in process of spreading cement, by employees of highway construction company, was involved in accident one night while driving to place where he was to spread cement the following morning, truck driver was not a "special employee" of highway construction company and was not covered by policy issued to highway construction company.

See publication Words and Phrases, for other judicial constructions and definitions of "Special Employee".

28. Master and Servant 🔑330(1)

When master hires out, under rental agreement, services of employee for operation of instrumentality owned by master, together with use of instrumentality, without relinquishing to hirer power to discharge servant, to go where and perform such work as hirer directs, legal presumption is that, though hirer directs servant where to go and what to do in performance of work, servant, as operator of instrumentality employed in doing work, remains, in absence of agreement to contrary, servant of general employer insofar as concerns manner and method of operating instrumentality, and negligence of servant must be held to be that of owner, and not that of hirer of instrumentality.

29. Master and Servant ⚷301(1)

Doctrine of respondeat superior applies only when relation of master and servant is shown to exist between wrongdoer and person sought to be charged for result of some neglect or wrong at very time and in respect to very thing out of which injury arose.

30. Master and Servant ⚷301(4)

Where servants of two parties are jointly engaged in work of mutual interest, each employee is the servant of his own master, and neither of the employees is the servant of the other's master, though one servant may have taken orders as to details from servant of the other employer.

31. Master and Servant ⚷301(4)

A servant of one employer does not become the servant of another, for whom the work is performed, merely because the latter points out the work to the servant, or gives him signals calling the service into activity, or gives him directions as to details of the work and manner of doing it.

32. Insurance ⚷512½

Where highway construction company, which with trucking company entered into contract with State Highway Department for a highway construction job, had no insurance against loss resulting from negligent operation of truck by truck driver employed by trucking company, except policy providing that if highway construction company had other valid and collectible insurance against a loss covered by the policy, the insurance under the policy shall be excess insurance with respect to such loss but shall apply only in amount by which applicable limit of liability stated in declarations exceeds total applicable limits of liability of such other insurance, such policy provision was inapplicable.

33. Insurance ⚷512½

Reciprocal rights and duties of several insurers, who have covered the same events, do not arise out of contract, since their agreements are not with each other, but flow from equitable principles designed to accomplish ultimate justice in bearing of a specific burden.

34. Insurance ⚷512½

Where several insurers have covered the same event, the respective rights of the insured persons must first be determined as a basis for adjusting equities between the insurers.

35. Joint Adventures ⚷4(1)

In the law of joint venture, member who has committed a tort must indemnify the other against liability for the tort.

36. Partnership ⚷85

In the law of partnership, member, who has committed a tort, must indemnify the other member against liability for the tort.

37. Insurance ⚷606(5)

Where highway construction company and trucking company, as joint venturers, entered into contract with State Highway Department for road construction job, and trucking company's truck driver negligently injured third person, highway construction company's insurer, if required to pay judgment in favor of third person for injuries, was subrogated to right of highway construction company against trucking company and trucking company's insurer.

38. Insurance ⚷512½

Where, by reason of agreement between sureties or by reason of general equities of the situation, one surety or insurer ought, as against other sureties or insurers, to bear the whole loss, he becomes the principal surety, and all other insurers or sureties become subinsurers or subsureties.

39. Insurance ⚷606(5)

Where highway construction company and trucking company as joint venturers entered into contract with State Highway Department for road construction job, and trucking company's truck driver negligently injured third person, provision in policy issued to trucking company that insurance should be deemed excess insurance over and above applicable limits of all other insurance, would not prevent insurer, which had issued a policy to highway construction company, if compelled to pay judgment in favor of third person for injuries, from asserting right of subrogation against trucking company's insurer.

40. Insurance ⚷512½

Phrase "other insurance" in policy issued by insurer to trucking company engaged in highway construction job connoted valid, collectible insurance.

41. Insurance ⚷512½

Every rule of construction in apportioning losses between insurers must yield to right of insured to be fully indemnified.

42. Insurance ⚷606(5)

Where highway construction company and trucking company, as joint venturers, entered into contract with State Highway Department for road construction job, and trucking company's truck driver negligently injured third person, fact that trucking company was innocent of wrongdoing equally with highway construction company would not prevent highway construction company's insurer, if compelled to pay judgment in favor of third person for injuries, from asserting right of subrogation against trucking company and its insurer.

43. Subrogation ⚷36

Subrogation runs against employer, individual or corporate, whose employee has done the wrong, and against the insurer of the employer.

44. Insurance ⚷606(5)

Where highway construction company and trucking company, as joint venturers, entered into contract with State Highway Department for highway construction job, and trucking company's truck driver negligently injured third person, highway construction company's insurer, if compelled to pay judgment in favor of third person for injuries, was entitled to indemnity from the truck driver and therefore from his insurer.

45. Courts ⚷89

Expressions used in judicial opinions are always to be construed and limited by reference to matters under consideration and cannot be safely applied in their largest and most universal sense to dissimilar cases.

46. Judgment ⚷948(1)

Where there was no plea of former judgment, claim of res judicata could not be upheld, since courts will not take judicial notice of proceedings in a different case for purpose of applying rule of res judicata.

47. Judgment ⚷704

Where parties interested in subrogation matter in subsequent action were not adversary parties in former action for injuries, plea of res judicata, if it had been made, would not have been good. West's Ann.Code Civ.Proc. § 1910.

48. Judgment ⚷665

Before former adjudication may operate as estoppel as to issues in later action, there must be identity of parties, as well as identity of issues. West's Ann.Code Civ.Proc. § 1910.

49. Judgment ⚷704

A judgment is not res judicata as to codefendants. West's Ann.Code Civ.Proc. § 1910.

50. Judgment ⚷715(1)

Doctrine of res judicata is not applicable unless issue decided in prior adjudication is identical with issue presented in subsequent action.

51. Judgment ⚷715(1)

Record in prior action for injuries negligently caused by truck driver failed to establish that Supreme Court determined that truck driver was an employee of highway construction company as well as the trucking company, and matter was not res judicata in subsequent action for declaration as to liability of insurers of highway construction company and trucking company.

52. Appeal and Error ⚷1176(1)

Where there were no issues of fact to be determined after reversal, and trial judge's errors went to matters of law only, it was therefore appropriate for District Court of Appeal to reverse with instructions. West's Ann.Code Civ.Proc. § 53.

53. Appeal and Error ⚷1119

Fact that certain parties did not appeal from judgment against them in declaratory judgment action did not preclude reversal as to them on appeal, where phase of judgment relating to their alleged liability was so inextricably interwoven with the rest of the judgment that complete reversal was necessary in the interests of justice.

* * *

Jennings & Belcher, Los Angeles, for appellant.

Robert W. Stevenson, Los Angeles, for respondents, Oilfields Trucking Co., Transport Indem. Co. and Underwriters at Lloyd's London.

Martin, Hahn & Camusi, Los Angeles, for respondent, Phoenix Const. Co.

Oscar F. Catalano, Bakersfield, for respondent, Harvey Leming.

ASHBURN, Justice pro tem.

In this declaratory relief action, the major controversy revolves around the question of liability of certain insurance companies to protect defendants Phoenix Contruction Company, Oilfields Trucking Company and James E. Mason from a judgment in favor of defendant Harvey Leming, who was injured in an accident on July 10, 1951, which he proved to have been caused by negligence of defendant Mason while driving a truck then and there owned by defendant Oilfields. Defendants Phoenix and Oilfields as joint venturers had a contract with the State Highway Department for a certain road construction job in Kern County known as Haypress Canyon job. Phoenix' business was that of highway and similar construction; that of Oilfields was the truck hauling of oil surfacing materials and heavy construction equipment. These two companies had taken the highway contract pursuant to an agreement between themselves that they should engage in certain unspecified joint ventures. Defendant Mason was found by the trial court to be a general employee of Oilfields and a special employee of Phoenix. It was also found that at the time and place of the accident, he was "acting in the scope and course of his employment as such employee and agent." Leming sued Phoenix, Oilfields and Mason for recovery of damages for his injuries. On a first trial he recovered judgment against all of them in the sum of $212,585.69. This judgment became final as to the driver Mason, but a new trial was granted to Phoenix and Oilfields. At the conclusion of same, a verdict was rendered against both for $213,460.02. The judgment thereon was recently affirmed by the Supreme Court, Leming v. Oilfields Trucking Co., 44 Cal.2d 343, 282 P.2d 23. Phoenix, Oilfields and Mason and their respective insurers are faced with this onerous liability and Continental Casualty Company brings this action for a determination of various questions arising under outstanding insurance policies.

The primary problems emanate from Continental's policy No. CLP5707316 and defendant Transport Indemnity Company's policy No. 46–001.[1] The Continental policy names defendant Phoenix Construction Company, Inc., a corporation, as insured and the Transport policy names defendant Oilfields Trucking Company, a corporation, as such. Certain excess insurance policies present questions peculiar to that subject which can be solved only after determination of those arising under the policies just mentioned by number. The question most debated by counsel is whether Phoenix is covered by the Continental policy with respect to the accident in question. That policy was obtained by Phoenix, which became obligated for the premium and which as stated was named as insured, its business being given therein as "general engineering contractor." It was stipulated and found that Phoenix was not protected by any insurance covering the instant accident except to the extent that the Continental line of policies (No. CLP5707316 and the excess certificates related thereto) might so operate.

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[1] Transport Indemnity Company is the successor in interest and obligation to Transport Insurance Exchange which actually issued both Transport policies herein discussed.

Phoenix having been named as insured in the Continental policy, the primary protection is thus stated in paragraph I of the "insuring agreements": "Coverage A—Bodily Injury Liability. To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person." An endorsement required by the Public Utilities Commission of this state contains this further language: "* * * the Company agrees that within the classes of coverage provided by the policy it will pay any final judgment rendered against the insured for bodily injuries to or death of any person or persons other than the named insured, or damage to or destruction of property, or both, arising out of the ownership, maintenance or use of any vehicle operated under authority of the aforesaid statutes, although such vehicle may not be specifically described in the policy." Two other endorsements or riders operate to name Oilfields Trucking Company as an insured. One of them, designated R6309202, reads as follows: "It is agreed Oil Fields Trucking Company is added as an additional insured in connection with construction operations conducted as a joint venture with the Phoenix Construction Company, Inc.

"It is further agreed that this policy excludes coverage for all operations of Oil Fields Trucking Company other than construction operations conducted as a joint venture with Phoenix Construction Company, Inc."; the other, R6309208, says: "It is agreed that this policy does not apply to automobiles owned, maintained or used by the Oil Fields Trucking Company, even though, they might be used in a joint venture operation with other named insureds."[2] Appellant Continental claims that rider 208 withdrew any coverage of Phoenix as well as Oilfields with respect to the accident in question. The trial judge found to the contrary.

[1] The language of these endorsements is ambiguous as will appear from further discussion. No parol evidence was introduced in aid of construction; but there were certain stipulations made which were not susceptible of divergent inferences. The construction of the instruments therefore becomes a question of law. Western Coal & Mining Co. v. Jones, 27 Cal.2d 819, 826, 167 P.2d 719, 164 A.L.R. 685.

[2-5] Certain settled rules of interpretation are here applicable. The language of the policy and of the riders is presumed to be that of the insurer, Ogburn v. Travelers Ins. Co., 207 Cal. 50, 53, 276 P. 1004, and when ambiguous is to be construed most favorably to the insured, in such manner as to provide full coverage of the indicated risk rather than to narrow the protection. Olson v. Standard Marine Ins. Co., 109 Cal.App.2d 130, 135, 240 P.2d 379; Miller v. United Ins. Co., 113 Cal.App.2d 493, 497, 248 P.2d 113; Pendell v. Westland Life Ins. Co., 95 Cal.App.2d 766, 769, 214 P.2d 392; Fageol Truck & Coach Co. v. Pacific Indemnity Co., 18 Cal.2d 748, 751, 117 P.2d 669. If the insurer would create an exception to the general import of the principal coverage clauses, the burden rests upon it to phrase that exception in clear and unmistakable language. Pendell v. Westland Life Ins. Co., supra, 95 Cal.App.2d at page 770, 214 P.2d at page 395. If this is not done any ambiguity or uncertainty is resolved in favor of the policyholder. The courts will not sanction a construction of the insurer's language that will defeat the very purpose or object of the insurance. Miller v. United Ins. Co., supra, 113 Cal.App.2d at page 497, 248 P.2d at page 115; Narver v. California State Life Ins. Co., 211 Cal. 176, 180, 294 P. 393, 71 A.L.R. 1374. Indeed an exception must be couched in terms which are "clear to the ordinary mind", Pendell v. West-

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[2] These riders are hereinafter referred to as Nos. 202 and 208.

land Life Ins. Co., supra, 95 Cal.App.2d at page 770, 214 P.2d at page 395, or any doubts as to meaning will be resolved against the insurer.

[6-9] At the top of the Continental policy, in the first line of the first page, appears this caption in prominent letters "Comprehensive General—Automobile Liability Policy." Such captions are properly considered in construing the policy. Zimmerman v. Continental Life Ins. Co., 99 Cal.App. 723, 726, 279 P. 464. The word comprehensive "means extensive or embracing much", Hemel v. State Farm Mut. Automobile Ins. Co., La.App., 25 So.2d 357, 358; or, as stated in State ex rel. Hewlett v. Womach, 355 Mo. 486, 196 S.W. 2d 809, 812, it signifies "'including much; comprising many things; having a wide scope; inclusive.'" If the responsible officer of Phoenix read as far as Coverage A, which he is presumed to have done, he would have met with no disappointment because the language is broad enough to cover the company in any and all activities pertaining to its contracting business. It is not limited to automobile accidents or any other specified type. On the contrary it embraces any and all untoward happenings incident to a construction business. In this respect it is in contrast with Coverage B which is designated "Property Damage Liability—Automobile" and agrees to pay property damage "caused by accident and arising out of the ownership, maintenance or use of any automobile." And the endorsement prescribed by the Public Utilities Commission above quoted specifically defines the coverage as including automobiles "operated under authority of the aforesaid statutes", which language refers to automobiles engaged in trucking and governed by the Highway Carriers' Act, the City Carriers' Act or the Public Utilities Act. This was the type of trucking in which Oilfields was engaged. The policy and riders 202 and 208 affirmatively show that Phoenix was engaged in the construction business and participating in a joint venture with Oilfields. The last rider, 208, raises the plain inference that the insurer Continental knew that Oilfields was in the trucking business. It is presumed that the ordinary course of business was followed in the preparation and issuance of this policy, Code Civ.Proc. § 1963, subd. 20, and hence that the insurer informed itself of the activities that were sought to be covered on behalf of the applicant Phoenix —in this case all aspects of construction work and trucking business conducted as a joint venture. As a member of that joint venture Phoenix would be liable for the negligence of any employee of Oilfields to the same extent as Oilfields itself, Leming v. Oilfields Trucking Co., supra, 44 Cal.2d 343, 282 P.2d 23; Hupfeld v. Wadley, 89 Cal.App.2d 171, 175, 200 P.2d 564; 48 C.J.S., Joint Adventures, § 14e, page 870. In procuring the coverage of Oilfields the protection against that vicarious liability would naturally be the primary consideration of Phoenix and, except for the ambiguity created by rider 208, that result was clearly accomplished. But Continental says that 208 took away from Phoenix such protection so far as Oilfields' major participation in the joint venture was concerned, namely, the hauling by automobile. Clearly that phase of the insurance was subtracted as to someone, but whom?

[10] Section 1648 of the Civil Code furnishes the key to our problem. It says: "However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract." These riders add nothing to the protection given to Phoenix in the body of the policy. It covers both direct and imputed liability. The riders merely add protection to Oilfields. No. 202 in its first paragraph names it as an additional insured "in connection with construction operations conducted as a joint venture with the Phoenix Construction Company, Inc." and in its second paragraph by way of emphasis of the preceding limited coverage says that "this policy excludes coverage for all operations of Oil Fields Trucking Company other than construction operations conducted" in the joint venture named. But that it was not the intention to cover all Oilfields' activities in furtherance of the joint venture is disclosed by the language of 208 which specifically says that the policy "does not apply to automobiles

owned, maintained or used by the Oil Fields Trucking Company, even though, they might be used in a joint venture operation with other named insureds." Of course, 202 does not protect Oilfields against any accidents caused by its trucks when used in any part of its business other than participation in the joint venture with Phoenix, and when 208 subtracted coverage on automobiles owned, maintained or used by Oilfields, it withdrew the operations of those trucks from the joint venture coverage and limited Oilfields' protection to the vicarious liability which it would incur as a result of negligence of any of Phoenix' employees while engaged in the specified joint venture. In other words, rider 208 leaves Oilfields not covered or protected in any of its own major activities though they be a part of the venture with Phoenix.

Counsel for the various parties have debated at length the meaning of the concluding phrase of 208 "even though, they might be used in the joint venture operation with other named insureds." This phrase does not have the controlling importance which counsel seem to attach to it. If "insured," the singular term, had been used the meaning would seem plain that the insurance company was merely saying that Oilfields' automobiles were not covered even though used in furtherance of the Phoenix joint venture. The use of the plural "insureds" does not forbid this construction but in our judgment it enlarges the thought and in effect says, perhaps needlessly, that Oilfields' truck operations are not covered even though they be a part of some joint venture with some other concern who might later be added to the policy as a named insured. An illustration of what might have been in the mind of the draftsman (though there is no affirmative evidence to this effect) is found in the fact that the Transport policy 46–001 has a special endorsement which adds as named insured "P. A. Phoenix and H. E. Phoenix, as co-partners only, jointly and not severally, doing business as Phoenix Brothers Garage and Storage Company." If a joint venture with this Phoenix Brothers partnership were later added to the Continental policy as a named insured, the language of 208 would operate to exclude from Continental coverage any of the described operations of Oilfields engaged in that joint venture as well as those engaged in the joint venture with the corporation Phoenix Construction Company.

[11] So far as Phoenix is concerned, this 208, if construed as appellant Continental would have it (namely, as withdrawing protection of Phoenix with respect to its imputed liability for operation of Oilfields' trucks) would take from Phoenix protection against one of its major risks, one which is clearly covered by the body of the policy in Coverage A. And Phoenix had no other insurance policy which would protect it against that sort of liability. It would be unreasonable to hold that it or the insurer so intended. There is a real ambiguity in 208 and the doubt raised thereby must be resolved in favor of the insured. Properly construed, 202 and 208 embrace the subject of Oilfields' liability only, covering it as to vicarious obligations and excluding those arising from its own major activity of trucking.

This construction is in harmony with the definition of "insured" found in III of the insuring agreements, viz., "The unqualified word 'insured' includes the named insured and also includes (1) under coverages A and C, any partner, executive officer, director or stockholder thereof while acting within the scope of his duties as such, except with respect to the ownership, maintenance or use of automobiles while away from premises owned, rented or controlled by the named insured or the ways immediately adjoining * * *." If Oilfields were a partner (which, as later appears, we hold it was not) this language would clearly except from the coverage the use of its automobiles while on the highway between the Phoenix yard and the site of the job.

[12] It follows that Phoenix Construction Company, a corporation, but not Oilfields Trucking Company, a corporation, is protected by the Continental policy with respect to the accident in question.

Oilfields is specifically covered by the Transport policy 46–001. Does it protect Phoenix? Appellant Continental and respondent Phoenix argue that it does. That policy does not name Phoenix Construction Company at all and there is no claim that it was included therein except through the use of the word "partner" in paragraph (3) (b) of the conditions: "The unqualified word 'insured' includes the named insured and also includes as respects Coverage Clause 1: (1) any partner, executive officer, managing employee, director or stockholder thereof while acting within the scope of his duties as such or in so far as he is or may be liable by reason of his occupying such position." The trial judge found that Phoenix and Oilfields were engaged in a joint venture and by implication that they were not partners.

[13–16] The agreement between the two companies provided for a series of separate joint ventures and the Haypress job became one of them. The distinction between joint venture and partnership has not entirely disappeared from our law, 14 Cal.Jur., § 2, p. 760. While ordinarily a joint venture embraces only one transaction the fact that it may continue for years does not change its character. Tufts v. Mann, 116 Cal.App. 170, 177, 2 P.2d 500. In this instance there was no joint ownership of the properties used on the job, no express agreement for sharing of losses, no general sharing of profits. Each party supplied its own men and equipment and operated the latter. Oilfields' participation in profits is restricted to "services they render" and "participation on items in which they have engaged." The primary object of the agreement was that of "increasing the bidding capacity by the combination of said corporations and equipment of each" and Oilfields' participation was to be "to such extent as they so desire—on jobs or contracts such as the purchasing of road oil, transportation of equipment and materials, transportation of road oil, etc." The parties specifically designated themselves as joint venturers and that fact has persuasive force. Blumenthal v. Greenberg, 130 Cal. 384, 388, 62 P. 599; Singh v. Kashian, 124 Cal.App.2d Supp. 879, 884, 268 P.2d 768. "Whether the parties to a particular contract have thereby created, as between themselves, the strict relation of joint adventurers or some other relation involving cooperative effort, depends upon their actual intention, which is determined in accordance with the ordinary rules governing the interpretation and construction of contracts." Universal Sales Corp. v. California, etc., Mfg. Co., 20 Cal.2d 751, 764, 128 P.2d 665, 673. While not separately determinative, the above mentioned factors point to a joint venture rather than a partnership. See Smith v. Moynihan, 44 Cal. 53, 61. And our function is not to determine the matter at large but to ascertain what this policy means by the use of the word "partner." It is to be noted that although many other firms are named in riders of one sort or another attached to the Transport policy, the name of Phoenix Construction Company does not appear but on the contrary P. A. Phoenix and H. E. Phoenix as partners, doing business as Phoenix Brothers Garage and Storage Company, are covered by a special endorsement. Incidentally, P. A. Phoenix was Vice-President and H. E. Phoenix was President of the Phoenix corporation. The word "partner" as used in the policy might well apply to either or both of them depending upon their actual relationship to Oilfields. Moreover, this definition of insured found in paragraph (3) (b) of the conditions of the Transport policy operates only "as respects coverage Clause 1," which is limited to damages "arising out of the occupation of the named insured" i. e. "motor carrier for hire" as stated in the declarations; and in no real sense was Phoenix a partner in that activity. The trial judge correctly concluded that Phoenix was not a partner and not covered by the Transport policy.

The next question is what, if any, insurance coverage does defendant Mason have with respect to liability upon the final judgment against him in the sum of $212,585.69.

[17] Mason was an employee of Oilfields. There is no contest over this finding and could be none. The court found

that the Transport policy afforded him no protection. He is not named as an insured, but paragraph (6) of the policy conditions, headed "Financial Responsibility Laws" says: "Such insurance as is afforded by this policy shall comply with the provisions of the motor vehicle financial responsibility law of any state or province which shall be applicable with respect to any such liability arising out of the existence, ownership, maintenance or use of any automobile during the policy period, to the extent of the coverage and limits of liability required by such law." As will become apparent this operates to insure Mason as well as his employer Oilfields.

[18, 19] California's financial responsibility law comprises sections 410–422.7 Vehicle Code. Chapter 2 of Division 7 (sections 410–418) is headed "Financial Responsibility Law" in the code; Chapter 3 (sections 419–422.7) is captioned "Security Following Accident" but its provisions are such as to bring it within the common acceptation of "financial responsibility laws" and it is so termed in Escobedo v. State of California, etc., 35 Cal.2d 870, 878, 222 P.2d 1; see also annotation in 35 A.L.R.2d 1012. Chapter 2 covers the matter of establishing responsibility after an accident and an unpaid judgment. Chapter 3 provides for such showing after the accident and before any judgment as a means of forestalling suspension of driver's license and the registration of the vehicle. Under chapter 2, the unpaid judgment provisions, the owner of a vehicle which has been driven with his consent (e. g., master and servant) suffers suspension of his vehicle registration, Vehicle Code § 410(c); Sheehan v. Division of Motor Vehicles, 140 Cal.App. 200, 205, 35 P.2d 359, unless he files an affidavit showing "that at the time of the accident * * * he was insured, that the insurer is liable to pay such judgment" and that he does not know why the insurer has not paid the judgment, § 411.5. He also files the original or certified copy of the policy and if his showing is satisfactory his certificate of registration is not suspended. Section 415 prescribes certain requisites for the policy. "(a) [*Definition: Requirements.*] A 'motor vehicle liability policy,' as used in this code means a policy of liability insurance issued by an insurance carrier authorized to transact such business in this State to or for the benefit of the person named therein as assured, which policy shall meet the following requirements: (1) [*Designation of vehicles.*] Such policy shall designate by explicit description or by appropriate reference all motor vehicles with respect to which coverage is thereby intended to be granted. (2) [*Persons insured.*] Such policy shall insure the person named therein and any other person using or responsible for the use of said motor vehicle or motor vehicles with the express or implied permission of said assured. * * * (c) [*Excess or additional coverage: Permissible agreements, provisions or stipulations.*] Any such policy may grant any lawful coverage in excess of or in addition to the coverage herein specified or contain any agreements, provisions or stipulations not in conflict with the provisions of this code and not otherwise contrary to law. * * *" Section 411 makes the procedure applicable to successive accidents and judgments. While it is true, generally speaking, that the procuring of the policy is optional, not mandatory, prior to the first accident and judgment, the businessman-employer in practice must have a policy in form prescribed by section 415 in order to be free of the threat of suspension in the event of nonpayment of any judgment rendered against him and his employee; he must be able to make proof that he was so insured at the time of the accident.

[20] When chapter 3 re "Security Following Accident" is digested it appears that it is the duty of both driver and owner (employer) to report to the Department of Motor Vehicles any accident causing personal injury or death and to do so within a specified time, except that an employer need not make a report if the vehicle involved in the accident "is owned or operated by any person or corporation who has filed with the department a certificate of an insurance carrier * * * that there is in effect a policy * * * meeting the requirements of Section 422.6 and when such insurance policy * * * was in full

force and effect in respect to such vehicle at the time of the accident." [3] Unless conditions for exemption are fulfilled the employer is required to deposit security; the penalty for failure being suspension of registration of all of the employer's vehicles not covered by insurance, § 420. Under section 422.5 exemption may be established by satisfactory proof to the department (a) that the owner had an automobile liability policy in effect at the time of the accident with respect to the driver or vehicle involved in the accident, a policy complying with requirements of section 422.6; (b) that the driver, if not the owner, had in effect a policy covering him; "(c) That such liability as may arise from the driver's operation of the motor vehicle involved in the accident is, in the judgment of the department covered by some form of liability insurance or bond which complies with the requirements set forth under Section 422.6." Section 422.6 relates to the qualifications of the insurance company and requires policy limits of not less than the familiar $5,000 and $10,000 for personal injury or death and $1,000 for property damage. Sub-paragraph (c) of 422.5, just quoted, seems designed to operate where the non-owner driver has not covered himself; for, if (a) and (b) have been complied with there is no separate area for (c) to cover. If the driver has not insured his own operation the employer, in order to avoid suspension of registration of all his uninsured vehicles must show that he himself has covered the activities of the driver and any liability arising therefrom. Under section 422.6(c) the insurance company named in the report of accident is required to notify the department "whenever such a policy or bond was not in effect at the time of such accident", and it seems that in that event the policy does not establish an exemption and the employers' registrations are suspended.

[21, 22] In short (if it be not too late for such an expression) the employer must have in effect at the time of accident an insurance policy satisfactory to the department or he is soon out of any business which depends on motor transportation. While the exact terms of the policy are not prescribed by chapter 3, it does seem to say in section 422.5(c) that any and all liability growing out of the driver's conduct must be covered. And, for want of better definition in chapter 3, we must turn to chapter 2 (in pari materia) where section 415(a) (2) specifically says that "Such policy shall insure the person named therein and any other person using or responsible for the use of said motor vehicle or motor vehicles with the express or implied permission of said assured." The introductory matter in section 415 is this: "A 'motor vehicle liability policy,' as used in this code means a policy * * * which policy shall meet the following requirements:" which include that of sub-paragraph (2) just quoted. Chapter 3 does not specifically mention a "motor vehicle liability policy" but it does refer to an "automobile liability policy". And we conclude that its requirements embrace those of section 415.

[23] This case does not present any question of whether these statutes are automatically incorporated into liability policies or when or whether the insurer's liability becomes absolute in given circumstances. Such are the cited cases of State Compensation Ins. Fund v. Bankers Indemnity Ins. Co., 9 Cir., 106 F.2d 368; Rasinski v. Metropolitan Casualty Ins. Co., 117 N.J.L. 490, 189 A. 373; American Lumbermen's Mut. Casualty Co. v. Trask, 238 App.Div. 668, 266 N.Y.S. 1; and they do not assist us. The present problem is one of interpretation of the Transport policy, condition (6). "Such insurance as is afforded by this policy shall comply with the provisions of the motor vehicle financial responsibility law of any state or province which shall be applicable with respect to any such liability arising out of the existence, ownership, maintenance or use of any automobile during the policy period, to the extent of

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[3] Vehicle Code, § 419. All references to code sections point to their form as same existed at the time of the accident,—the latest amendments being those of 1949. This seems to be dictated by Watson v. Division of Motor Vehicles, 212 Cal. 279, 287, 298 P. 481.

the coverage and limits of liability required by such law." This language seems plain. Its normal import is an agreement that any provision required by such financial responsibility law shall constitute an implied term of the policy. The rule of interpretation in favor of the insured emphasizes the soundness of this view. And the practical considerations do likewise. The declarations of the policy show Oilfields to be a "motor carrier for hire." It could not afford to have its business tied up by suspension of registrations because of failure to have in force at the time of accident a policy covering all risks necessary to satisfy the department. As a practical matter it must be in position to make that showing at once. It would not be reasonable to assume that the insurer did not intend to place the insured in that position or to leave it where it would have to make a deposit of security in the case of each personal injury. We hold that this language of condition (6) did incorporate into the Transport policy the terms required by section 415 Vehicle Code and that Mason was and is insured thereby.

[24] The next question is the extent of coverage of Mason. Condition (6) concludes with this phrase: "* * * to the extent of the coverage and limits of liability required by such law." The primary Transport policy, No. 46–001, carries limits of $5,000 for injury or death of one person and $10,000 for all persons injured or killed in one accident.[4] Lloyd's London certificate 46–C3–32 affords $40,000 excess insurance "against the hazards and perils of Comprehensive Bodily Injury, Property Damage and Cargo Liability Coverage as insured under policies issued by the Transport Indemnity Company of Los Angeles * * * to Oilfields Trucking Company, et al and other persons, firms and corporations named as insureds under said policies, all hereinafter called the Assured." It also provides: "It is the intention of the parties that under this Policy the assured is to be indemnified up to $40,000.00 as aforesaid, against all liability in excess of the liability of the Primary Insurer under its policies.

"It is agreed that this Policy is subject to the same Warranties, Terms and Conditions (except as regards * * * the amount and limit of Liability * * *) as are contained in, or as may be added to said Policy of the Primary Insurer." Mason having been included in the primary Transport policy, the quoted language increases his coverage to the extent of $40,000. Transport policy 46–002 furnishes additional excess coverage, "excess over $50,000.00" in an amount of $950,000. The "special excess endorsement" provides: "Notwithstanding anything in the policy to the contrary, it is further agreed that this policy is subject to the same warranties, terms and conditions (except as regards * * * the amount and limit of liability * * *) as are contained in or as may be added to the primary policy issued by the Transport Insurance Exchange." This policy increased Mason's coverage to a total of a million dollars.

[25, 26] So far as the Continental policy is concerned rider 208 excepts the automobiles of Mason's employer Oilfields from coverage, referring of course to liability arising from operation of the same. In the absence of some language specifically applicable to Mason, this exclusion of his employer rules him out of Continental coverage also assuming, as will be shown, that he was not an employee of Phoenix. Certain respondents contend that within the purview of the policy the truck involved in the accident was a "hired automobile" operated by or with the consent of Phoenix. This contention is based upon paragraph III of the insuring agreements which, reduced to its simplest terms, provides "The unqualified word 'insured' includes the named insured and also includes * * * (2) under Coverages A and B, any person while using an owned automobile[5] or a hired automobile, * * * provided the actual use of the

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[4] There were two people injured in this accident. See footnote 12, infra.

[5] "Owned automobile" is defined in paragraph (b) (1) of the Definitions as one "owned by the named insured,"—in this case Phoenix.

automobile is by the named insured or with his permission. * * *" Hired automobile is defined in paragraph 3(b) (2) of the Conditions as follows: "[A]n automobile used under contract in behalf of, or loaned to, the named insured provided such automobile is not owned by or registered in the name of (a) the named insured or (b) an executive officer thereof or (c) an employee or agent of the named insured who is granted an operating allowance of any sort for the use of such automobile." It would be possible to hold the Oilfields' truck to be a hired automobile if we were disposed to apply this language literally and without reference to context,—that it was being "used under contract in behalf of" the named insured Phoenix. But the "Annual Contractual Endorsement," No. R6309210, restricts the definition of "contract" so that it "shall not mean such agreements entered into and dated prior to effective date of below mentioned policy, and shall not apply to contracts entered into and dated after the expiration date of said policy." The effective date of that policy was April 1, 1951 and the joint venture agreement was dated January 27, 1949 and found to have been made on that date. So we do not deal with a "hired" automobile.

[27] Said respondents in order to bring Mason within the quoted definition of "insured" (insuring agreements III(2)) rely upon the trial judge's finding that he was a special employee of Phoenix at the time and place of the accident and contend that therefore the truck was being used by the named insured (Phoenix) or with its permission. It is doubtful if this is sufficient, for paragraph III of the insuring agreements contains this: "The insurance with respect to any person or organization other than the named insured does not apply under division (2) of this insuring agreement: * * * (d) with respect to any hired automobile, to the owner thereof, or any employee of such owner." But be that as it may, the evidence as a matter of law does not warrant the finding of a special employment of Mason by Phoenix.[6]

Mason was initially hired by John T. Butler of Oilfields two or three months before the accident. He was hired as a truck driver and truck 382 was assigned to him. It was equipped with a trailer on which was installed a concrete spreader. The truck and trailer were owned by Oilfields and the spreader by Phoenix. When at the site of the construction work, Mason would receive no specific orders from Butler or other Oilfields' representatives. Waldo Flamm and Aubrey Webb were employees of Phoenix working on the job and they would tell Mason where and when to manipulate his truck in the process of spreading the cement.[7] No other directions were given him by Phoenix men at the construction job or anywhere else. Butler was in charge of all Oilfields truck drivers. On the night of the accident he told Mason to have truck 382 at the job to unload cement between 5:00 and 6:00 o'clock the next morning. This order was given about 7:00 p. m. Mason went to the Oilfields' yard, arriving at about 9:00 to 9:30 p. m., hitched the trailer on to his truck and started for Haypress Canyon. The accident occurred on the way there at about 10:00 p. m. The yard was in Bakersfield about 17 miles from the job and adjoined that of Phoenix. Mason had nothing to do about the spreader that night except to haul it to the job and get it there by 5:00 or 6:00 o'clock in the morning. As to Flamm and Waldo, Mason testified without contradiction that all he did was to drive the truck for spreading cement, they controlled the poundage they wanted per square foot or cubic foot or however they put it down, that they controlled the backend, that all he did was to drive the truck and that they dumped it. Also that when the job was first started they told him how fast to drive and that's the way he drove the truck; that they took care of the rest of it from the rear, spreading the cement from the rear; that after the first load neither Flamm nor Waldo told him how fast to drive the truck; that after that the only instructions given him on the job were as to where to dump the cement. While on the job Mason also helped to load cement into the spreader at times.[8] Between the time that Butler gave him the order to have the truck on the job the next morning and the time of the accident, Mason had no function to perform for Phoenix in any sense of the word. He was merely hauling its spreader to the job and hauling was the specific function of his employer Oilfields. Phoenix had considerable valuable equipment on the job, as did Oilfields. It does appear that Mason customarily stayed on the job through the night, and that he was the only one who did so; the nature or extent of his duties at such times is not disclosed by the record. Mr. Bartlett, Secretary-Treasurer of Phoenix, testified that "we didn't have a night watchman in the true sense of the word." There is no evidence that any Phoenix representative ever gave him any instruction or direction during or with respect to this night duty, if duty it was. And the only inference deducible from the evidence is that none was given. Certainly there was no relinquishment of control to Phoenix covering these night vigils, if vigils they were. Mr. Mason said he had no keys to any of the buildings and that he "slept" in his car. The proof falls substantially short of establishing a special employment by Phoenix.

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[6] This question of special employment takes on added significance in our later discussion of subrogation.

[7] On cross-examination he was led into stating the conclusion, obviously erroneous, that they were his superiors on the job.

[28, 29] To effect a special employment such as that found by the trial judge, Oilfields must have surrendered to Phoenix the right to control Mason with respect to the acts he was doing at the time and place of the accident. There is no such evidence here. The case is governed by Billig v. Southern Pacific Co., 189 Cal. 477, 485, 209 P. 241, 244. The court there said: "It would appear, therefore, to be the rule in this state that, when a master hires out, under a rental agreement, the services of an employe for the operation of an instrumentality owned by the master, together with the use of the instrumentality, without relinquishing to the hirer the power to discharge such servant, to go where and perform such work as the hirer directs, the legal presumption is that, although the hirer directs the servant where to go and what to do in the performance of the work, the servant, as the operator of the instrumentality employed in the doing of the work, remains, in the absence of an agreement to the contrary, the servant of the general employer in so far as concerns the manner and method of operating the instrumentality, and the negligence of the servant must be held to be that of the owner, and not that of the hirer, of the instrumentality. Stewart v. California Improvement Co., supra [131 Cal. 125, 63 P. 177, 52 L.R.A. 205]; Garven v. Chicago, Rock Island and Pacific Railway Company, 100 Mo.App. 617, 620, 75 S.W. 193; note to Hardy v. Shelden Co., 37 L.R.A., p. 71."; Also at page 483 of 189 Cal., at page 243 of 209 P., the court said: "In such a situation, however, it is obvious that it is necessary to ascertain who was the master at the very time of the negligent act complained of. This is so, for the doctrine of *respondeat superior* applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged for the result of some neglect or wrong at the very time and in respect to the very thing out of which the injury arose." Gavel v. Jamison, 116 Cal.App.2d 635, 637, 254 P.2d 47, 48: "The doctrine of *respondeat superior* applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged for the result of some neglect or wrong at the very time and in respect to the very thing out of which the injury arose. (Billig v. Southern Pac. Co., supra, 189 Cal. 477, 483[3] ff., 209 P. 241.)" To

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[8] The record at bar is substantially different from that in the Leming case. Specifically we have no such concession as is quoted in that opinion, viz.: "Phoenix expressly concedes * * * that after Mason 'got on the job with the equipment, the job superintendent of Phoenix * * * directed him in the spreading of the cement.'" Leming v. Oilfields Trucking Co., 44 Cal.2d 343, 349, 282 P.2d 23, 27.

the same effect, see Doty v. Lacey, 114 Cal. App.2d 73, 77–79, 249 P.2d 550; Carlson v. Sun-Maid Raisin Growers Ass'n, 121 Cal. App. 719, 727, 9 P.2d 546; Lowell v. Harris, 24 Cal.App.2d 70, 76–77, 74 P.2d 551; McComas v. Al. G. Barnes Shows Co., 215 Cal. 685, 691–696, 12 P.2d 630; Shaff v. Baldwin, 107 Cal.App.2d 81, 88, 236 P.2d 634.

[30, 31] Moreover, "It is a well-recognized principle that where the servants of two parties are jointly engaged in a work of mutual interest, each employee is the servant of his own master and neither of the employees is the servant of the other's master." Moss v. Chronicle Pub. Co., 201 Cal. 610, 613, 258 P. 88, 89, 55 A.L.R. 1258. The cited case also says: "Under the principle announced above, the fact that one servant may have taken orders as to details from the servant of the other employer would not affect this rule. 'A servant of one employer does not become the servant of another for whom the work is performed merely because the latter points out the work to the servant, or gives him signals calling the service into activity, or gives him directions as to the details of the work and the manner of doing it.'" 201 Cal. at page 615, 258 P. at page 90. Cf. Valdick v. LeClair, 106 Cal.App. 489, 495–497, 289 P. 673; Entremont v. Whitsell, 13 Cal.2d 290, 296, 89 P.2d 392; 56 C.J.S., Master and Servant, § 330 a, page 1092. The finding that Mason was a special employee of Phoenix is not supported by substantial evidence. Nor is the conclusion that he was covered by the Continental policy.

We have not found it necessary to follow counsel through their various and divergent arguments as to the exact meaning of the detailed language of the policies and the riders thereto. The case must be decided on a higher level, that of the reasonable intention of the parties as expressed in the language of the insurer and in the light of surrounding circumstances so far as known. From what has been said it appears that the Continental policy covers Phoenix alone with respect to the accident in question and that the Transport policy protects only Oilfields and Mason. Upon this predicate we approach the questions arising under the "other insurance" clauses of the two policies.

[32] The trial judge, having found Phoenix, Oilfields and Mason to be covered by the Continental policy and only Oilfields protected by that of Transport, adjudged an elaborate pro-ration of liability between the Continental group of insurers on the one side and the Transport group on the other. As the pro-ration ordered by the trial court was based upon the finding that the Continental policy covers Oilfields and Mason as well as Phoenix, a concept which has been shown to be erroneous, that phase of the judgment cannot stand. The question of right to pro-ration is to be determined in the light of the terms of the various policies concerning other insurance. See Fidelity etc. Co. v. Fireman's Fund Indemnity Co., 38 Cal.App.2d 1, 100 P.2d 364. Paragraph 13 of the conditions of the Continental policy is this: "If the insured has other valid and collectible insurance against a loss covered by this policy, the insurance under this policy shall be excess insurance with respect to such loss but shall apply only in the amount by which the applicable limit of liability stated in the declarations exceeds the total applicable limits of liability of such other insurance." In view of our holding that Phoenix had no other insurance against the loss in question, this provision counts for naught and the coverage is unaffected by any reference to other insurance. The Transport policy says, in paragraph (11) of the conditions: "If there is other insurance against an occurrence covered by this policy, this insurance shall be deemed excess insurance over and above the applicable limits of all such other insurance." The Continental insurance does protect Phoenix "against an occurrence covered by this policy," namely, the Leming injury; and, if we adhere literally to the terms of paragraph (11), the Transport obligation to pay attaches only after Leming has collected the full amount of Continental coverage. If the courts were bound to decide according to the letter of the two policies, the insurance carriers of Phoenix would have to bear all of the loss and Transport would be exonerated. But the inquiry is not that narrow.

[33] The reciprocal rights and duties of several insurers who have covered the same event do not arise out of contract, for their agreements are not with each other. See Offer v. Superior Court, 194 Cal. 114, 118, 228 P. 11; Fireman's etc., Co. v. Palatine Ins. Co., 150 Cal. 252, 256, 88 P. 907. Their respective obligations flow from equitable principles designed to accomplish ultimate justice in the bearing of a specific burden. As these principles do not stem from agreement between the insurers their application is not controlled by the language of their contracts with the respective policy holders. The Minnesota Supreme Court, dealing with policies covering two insured persons whose liability for an accident was primary and secondary between themselves, said in Commercial Casualty Ins. Co. v. Hartford Accident & Indemnity Co., 190 Minn. 528, 252 N.W. 434, 435: "The two contracts of insurance and their interpretation must be the factual basis of decision. But there was no contract and so no contractual relation between the insurers. Neither was beneficiary of the other's contract. Neither having any contract right against the other, but both being under contractual obligations in respect to the same risk, it remains only to determine the respective equities. If they are concurrently liable for the same risk, it is but obvious equity that there should be contribution. Equally plain it is that, if the one paying the whole loss is primarily liable, and the other obligated only secondarily and not otherwise, there should be no contribution. In such case, the position of the defendant is the stronger, and there can be no recovery." And: "The two policies did not cover the same risk with enough identity of scope and purpose to be concurrent." Rehearing denied in 253 N.W. 888.

[34] This being a problem in the equity field the respective rights of the insured persons must first be determined as a basis for adjusting equities between the insurers.

[35–37] At the time of the accident Mason was the servant of Oilfields and not Phoenix. The liability to Leming is due to negligence of Oilfields' driver, Mason. In the law of joint venture and of partnership, the member who has committed a tort must indemnify the other member against liability for the same. Young v. Evans, 62 Cal.App.2d 365, 372, 144 P.2d 651; United Brokers' Co. v. Dose, 143 Or. 283, 22 P.2d 204, 205; Restatement of Law of Restitution, § 96, p. 418; § 98, p. 422; 13 Am.Jur. § 43, p. 40; § 47, p. 43; 38 Am.Jur. § 238, p. 925; 62 A.L.R. 442; 85 A.L.R. 632; 68 C.J.S., Partnership, § 83, page 522. If there were no insurance available and Phoenix were compelled to pay the Leming judgment, it would have an immediate right to recover over from Oilfields, whose servant had committed the wrong. If Phoenix' insurer, Continental, is required to pay Leming, it, through an established equitable principle, is subrogated to the right of Phoenix against Oilfields—a right of recovery over. The Phoenix policy contains this paragraph 14: "In the event of any payment under this policy the company shall be subrogated to all the insured's rights of recovery therefor against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights." But that provision adds nothing to the right of subrogation, which springs from the existing equity. In good conscience Oilfields has a right to have its insurer make good at this point. And the authorities are to the effect that this right of subrogation runs against the insurer of the immediate tort feasor as well as the wrongdoer himself.

[38] Hartford Accident & Indemnity Co. v. Worden-Allen Co., 238 Wis. 124, 297 N.W. 436, at page 440: "Where, however, by reason of the agreement between the sureties or by reason of the general equities of the situation one surety or insurer ought, as against other sureties or insurers, to bear the whole loss, he becomes the principal surety, and all other insurers or sureties become sub-insurers or sub-sureties." This language was quoted with approval in Fireman's, etc., Co. v. State Compensation, etc., Fund, 93 Cal.App.2d 408, 413, 209 P.2d 55. The same fundamental reasoning was applied to the same effect in these cases: Canadian Indemnity Co. v. United States Fidelity & Guaranty Co., 9 Cir., 213 F.2d

658; Central Surety & Ins. Corp. v. London & Lancashire Indemnity Co., 181 Wash. 353, 43 P.2d 12; Lucas v. Garrett, 209 S.C. 521, 41 S.E.2d 212, 169 A.L.R. 660; Maryland Casualty Co. v. Hubbard, D.C.Cal., 22 F.Supp. 697, 700; Bennett v. Preferred Accident Ins. Co. of New York, 10 Cir., 192 F.2d 748, 751; United States Fidelity & Guaranty Co. v. Thomlinson-Arkwright Co., 172 Or. 307, 141 P.2d 817, 824, 826; Aetna Casualty & Surety Co. v. Buckeye Union Casualty Co., 157 Ohio St. 385, 105 N.E.2d 568, 31 A.L.R.2d 1317.

[39] This equitable subrogation overrides the exact terms of the insurance policies. And the present case furnishes adequate reason. If adherence to the exact terms of the Transport policy were in order, Oilfields, after making good on the Continental subrogated claim, would be confronted with clause (11) of the Transport policy to the effect that "this insurance shall be deemed excess insurance over and above the applicable limits of all such other insurance," i. e., "other insurance against an occurrence covered by this policy." That is to say, Transport does not have to pay until after Continental and its excess insurers have paid the judgment in full; but Continental in fact has not paid at all, because it recovered over from Oilfields, and Oilfields, the insured of Transport, is saddled with the entire burden. That is the line of argument that would flow from strict adherence to the language of the Transport policy. Equity will not tolerate any such legalism. Cf. In re Estate of Kemmerer, 114 Cal.App.2d 810, 814, 251 P.2d 345, 35 A.L.R.2d 1393. It breaks through the barrier of form and does justice by placing the burden upon the proper, the equitable repository,—the insurer for the wrongdoer.

[40, 41] The same result is reached through another sound line of reasoning. The phrase "other insurance" in paragraph (11)[9] of the Transport policy connotes valid, collectible insurance. Though there is a split among the authorities upon this question, 6 Appleman Insurance Law & Practice, § 3905, p. 270; 29 Am.Jur., § 736, p. 569, the rule just stated is the sounder one as applied to this case. Otherwise Oilfields would be left without coverage of the accident against which it had insured—with a premium deposit of $4,500. In this case it is an especially sound view that "every rule of construction in apportioning losses must yield to the right of the insured to be fully indemnified." 6 Appleman Insurance Law and Practice, § 3905, p. 270. Cf. Kiefer Tanning Company v. Alliance Insurance Company, 266 Ill. App. 362, 376; Republic Ins. Co. v. American Ice Co., Tex.Civ.App., 2 S.W.2d 329, 330. If the "other insurance"—that issued by Continental—is not collectible, then the question of whether Oilfields or its insurer Transport should bear the loss is easily solved in favor of the insured. And the Continental policy is not in truth collectible if the company pays Phoenix and recovers the same amount from Oilfields. Other insurance clauses cannot fairly be construed to deprive a policy-holder of full coverage because of what some other policy-holder may have done in the way of procuring coverage for himself.

[42, 43] It is contended by respondents Oilfields and Transport that Oilfields is innocent of wrongdoing equally with Phoenix, that the liability of each is vicarious and hence that there is no basis for subrogation. Of course, each is a corporation and can act only through agents and servants. If this argument were to prevail there could be no subrogation with respect to corporations. But the authorities are to the effect that subrogation runs against the employer, individual or corporate, whose employee has done the wrong,—and against the insurer of that employer. Applications of this principle are found in Canadian Indemnity Co. v. United States Fidelity & Guaranty Co., supra, 9 Cir., 213 F.2d 658; United Pacific Ins. Co. v. Ohio Casualty Ins. Co., 9 Cir., 172 F.

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[9] For convenience said paragraph (11) is again quoted: "If there is other insurance against an occurrence covered by this policy, this insurance shall be deemed excess insurance over and above the applicable limits of all such other insurance."

2d 836; Central Surety & Ins. Corp. v. London & Lancashire Indemnity Co., supra, 181 Wash. 353, 43 P.2d 12, 14; Maryland Casualty Co. v. Hubbard, supra, D.C. Cal. 22 F.Supp. 697, 700; Bennett v. Preferred Accident Ins. Co. of New York, supra, 10 Cir., 192 F.2d 748, 751.

[44] Thus far the discussion of subrogation has proceeded upon the basis of Continental's equity of subrogation against Oilfields and through it against Transport. But the same result follows from consideration of the fact that Mason himself was insured by Transport and not by Continental. The latter company, standing in the shoes of Phoenix, is entitled to indemnity from the wrongdoer Mason and hence from his insurer Transport. The cases just cited support this proposition. And it is plain as a matter of principle.

We conclude that Transport, not Continental, must bear the burden of the Leming judgment.

What we have said about primary and secondary insurance obligations may seem opposed to certain California precedents. But analysis of them discloses that they deal with factual situations which do not afford a true analogy to this case and for other reasons are not controlling at bar. Those cases are Consolidated Shippers v. Pacific Employers Ins. Co., 45 Cal.App.2d 288, 114 P.2d 34; Air Transport, etc., Co. v. Employers' Liability, etc., Corp., 91 Cal. App.2d 129, 204 P.2d 647; Employers, etc., Corp. v. Pacific, etc., Ins. Co., 102 Cal.App. 2d 188, 227 P.2d 53; Traders, etc., Ins. Co. v. Pacific Employers Ins. Co., 130 Cal.App. 2d 158, 278 P.2d 493.

[45] It "is a familiar rule that expressions used in judicial opinions are always to be construed and limited by reference to the matters under consideration, and that they cannot be safely applied in their largest and most universal sense to dissimilar cases." City of Pasadena v. Stimson, 91 Cal. 238, 250, 27 P. 604, 606.

The Consolidated Shippers case involved an accident in which one Harvey was operating a truck owned by him; he was transporting merchandise for plaintiff Consolidated Shippers. Both Harvey and Consolidated Shippers were covered by a policy of defendant Commercial Standard Insurance Company and plaintiff Consolidated Shippers alone was covered by one issued by defendant Pacific Employers Insurance Company. Consolidated Shippers paid a compromise judgment and sued the two insurers for reimbursement. Both policies contained pro-ration clauses. The trial court held that the Commercial policy afforded primary coverage and that Pacific's coverage was secondary or excess insurance. This was challenged upon the ground that the risks were co-extensive, that both policies had pro-ration clauses and neither provided for conversion of its liability into excess insurance in the event of "other insurance." This contention was upheld and the judgment reversed because of the presence of the pro-ration clauses, which the court held to be inconsistent with any idea of excess insurance. The court, having thus ruled, said at page 293 of 45 Cal.App.2d, at page 37 of 114 P.2d: "Pacific contends that Harvey was primarily liable, that plaintiff was secondarily liable and that the judgment correctly determines the respective liabilities. No California case is cited in support of this proposition and we know of no law in this state fixing degrees of liability in relation to the joint liability for torts. From the fact that an action to recover damages for injuries resulting from the negligence of an employee may be maintained against either the employer or the employee alone (Schilling v. Central California Traction Co., 115 Cal. App. 30, 1 P.2d 53), or against both jointly, it would seem that there could be no such thing as primary and secondary liability. Moreover, the court made no finding on the issue of primary and secondary liability as between Harvey and plaintiff, and in fact made no finding concerning the relationship existing between Harvey and plaintiff out of which the latter's liability arose. *In view of our conclusion that both policies insured the same risk so far as plaintiff is concerned, the fact that plaintiff's liability may have been primary or secondary becomes immaterial.* Regardless of the nature of such liability, any loss resulting therefrom was covered by both insurers."

(Emphasis added.) It thus appears that the discussion of primary and secondary liability was dictum. And the sentence "From the fact that an action to recover damages for injuries resulting from the negligence of an employee may be maintained against either the employer or the employee alone * * *, or against both jointly, it would seem that there could be no such thing as primary and secondary liability" is directed to the matter of liability to the injured party, not to the relationship between the parties liable for the tort.

The Supreme Court spoke on this subject in Bradley v. Rosenthal, 154 Cal. 420, 423, 97 P. 875, 876, saying: "The employe's responsibility is primary. He is responsible because he committed the wrongful or negligent act. The employer's responsibility is secondary, in the sense that he has committed no moral wrong, but under the law is held accountable for his agent's conduct. While both may be sued in a single action, a verdict exonerating the agent, must necessarily exonerate the principal, since the verdict exonerating the agent is a declaration that he has committed no wrong, and the principal cannot be responsible for the agent if the agent has committed no tort. While no right of contribution exists between joint tort-feasors, whether sued separately or collectively, there exists, in the kind of case here presented, much more than the mere right of contribution. The principal who has been obliged thus to pay for the unauthorized negligent act of his agent resulting in injury may indemnify himself to the full amount against his agent." The dictum in the Consolidated Shippers case is not controlling here.

In Air Transport, etc., Co. v. Employers' Liability, etc., Corp., supra [91 Cal.App.2d 129, 204 P.2d 650], it appeared that Employers had issued to American U-Drive Truck Rentals Company a public liability policy containing an omnibus clause covering anyone using a U-Drive car by permission of the insured. The policy also contained an "other insurance" clause converting Employers' insurance into excess coverage for the part of the policy limit which might exceed the "' "other valid insurance"' "; Pacific Indemnity had issued a comprehensive policy to Air Transport covering all its operations; it contained an "other insurance" clause providing for pro-ration in that event. Air Transport rented a car from American U-Drive and same was in an accident while being driven by an employee of Air Transport. Employers was adjudged liable for one-half of the damages and contended on appeal that it was exonerated from any liability because the other insurance issued by Pacific Indemnity brought its own excess clause into operation. The judgment was affirmed. In discussing the conflicting views entertained by various courts upon the effect of other insurance clauses, the court said at page 132 of 91 Cal.App.2d, at page 649 of 204 P.2d: "'Another line of authorities holds that each insurer is primarily liable for the losses of its named assured and secondarily liable as an excess carrier for other losses. (Citing cases.) This principle cannot apply in California for the reason that there is no such thing as primary and secondary liability as between a vehicle owner and the operator thereof with permission. Consolidated Shippers, Inc., v. Pacific Employers Ins. Co., 45 Cal.App.2d 288, 114 P.2d 34.'" Having rejected this test of primary and secondary liability, the court proceeded to determine the case from a construction of the language of the different policies. It is quite true that the liability of both the owner and the permittee-driver to the injured person under Vehicle Code Section 402 is direct and primary, Holland v. Kodimer, 11 Cal.2d 40, 42, 77 P.2d 843; Broome v. Kern Valley Packing Co., 6 Cal.App.2d 256, 261, 44 P.2d 430. But the statute clearly makes it primary and secondary so far as the owner and driver are concerned. It provides for a joinder of the driver and a recovery over by the owner in event of judgment for plaintiff and its payment by the owner. And the lower court was reversed in Aynes v. Winans, 33 Cal.2d 206, 200 P.2d 533, because the verdicts and judgments entered thereon did not preserve to the owner this right of subrogation. Examination of the briefs in the Air Transport case reveals that our question of primary and secondary liability or its relation to the matter of subrogation was not discussed by counsel. The court's remark that "there is no such thing as primary and secondary liability as between a vehicle owner and the operator thereof with permission" is at best arguendo, and does not constitute a binding precedent.

In the later case of Gillies v. Michigan Millers, etc., Ins. Co., 98 Cal.App.2d 743, 751, 221 P.2d 272, 277, the holding in the Air Transport case was thus defined by the same division of the same court: "There the court decided but one question; was Employers' policy rendered void because of the existence of other valid insurance? Or to be more specific, was the policy issued prior to that of Employers' valid insurance within the meaning of the 'other insurance' clause of the defendant's policy? The court held that the term, 'valid insurance,' contemplated insurance which provides unconditional coverage and that since the Pacific policy afforded only pro rata coverage it did not meet the requirement. The 'excess' portion of the clause was not involved."

Employers, etc., Corp. v. Pacific, etc., Ins. Co., 102 Cal.App.2d 188, 227 P.2d 53, turned upon the effect of clauses in two policies covering the same risk, both of which provided that the existence of other valid insurance would convert the particular policy into excess coverage. It was held that they constituted concurrent insurance and must pro-rate the loss. The closest approach to our problem of subrogation appears at page 192, of 102 Cal.App.2d, at page 55 of 227 P.2d where the court said: "Appellant maintains that even assuming that each of the policies constituted excess insurance, Employers' policy is specific in nature whereas that of appellant is comprehensive or general and therefore the liability of Employers is primary and that of appellant is secondary. This contention is not supported by the cases cited by appellant, which are readily distinguishable from the instant case." The court then reviewed Commercial Casualty Ins. Co. v. Hartford Accident & Indemnity Co., 190 Minn. 528, 252 N.W. 434, quoted supra, and remarked: "The theory that the insurer covering the primary tort feasor is liable to its policy limits and the insurer covering the secondary tortfeasor is liable for excess insurance only has been rejected in California. Consolidated Shippers, Inc. v. Pacific Employers Ins. Co., 45 Cal.App.2d 288, 114 P.2d 34; Air Transport Mfg. Co., Ltd. v. Employers' Liability, etc., Corp., 91 Cal.App.2d 129, 204 P.2d 647. Moreover, in the instant case, neither appellant nor respondent insured the party driving the car involved in the accident." It will be observed that the question was not one of subrogation and could not be, because "neither appellant nor respondent insured the party driving the car involved in the accident." He was covered by the policy which constituted the " ' "other valid insurance." ' "

The Consolidated Shippers, Air Transport, and Employers, etc., Corp. cases, supra, were held inapplicable to a subrogation problem, in Canadian Indemnity Co. v. United States Fidelity & Guaranty Co., supra, 9 Cir., 213 F.2d 658, 659. In that case the plaintiff United States F. & G. Co. had insured Headrick & Brown Co. against liability for negligence but the policy did not cover its employees. An accident was caused by negligence of one Goff, an employee of Headrick & Brown Co.; Goff was driving a truck belonging to Thomas Rigging Co., with its consent; the Canadian Indemnity Co. had insured the Rigging Co. and Goff was within the omnibus clause of that policy, though not protected by that of United States F. & G. Co. Headrick & Brown Co. was held liable for the injury as employer of Goff and its insurer paid the judgment. It then sued Canadian Indemnity Company, the only insurer of Goff, asserting its right of subrogation. "This is on the basis that as between principal and agent, where only the agent has been at fault, the agent has a duty to reimburse the principal. 3 C.J.S., Agency, § 162, page 46. Stated another way, the principal, under such circumstances, may recoup from its agent. Bradley v. Rosenthal, 154 Cal. 420, 97 P. 875; Popejoy v. Hannon, 37 Cal.2d 159, 231 P.2d 484; Spruce v. Wellman, 98 Cal.App.2d 158, 219 P.2d 472. Being subrogated to the rights of the principal (Headrick & Brown Co.), U. S. F. & G. claims the right to recoup against Goff; and consequently against the only insurer of Goff,

i. e., Canadian." Each policy had an "'other insurance' clause" which the court held inapplicable to the problem before it, saying: "A comparable situation was presented to this court in United Pacific Ins. Co. v. Ohio Casualty Ins. Co., 9 Cir., 172 F.2d 836. In that case we recognized the right of an employer to recoup his losses from a negligent employee, relying on Johnston v. City of San Fernando, 35 Cal.App.2d 244, 95 P.2d 147, and Myers v. Tranquility Irr. Dist., 26 Cal.App.2d 385, 79 P.2d 419. See note 5 at page 840 of 172 F.2d, United case, supra. We also held that the insurer of the employer may recover against the insurer of the negligent employee. United, etc., Co. v. Ohio, etc., Co., supra, 172 F.2d at pages 846–848. Viewed in the light of these principles, the 'other insurance' clauses of these policies are removed from the issue. Goff being ultimately liable, is insured by Canadian alone." The court then reviewed the three California cases and held them not controlling because they presented no question of subrogation. The judgment in favor of plaintiff was affirmed.

Traders, etc., Ins. Co. v. Pacific Employers Ins. Co., 130 Cal.App.2d 158, 278 P.2d 493, deals with an owner Harris and a permittee-driver Shinn. The owner was insured by Pacific Employers Insurance Company; the driver was covered by Traders and General Insurance Company. Both policies contained pro-ration clauses. Pacific contended, inter alia, that its policy should be adjudged excess insurance because Traders' insured, Shinn, was the primary tort feasor and Harris only secondarily liable. The court rejected this argument, saying at page 165 of 130 Cal. App.2d, at page 498 of 278 P.2d: "Many jurisdictions distinguish between primary and secondary liability and apply excess coverage only to the later. * * * But that theory has been expressly rejected in this state. '"This principle cannot apply in California"', said the court in Air Transport Mfg. Co. v. Employers' Liability Assur. Corp., 91 Cal.App.2d 129, 132, 204 P.2d 647, 649, '"for the reason that there is no such thing as primary and secondary liability as between a vehicle owner and the operator thereof with permission."' To the same effect is Consolidated Shippers, Inc., v. Pacific E. Ins. Co., 45 Cal.App.2d 288, 114 P.2d 34." At page 166 of 130 Cal.App.2d, at page 499 of 278 P.2d the court discussed the matter of subrogation saying: "Nevertheless, insists appellant, even if Harris was liable as owner, under Vehicle Code § 402 Harris would be entitled to indemnity from Shinn; as Harris' insurance carrier, then Pacific would be entitled to reimbursement from Traders, which covers Shinn; to prevent this multiplicity and circuity of lawsuits, the trial court should have recognized Pacific's right of subrogation. Aetna Casualty & Surety Co. v. Buckeye Union Cas. Co., 157 Ohio St. 385, 105 N.E.2d 568, 31 A.L.R.2d 1317; Central Surety & Ins. Corp. v. London & Lancashire Indemnity Co., 181 Wash. 353, 43 P.2d 12. This contention, however, is built upon the erroneous belief that the Pacific policy covered only Harris' liability as owner and did not provide any coverage for the operator, Shinn. The Pacific policy was not restricted in coverage to the named insured. The insured to whom coverage was granted included not only the named insured but also any person using an automobile covered thereby with permission of the named insured. As operator of the De Soto with the permission of the owner Harris, Shinn was expressly included as an insured under the Pacific policy." It is plain that the denial of subrogation was rested upon the fact that appellant, who was making that claim, had insured both the owner and driver and the basis for subrogation was therefore absent, both policies covered Shinn. The case requires no further comment, except the observation, applicable to all the California cases just discussed, that the question of primary and excess insurance, which turns upon the language of the policies, is essentially different from that of subrogation which flows from considerations of fundamental equities. And none of those cases actually decides the exact question of subrogation which is crucial in the case before us.

Upon oral argument at bar counsel for respondents Oilfields and Transport invoked as res judicata the holding in the Leming case, 44 Cal.2d 343, 282 P.2d 23, rendered five days before. The argument was that the Supreme Court had upheld the sufficiency of the evidence to support an implied jury finding that Mason was under the control of Phoenix as well as Oilfields; that therefore he was at least a special employee of Phoenix; that any basis for indemnification or subrogation thus disappeared; and that the affirmance of the Leming judgment was a conclusive determination of the matter.

[46] This claim of res judicata cannot be upheld for several reasons. In the first place, there is no plea of former judgment, and courts will not take judicial notice of proceedings in a different case for the purpose of applying the rule of res judicata, Willson v. Security-First National Bank, 21 Cal.2d 705, 710, 134 P.2d 800; Dillard v. McKnight, 34 Cal.2d 209, 218, 209 P.2d 387, 11 A.L.R.2d 835; Johnston v. Ota, 43 Cal.App.2d 94, 97, 110 P.2d 507.

[47–50] Such a plea, if made, would not be good, for the parties interested in this subrogation matter were not adversary parties in the former (the Leming) action. "[I]t is fundamental as to the doctrine of *res judicata* that, before the former adjudication may operate as an estoppel as to issues in the later action, there must be an identity of parties, as well as an identity of issues." Standard Oil Co. v. John P. Mills Organization, 3 Cal.2d 128, 139, 43 P.2d 797, 802. Section 1910, Code of Civil Procedure, says: "The parties are deemed to be the same when those between whom the evidence is offered were on opposite sides in the former case, and a judgment or other determination could in that case have been made between them alone, though other parties were joined with both or either." There are numerous cases in this state to the effect that a judgment is not res judicata as to codefendants. Victor Oil Co. v. Drum, 184 Cal. 226, 239, 193 P. 243; Tanaka v. Highway Farming Co., 76 Cal.App. 590, 594, 245 P. 434; City of San Diego v. California Water & Telephone Co., 71 Cal.App.2d 261, 276, 162 P.2d 684; County of Los Angeles v. Continental Development Corp., 113 Cal.App.2d 207, 222, 248 P.2d 157; Allen v. California Water & Telephone Co., 29 Cal.2d 466, 491, 176 P.2d 8, are a few of them. See, also, 15 Cal.Jur. § 217, p. 186. The cases having direct application to the question of the effect, as between the defendants, of a judgment in favor of plaintiff and against one or more of them, are collected in notes in 101 A.L.R. 104; 142 A.L.R. 727; 152 A.L.R. 1066. They are thus summarized in 101 A.L.R. at 105: "While the cases are not entirely in harmony, sometimes even in the same jurisdiction, the rule supported by the great weight of authority is that a judgment in favor of the plaintiff in an action against two or more defendants is not res judicata or conclusive of the rights and liabilities of the defendants inter se in a subsequent action between them, unless those rights and liabilities were expressly put in issue in the first action, by cross complaint or other adversary pleadings, and determined by the judgment in the first action." And in 142 A.L.R. at 728: "The same conflict of authority prevails in the later cases, with the weight of authority, as in the older cases, supporting the view that the judgment in favor of the plaintiff in the former action is not res judicata or conclusive, in a subsequent action between the codefendants, of their rights and liabilities inter se, unless those rights and liabilities were expressly put in issue in the first action by cross complaint or other adversary pleadings, and determined by the judgment therein." In Merrill v. St. Paul City Ry. Co., 170 Minn. 332, 212 N.W. 533; Pearlman v. Truppo, 159 A. 623, 10 N.J. Misc. 477, Id., 160 A. 334, 10 N.J.Misc. 772; Snyder v. Marken, 116 Wash. 700, 199 P. 303; United States Fidelity & Guaranty Co. v. Thomlinson-Arkwright Co., supra, 172 Or. 307, 141 P.2d 817, 824, it is pointed out that mere assertions in separate answers that the other defendant was at fault do not make the codefendants adversaries where no cross-pleading is filed.[10] Bernhard v. Bank of America, etc., 19 Cal.2d 807, 813, 122 P.2d 892, 895, prescribes as one of the elements of res judicata an affirmative answer to this question: "Was the issue decided in the prior adjudication identical with the one presented in the action in question?" The case has been cited many times to this effect.

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[10] Cases cited by respondent, Maryland Casualty Co. of Baltimore v. Sturgis, 198 Ark. 574, 129 S.W.2d 599, 123 A.L.R. 704 and Edinger & Co. v. Southwestern Surety Ins. Co., 182 Ky. 340, 206 S.W. 465, are not in point. They deal only with problems arising between a defendant and his own insurer.

Hardy v. Rosenthal, 2 Cal.App.2d 442, 38 P.2d 412, seems to be controlling. One Stoffel sued H. J. Hardy, his employee J. W. Nicholson, and one T. Rosenthal. Automobiles driven by Nicholson and Rosenthal collided on the highway and traveled thence to plaintiff's house and swept it from its foundations. Stoffel recovered judgment, which was paid by Hardy and Rosenthal. Hardy then sued Rosenthal to recover his own damages. Defendant claimed that the former judgment holding both parties liable to Stoffel was a bar to the action. That claim was rejected. The court said, 2 Cal.App.2d at page 445, 38 P.2d at page 413: "It is apparent that, to constitute a judgment in one case a bar to the prosecution of a second action, there must have been an identity of a question litigated in the two cases which would form the basis of a recovery in the second case. Such identity is entirely lacking in the two cases we are considering." And at page 446 of 2 Cal.App.2d, at page 414 of 38 P.2d: "'It is true that both Drum and the plaintiff were parties defendant in the action in which the judgment was rendered, but the judgment was not between them, but between them on the one side and the plaintiff in that action on the other. A judgment may operate as an estoppel between parties to it only when they are adverse parties, so that the judgment is a determination of issues between them. Section 1910, Code Civ.Proc.; 23 Cyc. 1237.'"

[51] If it be said that the Leming opinion establishes a precedent upon the subject of sufficiency of the evidence to establish an employment of Mason by Phoenix, the record will not verify that assertion. For a comparison of the Leming opinion with the statement of the facts herein will reveal that the two records present substantially different facts. The matter arises from Phoenix' contention that "'The evidence is insufficient to support a judgment against * * * Phoenix * * * as a joint adventurer of * * * Oilfields * * *, since appellant (Phoenix) exerted no control over Mason'", quoting 44 Cal.2d 349, 282 P.2d 23, 27. Inasmuch as "an officer of each corporation confirmed that 'that was a joint venture between' Oilfields and Phoenix", 44 Cal.2d 347, 282 P.2d 25, this contention of Phoenix injected an issue which was not controlling (an argument which is germane to the question of whether a joint adventure has been established, e. g., between several automobilists); joint control is not important in a case where the fact of joint venture is established or conceded and the co-venturers have expressly or impliedly agreed upon a division of the work and responsibility, Foster v. Keating, 120 Cal.App.2d 435, 452, 261 P.2d 529; Sime v. Malouf, 95 Cal.App.2d 82, 95, 212 P.2d 946, 213 P.2d 788. And the Supreme Court summarily disposed of the matter, immediately adding: "Not only does the above evidence show that Phoenix actually did exercise control over Mason, but it appears to be the general principle that 'The relationship of joint venturers is that of a mutual agency, akin to a limited partnership' (Campagna v. Market Street Ry. Co. (1944), 24 Cal.2d 304, 308, 149 P.2d 281), and that the negligence of one joint venturer or of his employes acting in connection with the joint venture is imputed to the other joint venturers. (See Shook v. Beals, 1950, 96 Cal.App.2d 963, 970, 217 P.2d 56, 18 A.L.R.2d 919; Hupfeld v. Wadley, 1948, 89 Cal.App.2d 171, 175–176, 200 P.2d 564; Di Vita v. Martinelli, 1932, 123 Cal.App. 392, 394, 11 P.2d 423; 48 C.J.S., Joint Adventures, § 14–e, p. 870.)" Moreover, as previously pointed out, there is at bar no proof and no concession "that after Mason 'got on the job with the equipment, the job superintendent of Phoenix * * * directed him in the spreading of the cement.'" The Leming opinion is not opposed to the views herein expressed as to Mason's alleged special employment or as to the right of subrogation existing in favor of Phoenix and Continental and against Oilfields and Transport.

Now as to excess insurance in the instant case. The Continental policy has a $200,000 limit. Certain interveners, whom counsel as matter of convenience have termed Pacific Lloyd's,[11] issued to Phoenix a certificate providing maximum insurance of $100,000 with liability attaching only after full utilization of the $200,000 afforded by the main Continental policy CLP5707316. This Lloyd's certificate is LC17863. Pacific Lloyd's also issued to Phoenix a further certificate, No. LC17963, providing additional excess insurance in the sum of $150,000; total of Phoenix coverage $450.000.

Oilfields had these policies or certificates: Transport policy 46–001 with limit of $10,000; certificate No. 46–C3–32 issued by Lloyd's, London (not Pacific Lloyd's) providing excess insurance with $40,000 maximum; and another Transport policy, No. 46–002, affording additional excess coverage in the amount of $950,000; total Oilfields' coverage $1,000,000.

Each of the excess policies is conditioned upon liability under the primary policy, i. e., Continental CLP5707316 in the one instance and Transport 46–001 in the other. The Lloyd's London certificate 46–C3–32 states in endorsement No. 1 that it provides only excess insurance and that liability shall not attach "unless the Primary Insurer shall have admitted liability for the first $10,000.00 under its policies, or unless or until the Assured has by final judgment been adjudged to pay the said sum of $10,000." Transport policy No. 46–002 carries a "special excess endorsement," No. 2, making it excess insurance over and above $50,000 and upon the same warranties, terms and conditions as the primary policy 46–001.

The Phoenix policies, primary and excess, naturally stand or fall together. It having been held that Transport must bear the burden of the Leming judgment to the exclusion of Continental, it follows that Phoenix excess insurance does not attach. And the Transport policies do become payable in the order and the amounts above mentioned, viz.: Transport 46–001, the first $10,000; Lloyd's London the next $40,000; Transport 46–002 the next $950,000. The Leming judgment which the Supreme Court affirmed was for $213,460.22; the one against Mason $212,585.69; of course there can be but one satisfaction. It seems clear that the total liability to Leming will not exhaust the Oilfields' coverage of a million dollars.[12] Therefore, the ultimate judgment in this case must be that Transport and Lloyd's, London shall bear the entire burden of the Leming judgments against Phoenix and Oilfields and Mason.

[52] There are no issues of fact to be determined after a reversal herein; the trial judge's errors went to matters of law only; it is therefore appropriate to reverse with instructions, Code Civ.Proc. § 53; Stauter v. Carithers, 185 Cal. 160, 164, 196 P. 37.

[53] The judgment is reversed with instructions to the trial court to enter judgment declaring that defendant Transport Indemnity Company, and intervener Underwriters at Lloyd's, London, an unincorporated association, are obligated to pay any and all damages awarded against Phoenix Construction Company and Oilfields Trucking Company and James E. Mason in favor of said Harvey Leming by final judgments in the case of Harvey Leming, Plaintiff, v. Oilfields Trucking Company, a corporation, Phoenix Construction Company, a corporation, and James Ellert Mason, Defendants, being No. 56455 on the records of the Superior Court for Kern County; or any damages which may be payable to

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[11] The term Pacific Lloyd's embraces Certain Underwriters at Lloyd's, London; Pacific Marine Agency, Inc.; E. C. Evans Agencies, Managers; Willis Faber & Dumas, Ltd.; and Lloyd's, London, refers to Underwriters at Lloyd's, London, an unincorporated association.

[12] Appellant's opening brief says that one Laverne Rife died from injuries received in the same accident and that his heirs were prosecuting an action for wrongful death, Kern County case No. 56653, against Oilfields, Phoenix and Mason. But the later history of the case is not given; all counsel treat it as if nonexistent and discuss the Insurance from the standpoint of liability for injuries to only one person.

said Leming through any valid compromise of said action; also declaring that Phoenix Construction Company, Continental Casualty Company, interveners Certain Underwriters at Lloyd's London,[13] Pacific Marine Insurance Agency, Inc., E. C. Evans Agencies, Managers, and Willis Faber & Dumas, Ltd., are not, nor is any of them, obligated to pay to said Leming or to any other party to this action all or any part of any judgment in favor of said Leming or any moneys payable under any compromise of said Kern County action No. 56455.

Each party to bear own costs on appeal, except as to transcripts on appeal; Continental and Transport each to bear one-half of cost thereof.

SHINN, P. J., and VALLEE, J., concur.

133 Cal.App.2d Supp. 790

COVINA MANOR, Inc., etc., Plaintiff and Respondent,

v.

William T. HATCH et ux., Defendants and Appellants.

C. A. 8568.

Appellate Department, Superior Court,
Los Angeles County, California.
May 24, 1955.

Action in unlawful detainer to recover possession of dwelling house and damages for detention. The Municipal Court, Citrus Judicial District, rendered judgment for plaintiff and defendants appealed. The Appellate Department of the Superior Court, Patrosso, J., held that evidence of verbal agreement under which defendants alleged that the property was to be conveyed to them in consideration of services rendered, was admissible for purpose of showing circumstances under which defendants had entered into possession, even though such agreement was invalid under statute of frauds.

Judgment reversed.

1. Frauds, Statute of 🔑141

In action in unlawful detainer to recover possession of dwelling house and damages for detention, evidence of verbal agreement under which defendants alleged that the property was to be conveyed to them in consideration of services rendered was admissible for purpose of showing circumstances under which defendants had entered into possession, even though such agreement was invalid under statute of frauds.

2. Landlord and Tenant 🔑117

"Tenancy at will" is leasehold estate which simply confers right to possession of premises leased for such indefinite period as both parties shall determine such possession shall continue.

See publication Words and Phrases, for other judicial constructions and definitions of "Tenancy at Will".

3. Landlord and Tenant 🔑117

Tenant at will is in possession by right with consent of landlord, either express or implied, he holds in subordination to title of landlord, and he does not begin to hold unlawfully until termination of his tenancy.

4. Landlord and Tenant 🔑118(1)

Permissive occupation of real estate, where no rent is reserved or paid and no time agreed on to limit occupation, is "tenancy at will".

5. Landlord and Tenant 🔑118(3)

One who enters upon land by permission of owner under void parol contract, or under void lease, or pending unexecuted negotiations for written lease, is "tenant at will".

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[13] The fact that this group (Pacific Lloyd's) did not appeal does not preclude reversal as to them, for the phase of the judgment relating to their alleged liability is so inextricably interwoven with the rest of the judgment that a complete reversal is necessary in the interest of justice. See Blache v. Blache, 37 Cal.2d 531, 538, 233 P.2d 547.

See publication Words and Phrases, for other judicial constructions and definitions of "Tenant at Will".

6. Licenses ⚿44(2)

A "license" is authority to do particular act or series of acts upon land of another, and conveys no estate in land, whereas "tenancy at will" is permissive right to occupy and enjoy premises, and creates estate in tenant.

See publication Words and Phrases, for other judicial constructions and definitions of "License".

7. Licenses ⚿44(2)

Whether agreement for use of realty is "license" or "lease" depends upon whether contract gives exclusive possession of premises as against all world, including owner, in which case it is "lease", or gives mere privilege to occupy under owner, in which case it is "license".

See publication Words and Phrases, for other judicial constructions and definitions of "Lease".

8. Forcible Entry and Detainer ⚿30(3)

In action in unlawful detainer to recover possession of dwelling house and damages for detention, wherein complaint alleged only that plaintiff would be damaged by the unlawful detainer at $5 per day from date of serving complaint on defendants until premises were restored, plaintiff was entitled to recover $90 only, for the 18 days between service of complaint and trial, rather than $1,470, for approximately 10 months between first day of alleged detention and trial.

9. Forcible Entry and Detainer ⚿30(1)

In action in unlawful detainer, plaintiff is not entitled to damages for detaining the property unless it proves that it is entitled to possession.

10. Forcible Entry and Detainer ⚿43(7)

In action in unlawful detainer to recover possession of dwelling house and damages for detention, wherein trial court unduly restricted defendants in proof of verbal agreement they had alleged as basis for possession, on ground that agreement was invalid under statute of frauds, judgment for plaintiff would be reversed and on retrial, parties should be permitted to produce evidence as to circumstances surrounding placing of defendants in possession and conversations then had between them with respect thereto, in order that correct determination could be made as to legal relation created between plaintiff and defendants. West's Ann.Code Civ.Proc. § 1161, subd. 1.

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Cooper & Cooper, Temple City, for appellants.

V. Edward Drake, Alhambra, for respondent.

PATROSSO, Judge.

Action in unlawful detainer to recover possession of a dwelling house, wherein plaintiff recovered judgment for restitution of the premises and damages in the sum of $1,470, from which defendants appeal.

The record discloses that defendant William T. Hatch was employed by plaintiff sometime prior to December 5, 1952 and remained in its employ until June 19, 1953, when his employment was terminated. Just what his duties were is not clear from the record, but he is described by an officer of the plaintiff "as a sort of a maintenance man—he had several duties." The circumstances surrounding defendants' occupancy of the house is left in equal obscurity; the testimony on the subject adduced upon behalf of plaintiff being merely to the effect that on or about March 1, 1953, Mr. Hatch was granted "oral permission to move into the premises in question"; that there was no "agreement with regard to rent at the time he [defendant] took possession"; and that defendants never agreed to or paid any rent therefor.

[1] Upon termination of Mr. Hatch's employment, plaintiff demanded possession of the premises, and upon defendants' refusal to surrender the same plaintiff caused to be served upon defendants a three-day notice, dated June 23, 1953, to pay rent at the rate of $200 per month for the month beginning June 20, 1953 or quit possession of the premises. Despite this notice defend-

ants remained in possession without payment of rent, and on March 25, 1954, the present action was instituted. The complaint makes no mention of the three-day notice referred to above, alleging that the defendants occupied the premises under an oral license from plaintiffs, and that the latter terminated such license on June 19, 1953. Defendants' answer denies the material allegations of the complaint and alleges that on March 1, 1953 the parties entered into an oral agreement whereby defendant Mr. Hatch was to act as sales agent for the plaintiff in the sale of fifty houses located in a described tract in consideration of the conveyance to defendants of the property in question "subject only to the first and second trust deeds thereon" plus "$100 per house," and defendants entered into possession of the premises pursuant to such agreement. Upon the trial, however, the court unduly restricted defendants in the proof of the agreement alleged, upon the ground that such agreement was invalid or unenforceable under the statute of frauds. Defendant was, however, permitted to testify that he was "to secure money or building for them (plaintiff) to secure a tract under the name of Covina Manor, Incorporated, in Covina, and they were in turn to give me an agreement to have a house that I was to occupy up to the—that is, the house that I am now occupying up to the first—that is, I was to have that house up to the first and second mortgage, and the right to sell houses at $100.00 a house." Defendant further testified that he thereupon moved into the house in question, but upon objection was precluded from testifying further as to his conversation with plaintiff as to what he was to do with respect to the house. Assuming that the agreement was invalid for the reason suggested, the evidence was nonetheless admissible for the purpose of showing the circumstances under which defendant went into possession, as will hereafter appear.

As grounds for reversal, defendants first contend that they were tenants at will and as admittedly the thirty-day notice in writing required by section 789, Civil Code, was not given, an action in unlawful detainer cannot be maintained. C.C.P. § 1161(1); Carteri v. Roberts, 1903, 140 Cal. 164, 167, 73 P. 818.

[2-5] "A tenancy at will is an estate which simply confers a right to the possession of premises leased for such indefinite period as both parties shall determine such possession shall continue. * * * The tenant at will is in possession by right with the consent of the landlord either express or implied, and he does not begin to hold unlawfully until the termination of his tenancy. His estate is a leasehold and he holds in subordination to the title of the landlord." 51 C.J.S., Landlord and Tenant, § 156, p. 762. And "A permissive occupation of real estate, where no rent is reserved or paid and no time agreed on to limit the occupation, is a tenancy at will." 51 C.J.S., Landlord and Tenant, § 159, p. 766. See also Jones v. Shay, 1875, 50 Cal. 508; Hayden v. Collins, 1905, 1 Cal.App. 259, 265, 81 P. 1120. It is equally well settled that "one who enters upon land by permission of the owner under a void parol contract, or under a void lease, or pending unexecuted negotiations for a written lease, is a tenant at will." Carteri v. Roberts, supra, 1903, 140 Cal. 164, 167, 73 P. 818, 819, and see also Norton v. Overholtzer, 1923, 63 Cal.App. 388, 395-396, 218 P. 637.

Thus, under the authorities cited, whether we accept the testimony adduced upon behalf of plaintiff to the effect that defendants were granted oral permission to occupy the premises without specification as to time and absent any agreement for the payment of rent, or whether we accept defendants' version that they entered into possession of the property under a verbal agreement—invalid under the statute of frauds—that the property was to be conveyed to them in consideration of services rendered or to be rendered by defendants, the status of defendants was that of tenants at will.

[6, 7] The preceding discussion serves to dispose of plaintiff's argument that the defendants were mere licensees. "A license is an authority to do a particular act or series of acts upon the land of another, and conveys no estate in the land, whereas a tenancy at will is the permissive right to occupy and enjoy premises, and creates an

estate in the tenant." 51 C.J.S., Landlord and Tenant, § 156, p. 763. See also Emerson v. Bergin, 1888, 76 Cal. 197, 201, 18 P. 264; Eastman v. Piper, 1924, 68 Cal.App. 554, 560, 229 P. 1002. In Kaiser Co. v. Reid, 1947, 30 Cal.2d 610, 619, 184 P.2d 879, 885, the following is quoted with approval from Von Goerlitz v. Turner, 1944, 65 Cal.App.2d 425, 429, 150 P.2d 278, 280: "'The test * * * "whether an agreement for the use of real estate is a license or a lease is whether the contract gives *exclusive possession of the premises against all the world, including the owner,* in which case it is a lease, or whether it merely confers a privilege to occupy under the owner, in which case it is a license, and this is a question of law arising out of the construction of the instrument."'" Here, under the evidence, defendants' occupation of the premises was exclusive even as against the plaintiff.

[8, 9] We are also in agreement with defendants' contention that the award of damages for detention of the property is excessive. As previously indicated, the judgment was for $1,470, computed at the rate of $5 per day from June 19, 1953 to and including April 13, 1954. An examination of the complaint discloses that the only allegation as to damage is the following: "The reasonable rental value of said real property is the sum of $5.00 per day and plaintiff will be damaged by said unlawful detainer in the sum of $5.00 per day *from the date the serving of this complaint on defendants* and each of them until the said premises are restored to plaintiff" [emphasis added], and the prayer is for damages upon the same basis. The record before us does not disclose the date of service of the complaint upon defendants, but the action was filed on March 25, 1954, and the trial had on April 13, 1954, with the result that if the complaint was served on the date filed, only eighteen days elapsed between the date of filing of the complaint and the trial. As a consequence, under plaintiff's pleading, it was entitled to recover at the most damages in the total sum of $90. Meisner v. McIntosh, 1928, 205 Cal. 11, 13–14, 269 P. 612. Furthermore, the plaintiff is not entitled, in this action, to damages for detaining the property unless it proves that it is entitled to possession. "The action of unlawful detainer is a statutory proceeding, and is governed solely by the provision of the statute creating it. It was designed for the purpose of providing a speedy and summary remedy to determine the right to the possession of real property in the cases specified in the statute. It cannot be used for any other purpose than those enumerated therein." Bekins v. Trull, 1924, 69 Cal.App. 40, 45, 230 P. 24, 26. See also Klein v. Loeffler, 1929, 96 Cal.App. 383, 385, 274 P. 373, and Lynch v. Lennon (1940), Civ.A. 4576.

[10] Upon a retrial the parties should be permitted to produce evidence as to the circumstances surrounding the placing of defendants in possession, and the conversations then had between them with respect thereto, in order that a correct determination may be made as to the legal relation thereby created between them.

The judgment is reversed.

BISHOP, Acting P. J., and SWAIN, J., concur.

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133 Cal.App.2d Supp. 795

Joseph O. DARCY, etc., Plaintiff and Appellant,

v.

H. E. MURRAY COMPANY, etc., Defendant and Respondent.

C. A. 8696.

Appellate Department, Superior Court,
Los Angeles County, California.

May 24, 1955.

Rehearing Denied June 6, 1955.

Employee's action for damages for wrongful discharge. The Municipal Court of the Los Angeles Judicial District rendered judgment for defendant, and plaintiff appealed. The Superior Court, Appellate Department, Bishop, J., held that evidence was sufficient to sustain a finding that employee had been engaging in activities which interfered with his ability to work and perform his services for employer.

Judgment affirmed.

Swain, J., dissented.

1. **Appeal and Error** ⚷846(5)

Reviewing court assumed that trial court reached every conclusion, essential to judgment, that was supported by evidence.

2. **Master and Servant** ⚷40(3)

In employee's action for allegedly wrongful discharge, evidence was sufficient to sustain a finding that employee had been engaging in activities which interfered with his ability to work and perform his services for employer.

3. **Master and Servant** ⚷30(1)

That employee, whose contract of employment required that he devote his entire time and energy to furtherance of employer's business, engaged in activities which interfered with his ability to work and perform services for employer, was ground for discharge.

4. **Master and Servant** ⚷39(2)

Where employer's answer, in action for damages for wrongful discharge, alleged that contract of employment required that employee devote his entire time and energy to business, proof that employee had not devoted his entire time to business was not a material variance, and foundation was laid therefor, even though employer had failed to allege that employee had not devoted his entire time to business. West's Ann.Code Civ.Proc. § 469.

5. **Pleading** ⚷430(2)

Where evidence was admitted at trial without objection, any possible claim of variance was waived.

William T. Brandlin, Los Angeles, for appellant.

Spray, Gould & Bowers, Los Angeles, for respondent.

BISHOP, Judge.

[1] Had the plaintiff demanded findings of fact, it is possible that he would now find himself in a position to contend that the basis for the adverse judgment was the trial court's conclusion that the plaintiff was properly discharged because of his preparation for his future activities. (We are inclined to the view that the plaintiff had a right to look ahead and take action by way of preparation.) Findings were not requested, however, and assuming, as we should, In re Estate of Rule, 1944, 25 Cal.2d 1, 10, 152 P.2d 1003, 155 A.L.R. 1319, that the trial court reached every conclusion, essential to the judgment, that is supported by the evidence, we find a basis for the judgment other than plaintiff's preparations to be defendant's rival.

[2–5] The plaintiff sought judgment for a month's wages (etc.) that he had been prevented from earning, although he alleged himself to be ready, willing and able to do so. "The case was tried on the theory," we read in the settled statement on appeal, "that the pleadings establish a prima facie case entitling plaintiff * * * to recover." The issues to be tried, on this theory, must have been the defenses. We find it alleged in the answer that the contract of employment "provided, among other things, that plaintiff would devote his entire time and energy to the furtherance of the business of defendant * * *." Strangely enough, this was not followed by an allegation that the plaintiff had not devoted his entire time and energy to defendant's business, but evidence was received, apparently without objection, that for a period of three months prior to his discharge the plaintiff had been absent from his duties on many occasions, the defendant not knowing his whereabouts nor how to get in touch with him. The plaintiff offered (and should have been permitted) to prove that he was never absent because of his preparations to go into his own business, but he neither disproved nor attempted to deny that he had frequently been absent from his duties, nor did he offer any explanation of his absences (and the error noted was not prejudicial). We have here a ground for discharging plaintiff that is both tenable and comes within the reason given him, "that he was engaging in activities which interfered with [his] ability to work and perform his services for [the defendant]." True, this ground is not clearly set forth in defendant's answer as a reason for his discharge, yet the foundation was laid for it, as we have noted, and it is not a material variance, as defined in section 469, C.C.P. See Genger v. Albers, 1949, 90 Cal.App.2d 52, 55, 202 P.2d 569. Moreover, not having been raised at the trial, any possible claim of variance has been waived. Colbert v. Colbert, 1946, 28 Cal.2d 276, 281, 169 P.2d 633.

The judgment is affirmed.

SHAW, P. J., concurs.

SWAIN, Judge.

I dissent. The majority opinion affirms the judgment on the ground that plaintiff was absent from work at unspecified times in September, October and November, 1953 without explanation, and that this supports an implied finding that he was discharged for that reason. The record does show (Settled Statement, p. 2 line 20 et seq.) that during September, October and November, 1953 appellant was absent from his duties on many occasions without explaining his absence. However, it does not show that this was a cause of his discharge. The answer alleges only two grounds for the discharge, (1) "that plaintiff was negotiating for the purchase and, in fact, completed the purchase of a plumbing business, which business was in competition with defendant's business" (Par. II of Second Defense), and (2) that plaintiff "secured information of a confidential nature belonging to defendant for the purpose of using said information when plaintiff was engaged in the operation of his own business" (Par. V of Second Defense). Nowhere does the answer allege that plaintiff was discharged because of unexplained absences in September, October and November. Furthermore, the evidence does show the true cause of discharge, viz. (p. 3 line 16 et seq., Settled Statement), that defendant learned on November 27, 1953 of plaintiff's contemplated purchase of the competing business and "* * * on the 28th day of November, 1953, respondent notified appellant that his services were no longer needed or desired because of the fact that he was engaging in activities which interfered with appellant's ability to work and perform his services for respondent." Those activities were, obviously, the ones just discovered; absence is not an activity. There is no evidence to support the alleged second ground of defense that plaintiff was discharged because he had secured confidential information. There is evidence (Settled Statement p. 2 line 27 et seq.) that "appellant moved from respondents' place of business a large brief case, the contents of which were not disclosed to respondents" but there is no evidence that the suitcase contained confidential information. The court's error, in holding that mere negotiations for purchasing the competing business was ground for discharge, was prejudicial. I would reverse the judgment.

44 Cal.2d 665

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Stillman POND, Defendant and Appellant.

Cr. 5612.

Supreme Court of California.
In Bank.
June 10, 1955.

Prosecution for grand theft. Defendant was found guilty by a jury in Superior Court, Los Angeles County, Charles W. Fricke, J., and appealed from an order denying his motion for new trial. The Supreme Court, Schauer, J., held that where the defendant had been accused of "grand theft" by an indictment which expressly referred to the Penal Code, he did not have notice of, and was not obligated to defend against, accusations that he violated a section of the Labor Code, notwithstanding provision of latter code that one who violated the section in question is guilty of theft.

Order reversed.

Opinion, 269 P.2d 216, vacated.

1. False Pretenses ⚿51

Money paid to real estate man who owned chicken ranch, by persons who contemplated raising chickens on commission basis, as a "guarantee that they will properly supervise and operate the chicken houses" was not, as matter of law in grand theft prosecution, intended to become partnership or joint venture property, and it was question for jury (if on pleadings the facts were at issue), whether money was cash bond which was misused in violation of statute or whether money was obtained by false or fraudulent representation or pretense or whether transaction took some other form, criminal or noncriminal. Pen.Code, § 487, subd. 1; Labor Code, § 405.

2. False Pretenses ⚿49(1)

In prosecution for grand theft, written contract constituted signed memorandum of oral, assertedly false pretense that "house would be furnished and chicken house would be finished and ready to go into production of chickens on the 9 of May" and the contract and testimony of two persons, husband and wife, who paid money to defendant in connection with arrangement whereby they were to raise chickens on commission basis for defendant, together with admission of defendant that he made such promise, met requirements of statute, prescribing evidence necessary for conviction for cheating by false pretense. Pen.Code, §§ 487, subd. 1, 1110.

3. False Pretenses ⚿49(4)

In prosecution for grand theft, evidence was sufficient to warrant jury finding (though whether finding was made could not be ascertained from record), that defendant obtained money by promising, without intent to perform, that he would secure approval of sale by owner of property and would drill well and erect house on premises, and corroborative evidence was sufficient to meet statutory requirement. Pen.Code, §§ 487, subd. 1, 1110.

4. False Pretenses ⚿22

In prosecution for grand theft, evidence was not insufficient to establish offense merely because each alleged victim received back from defendant at least as much as they had paid him. Pen.Code, § 487, subd. 1.

5. Larceny ⚿26

Restoration of property feloniously taken or appropriated is no defense to charge of theft. Pen.Code, § 487, subd. 1.

6. Constitutional Law ⚿89(1)

Right of contract is subject to regulation and limitation in many of its phases, and there is special need for such regulation in regard to relation between employer and employee. Labor Code, §§ 402–406; West's Ann.Const. art. 1, § 1; U.S.C.A. Const. Amend. 14.

7. Criminal Law ⚿304(2)

It is matter of common knowledge that there is great opportunity for fraudulent practices, embezzlement and other forms of cheating by employers in common custom of requiring employees to deposit so-called cash bonds with employer. Labor Code, §§ 402–406.

8. Constitutional Law ⚷70(3)

Whether statute, providing that property put up by employee as part of employment contract shall be deemed bond and held in trust by employer for purpose of liquidating accounts with employee or return to latter, should have been adopted, was purely question of legislative discretion, not power, and court could not interfere with exercise of such discretion. Labor Code, §§ 401–410, 405.

9. Statutes ⚷47

Statute providing that any property put up by employee or applicant as bond should not be used for any purpose other than liquidating accounts between employer and employee or for return to employee or applicant and should be held in trust for such purpose and not mingled with property of employer, was not unconstitutionally vague merely because it did not define "property put up by any employee or applicant as a bond" and "liquidating accounts". Labor Code, § 405; U.S.C.A.Const. Amend. 14.

10. Indictment and Information ⚷56

Notice of specific charge against defendant is a constitutional right of accused. Pen.Code, §§ 950–952; U.S.C.A.Const. Amend. 14.

11. Embezzlement ⚷26

Where defendant was accused of "grand theft" by indictment which expressly referred to Penal Code, he did not have notice of, and was not obligated to defend against, accusation that he violated Labor Code section providing that any property put up by employee or applicant as bond shall not be used for any purpose other than liquidating accounts between employer and employee or for return to employee or applicant and it shall be held in trust for such purpose and not mingled with property of employer, notwithstanding further provision of Labor Code section that one who violates section is guilty of theft. Pen.Code §§ 484, 487, subd. 1; Labor Code, § 405.

12. Criminal Law ⚷922(1), 1176

Where record of appeal from conviction for grand theft was such that reviewing court could not ascertain whether jury might have been confused, by instructions pertaining to Labor Code provision, to extent of believing that alleged offenses in question were violations of the Labor Code provision as to misuse of cash bonds put up by employees, which provision was not properly in issue under indictment, order denying motion for new trial would be reversed. Pen.Code, § 487, subd. 1; Labor Code, § 405.

Cannon & Callister and Morris Lavine, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., S. Ernest Roll, Dist. Atty., and Robert Wheeler, Deputy Dist. Atty., Los Angeles, for respondent.

SCHAUER, Justice.

Defendant, a real estate broker, was charged with grand theft in violation of paragraph 1 of section 487 of the Penal Code. That statute provides in material part, "Grand theft is theft committed in any of the following cases: 1. When the money, labor or real or personal property taken is of a value exceeding two hundred dollars * * *" Defendant pleaded not guilty and was tried by a jury instructed at length, among other things, as to the sections of the Labor Code which regulated the exaction by employers of cash bonds from employes or applicants, including section 405, which provides that misuse by an employer of such a cash bond is theft.[1]

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[1] Section 405 of the Labor Code provides: "Any property put up by any employee or applicant as a bond shall not be used for any purpose other than liquidating accounts between the employer and employee or for return to the employee or applicant and shall be held in trust for this purpose and not mingled with the property of the employer. No contract between the employer and employee or applicant shall abrogate the provisions of this section. Any employer or pro-

The jury found defendant guilty. He appeals from an order denying his motion for new trial. For reasons more fully explained hereinafter, we have concluded that the order must be reversed because so far as the record discloses defendant may well have been convicted of offenses (violations of section 405 of the Labor Code) not charged in the indictment.

The indictment alleges ten counts of "Grand Theft (Vio.Sec. 487.1 PC)," the taking of money of various victims. During the trial, after the close of the People's case, Counts 3 and 4 were dismissed on motion of the People because the complaining witness as to those counts had become ill and could not complete her testimony. The jury found defendant guilty on Counts 1, 2, 9, and 10 and not guilty on Counts 5 and 6; they were unable to agree as to Counts 7 and 8 and those counts were dismissed. Defendant's motion for a new trial was denied. The trial court ordered the proceedings suspended as to Counts 1, 2, 9, and 10 and granted probation upon certain conditions.

On appeal defendant originally contended (through counsel other than his present attorney) that (1) the trial court erred in denying his motions for declaration of a mistrial and for continuance, made at the conclusion of the People's case when it was learned that the prosecuting witness as to Counts 3 and 4 would be unable to complete her testimony; (2) the trial court prevented defendant from presenting his defense by sustaining objections to his offers of proof intended to show that he engaged in the transactions charged as crimes and in other business transactions in an effort to rehabilitate himself financially, and that the conduct of a business associate (the prosecuting witness as to Counts 3 and 4) made it impossible for defendant to complete those transactions; (3) remarks of the trial judge during the trial prejudiced defendant; (4) the verdicts of guilty are contrary to the evidence. The People oppose these contentions and urge that the convictions can be upheld under section 405 of the Labor Code. Defendant replies that reliance cannot be placed on section 405 because the indictment did not charge a violation of that section, and that the section is unconstitutional.

The record on appeal originally did not include the instructions to the jury and contained no mention of the Labor Code and no indication that the People, defendant, or the judge considered that defendant was being tried for violation of section 405 of that code. So far as appeared from the matter then in the record, the People, defendant, and the judge considered that the evidence was directed to establishing the crime of theft on the theory of obtaining money by false pretenses or perhaps larceny by trick and device or embezzlement.

At oral argument before this court, defendant's present counsel, when he commenced to present his contentions concerning section 405 of the Labor Code, requested that the record on appeal be augmented to include the instructions to the jury. This has since been done and it now appears, as stated above, that the jury were instructed at length as to the Labor Code sections (400–410) which regulate the exaction by employers of cash bonds from employes or applicants.[2]

Evidence as to Counts 1 and 2

Count 1 charged grand theft of $5,500 from Mr. and Mrs. G. M. Bradford on or about April 24, 1951. Count 2 charged grand theft of $1,000 from Mr. and Mrs. J. A. Reinders on or about August 30, 1951. As previously stated, defendant was found guilty on each of these counts.

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spective employer, or agent or officer thereof, who misappropriates any such property, mingles it with his own, or uses it for any other purpose than that herein set forth is guilty of theft and shall be punished in accordance with the provisions of the Penal Code relating to theft."

[2] The jury were told:

"You are instructed that any property put up by an employee or applicant as a part of the contract of employment directly or indirectly, shall be deemed put up as a bond and is subject to the provisions of this article whether the property is put up on a note or as a

Defendant carried on a real estate business in Lancaster. Mr. and Mrs. Bradford, who were interested in buying and operating a chicken ranch, saw a newspaper advertisement of defendant. On April 24, 1951, they went to defendant's office and told him of their previous experience in raising chickens and their interest in that business. Bradford said that he had $7,000 and wanted to buy a chicken ranch. Defendant showed the Bradfords various ranches but said, "I don't think you have got quite enough money for them." Defendant then showed them his own ranch, where a chicken house was under construction, and told Bradford that he needed a man such as Bradford, that if the Bradfords would do all the work of raising chickens defendant would "furnish everything," that the Bradfords could live in a house on the ranch, that Bradford would have to deposit $5,500 with defendant, and that in a short time he would receive his money back and a large profit. Defendant and the Bradfords executed a written contract dated April 24, 1951, which provided that the Bradfords "agree to put up $5500.-00 as a guarantee that they will properly supervise and operate the chicken house"; defendant agreed to furnish living quarters and all equipment; net income was to be divided 75 per cent to the Bradfords and 25 per cent to defendant until the Bradfords received $5,500, then 60 per cent to the Bradfords and 40 per cent to defendant; no termination date was stated. Bradford delivered his check for $5,500 to defendant. Defendant orally promised that "the house would be furnished and the chicken house would be finished and ready to go into production of chickens on the 9th of May." Defendant cashed Bradford's $5,500 check and, according to his testimony, the proceeds were "just used in my regular business."

About May 6th the Bradfords received a letter from defendant stating that the house and chicken house would be ready for the Bradfords on the 9th. On May 9th they returned to defendant's ranch and found that the house and chicken house were not completed. Defendant had the Bradfords move into an apartment near his own house "until a short time, he said, until the chicken house was completed," and hired Bradford as foreman, "planting crops and things, and doing the ranch work." Bradford worked for defendant for $150 a month for four months; during this time "work on the chicken house practically stopped" and "there were no chickens in it at any time." Defendant then discharged Bradford because "He said I had been talking about my business and his business to other people"; Bradford admitted that he had done so. The Bradfords

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loan or an investment and regardless of the wording of the agreement under which it is put up. [Lab. Code, § 406.]

"You are instructed that no employer shall demand, exact, or accept any cash bond from any employee or applicant unless:

"(a) The employee or applicant is entrusted with property of an equivalent value, or

"(b) The employer advances regularly to the employee goods, wares, or merchandise to be delivered or sold by the employee, and for which the employer is reimbursed by the employee at regular periodic intervals, and the employer limits the cash bond to an amount sufficient to cover the value of the goods, wares, or merchandise so advanced during the period prior to the payment therefor. [Lab. Code, § 402.]

"You are instructed that if cash is received as a bond it shall be deposited in a savings account in a bank authorized to do business in this State, and may be withdrawn only upon the joint signatures of the employer and the employee or applicant. [Lab. Code, § 403.]

"Section 405 of the State Labor Code provides that any property put up by an employee or applicant as a bond shall not be used for any purpose other than liquidating accounts between the employer and the employee or for return to the employee or applicant and shall be held in trust for this purpose and not mingled with the property of the employer. No contract between the employer and employee or applicant shall abrogate the provisions of this section. *Any employer or prospective employer or agent or officer thereof who misappropriates any such property, mingles it with his own, or uses it for any other purpose than that herein set forth is guilty of theft.*" (Italics added.)

continued to live in defendant's apartment, and Bradford worked at other ranches, until February, 1952. Defendant said that Bradford occupied the apartment in lieu of receiving interest on his $5,500. During the ten months Bradford remained in the apartment he asked defendant about once a week for the return of his $5,500 and defendant repeatedly said, "Well, it won't be long now," or specified a date for payment, then said, "I can't give it to you now, I have got other deals on." Defendant finally repaid the $5,500 to the Bradfords on October 31, 1952.

The evidence as to defendant's obtaining $1,000 from Mr. and Mrs. Reinders on or about August 30, 1951, as charged in Count 2, shows a transaction with defendant materially similar to that of the Bradfords. Reinders gave defendant his check for $1,000 on August 29, 1951, pursuant to an agreement similar to that above summarized between defendant and the Bradfords. The Reinders moved to defendant's ranch on September 15, 1951. No chicken ranching was carried on during Reinders' stay. He worked for defendant for a weekly wage until March 2, 1952. He received $500 of his $1,000 from defendant on March 21, 1952, and the remaining $500 on November 19, 1952, just after Reinders had testified before the grand jury as to this matter.

Defendant urges that the evidence does not support the findings of theft as to Counts 1 and 2 because, he says, it shows that the arrangements of defendant with the Bradfords and with the Reinders were joint ventures or partnerships; he cites the conflicting views of People v. Foss (1936), 7 Cal.2d 669, 670, 62 P.2d 372 ["The rule that a partner cannot steal from the partnership is, of course, well settled"; dictum, citing no authority], and People v. Cravens (1947), 79 Cal.App.2d 658, 662–663, 180 P.2d 453 ["In the few cases which we have found on the precise subject it has been held that the procuring of money to be contributed to the capital of a partnership of which the victim is a member cannot constitute the crime of obtaining money by false pretenses because the victim as partner retains an interest in the fund. [Citations from other jurisdictions.] We are not satisfied that proof that the wrongdoer afterwards converted the partnership property to his own use while the victim was still subject to the influence of his false pretenses would not constitute the crime of obtaining money or property by false pretenses"].

[1] Manifestly the money paid to defendant by the Bradfords and the Reinders, characterized in their agreements as a "guarantee," was not, as a matter of law, intended to become partnership or joint venture property; it was transferred to defendant without any agreement that he would use it in the chicken-raising venture or in any particular way. It was for the jury (if on the pleadings the facts were at issue) to determine whether the money was paid as a cash bond which was misused by defendant in violation of section 405 (see People v. Acree (1933), 132 Cal.App. 193, 196, 22 P.2d 518); whether defendant obtained the payments by making false agreements which he intended not to perform, that is, by a "false or fraudulent representation or pretense" within the meaning of section 484 of the Penal Code (see People v. Ashley (1954), 42 Cal.2d 246, 262–263, 267 P.2d 271; People v. Weitz (1954), 42 Cal.2d 338, 343, 267 P.2d 295); or whether the transaction took some other form, criminal or noncriminal.

[2] Defendant suggests that a conviction of the crime of obtaining money by false pretenses cannot stand because of the provision of section 1110 of the Penal Code that "the defendant cannot be convicted if the false pretense was expressed in language unaccompanied by a false token or writing, unless the pretense, or some note or memorandum thereof is in writing subscribed by or in the handwriting of the defendant, or unless the pretense is proven by the testimony of two witnesses, or that of one witness and corroborating circumstances." The formal requirements of this section are amply met. As to both Count 1 and Count 2 there is in evidence a written contract which constitutes a memorandum of the assertedly false pretense signed by defendant; also both Mr. and Mrs. Bradford and defendant himself testified to the

making of the promise which (insofar as this contention of defendant is concerned) we must assume was found to be a false pretense in Count 1, and both Mr. Reinders and defendant himself testified to the making of the promise which likewise (in respect to this contention) we must assume was found to be a false pretense in Count 2.

Evidence as to Counts 8, 9, and 10

Count 8 charged theft of $1,950 from Cecil R. Dean on or about March 21, 1951; Count 9 charged theft of $2,750 from Dean on or about March 22, 1951; and Count 10 charged theft of $1,500 from Dean on or about April 1, 1951. As previously stated, the jury were unable to agree on a verdict as to Count 8 and found defendant guilty on Counts 9 and 10.

Mr. Dean went to defendant's office in February, 1951, and offered defendant $125 an acre for certain land; defendant accepted a $50 deposit and undertook to transmit Dean's offer to the owner of the property. Thereafter defendant told Dean that he could not obtain the land which Dean had offered to buy but that he would like to show Dean another, better property. Defendant showed Dean an 80-acre piece of land. On March 21, 1951, Dean told defendant that purchase of the 80 acres would require too much money. Defendant proposed that they each buy 40 acres of the piece and subdivide the property; defendant said that he would drill a joint well and offered to sell the land as subdivision property at a commission of 10 per cent, which was lower than the usual commission. After discussion defendant and Dean agreed to attempt to buy the land for $190 an acre. Dean said that he would go with defendant to talk with the owner of the property; defendant replied that he could transact business better if he went alone to see the owner, whom he described as "a widow." On March 21, 1951, defendant and Dean executed an agreement by which Dean agreed to buy 40 acres of the property for a total price of $7,600, with a down payment of $4,000; Dean gave defendant a check for $1,950 and was credited with the $50 which he had previously deposited. On March 22, 1951, Dean gave defendant another check for $2,750, $2,000 as the balance of his down payment and $750 as his share of the cost of the well. Defendant said he would have the well started in two weeks. No well was drilled on the property.

On April 1, 1951, Dean paid defendant $1,500, with which defendant agreed to build a tract house on the property. No such house was built. Dean believed defendant's various statements and relied on them in parting with his money. Defendant used the money which he received from Dean for his own purposes in his own business.

Dean next saw defendant on May 14, 1951. Dean demanded title to the property. Defendant replied that he could not give Dean title because it was in the name of Mrs. Blackburn, whom defendant described as "a widow" and a former employe of defendant. (Mrs. Blackburn was the prosecuting witness as to Counts 3 and 4, dismissed when she became unable to complete her testimony because of illness. As defendant had been notified in December, 1950, and January, 1951, months before his meeting with Dean, Mrs. Blackburn had placed in the hands of her attorney the transactions involving defendant and herself as to this and other property, had taken the position that defendant was dealing illegally with such properties, and had warned him against attempting to deal further with them.) Dean then demanded the return of his money. Defendant said that he did not have the money; he offered Dean an assignment of a certain trust deed, which Dean later received, as security for its repayment. At this time, May 14, 1951, Dean obtained from defendant a writing setting forth the terms of their transactions as follows: "Receipt is acknowledged from Cecil R. Dean" of $4,000 down payment on the described 40 acres. "Total purchase price:" $7,600. "Above sale subject to owner's approval. Receipt is also acknowledged" of $750 "as deposit on well to be drilled, half on the above described property and half on the adjoining forty acres owned by myself" and of $1,500 "deposit for the purchase of building materials for residence to be constructed on the above described property." Thereafter defendant repaid Dean and Dean re-assigned the trust deed to defendant.

[3] There is evidence from which it could be found (although, in the state of the record, we cannot hold that it was found [see *infra,* 284 P.2d 801]) that defendant obtained the payments from Dean by making false promises with intent not to perform them. Defendant had put title to the property which Dean agreed to buy, as well as title to other property, in the name of Mrs. Blackburn; defendant knew that she had turned over to her attorney the matter of defendant's dealings in her name, including the matter of the property which Dean agreed to buy, and the attorney had notified defendant that he had "placed an alert on these titles." Nevertheless, defendant indicated to Dean that he would obtain approval of "the owner" of the property to its sale to Dean. Defendant's financial condition was such that it could be found that he promised Dean to drill a well and erect a house knowing that he probably could not, and intending not to, carry out these promises. Corroboration of Dean's testimony to the false promises could be found in the testimony of defendant himself and in the March 21, 1951, agreement and the May 14, 1951, memorandum signed by defendant.

[4, 5] Defendant asserts that the evidence does not show that he committed any crimes because the Bradfords, the Reinders, and Dean each received back from defendant at least as much as they had paid him. Restoration of property feloniously taken or appropriated is no defense to a charge of theft. (People v. Kay (1939), 34 Cal.App.2d 691, 696, 94 P.2d 361; People v. Alba (1941), 46 Cal.App.2d 859, 866, 117 P.2d 63; People v. Costello (1951), 107 Cal.App.2d 514, 518, 237 P.2d 281.)

Constitutionality of Sections 402 through 406 of the Labor Code

Defendant urges that sections 402 through 406 of the Labor Code violate the due process clause of the Fourteenth Amendment of the federal Constitution and the provision of section 1 of article I of our state Constitution that "All men * * have certain inalienable rights, among which are those of * * * acquiring, possessing, and protecting property * *," and that these Labor Code sections cannot be justified under the police power.

[6–8] As defendant says, the sections limit the right of contract between employer and employe. However, we agree with the following reasoning of Presiding Judge Shaw, speaking for the Appellate Department of the Superior Court in People v. McEntyre (1938), 32 Cal.App.2d Supp. 752, 755–756, 84 P.2d 560, where the constitutionality of the legislation was upheld against an argument such as that presented by defendant here: "The right of contract is subject to regulation and limitation in many of its phases; and there is special need for such regulation in regard to the relations between employer and employee. The prospective employer and the applicant for employment, who is usually dependent on his own earnings for the support of himself and his family, do not deal on an equal footing. Especially is this true in times of depression and widespread unemployment. Experience has shown, to the extent that it may be regarded as a matter of common knowledge, that there is great opportunity for fraudulent practices, embezzlements and other forms of cheating by employers in the common custom of requiring employees to deposit so-called 'cash bonds' with their employers. * * * The usual applicant for employment, in spite of his supposed freedom of contract, is in no position to dictate the terms of his contract of employment, or to insist that it protect him against these possibilities of loss. The legislature has therefore deemed it necessary to provide such protection for him, and to that end has enacted that all deposits put up by him as part of the contract of employment be deemed bonds and that all such deposits be held intact as trust funds, and has prohibited any contract to the contrary. Considering such facts regarding the matter as are matters of general knowledge, this legislative conclusion is obviously one to which reasonable minds might come. It is equally obvious that the legislation enacted in pursuance of that conclusion has a reasonable tendency to abate the evil at which it is aimed. The question whether it should have been adopted is therefore purely one of legislative discretion, not of power, and we may not, if we would, interfere with that exercise of discretion."

[9] Defendant urges that the legislation is unconstitutionally vague because it does not define "property put up by any employee or applicant as a bond" and "liquidating accounts" as used in section 405 of the Labor Code.[3] He relies upon Winters v. New York (1948), 333 U.S. 507, 518, 68 S. Ct. 665, 92 L.Ed. 840, where it is said, "The standards of certainty in statutes punishing for offenses is [sic] higher than in those depending primarily upon civil sanction for enforcement. * * * There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment." The meaning of the expressions challenged by defendant, in their context, is clear to persons of ordinary intelligence, and explicit statutory definition thereof is not necessary.

Failure to Give Notice of the Specific Charge

[10] Notice of the specific charge against defendant is a constitutional right of the accused. (Cole v. Arkansas (1948), 333 U.S. 196, 201, 68 S.Ct. 514, 92 L.Ed. 644; People v. Mahony (1904), 145 Cal. 104, 106–107, 78 P. 354. As previously stated, defendant was charged with "Grand Theft"; the jury were instructed and the People urge that under this charge he can be convicted of violation of section 405 of the Labor Code, quoted *supra,* p. 1, footnote 1. According to the People, "It was not incumbent upon the prosecution to say that the particular type of theft was the theft denounced in the Labor Code, the Penal Code or any particular code." The People cite the provision of section 950 of the Penal Code, as it read prior to its amendment in 1951, that "The indictment or information must contain: * * * 2. A statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended." Section 950 now provides, "The accusatory pleading must contain: * * * 2. A statement of the public offense or offenses charged therein." The People also cite the provision of section 952 of the Penal Code that "In charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another." The last quoted sentence was added to section 952 by amendment in 1927.

Under the last quoted provision of section 952, it has been said, "it was not necessary for the information to allege the particular type of theft involved, such as false pretenses, embezzlement, or larceny by trick and device. (People v. Fewkes [1931], 214 Cal. 142, 149 [4 P.2d 538].)" (People v. Nor Woods (1951), 37 Cal.2d 584, 586, 233 P.2d 897.) In the Fewkes and Nor Woods cases the thefts were either false pretenses, larceny by trick and device, or embezzlement, all offenses covered by the Penal Code; those cases do not concern the charging of a violation of section 405 of the Labor Code.

The provision of section 405 of the Labor Code that any employer who misuses property put up by an employe as a bond "is guilty of theft and shall be punished in accordance with the provisions of the Penal Code relating to theft" is based upon the provision of former Stats.1929, ch. 559, p. 962, that any employer who misuses such property "shall be guilty of theft and shall be punished, upon conviction thereof, in accordance with the provisions of sections 486, 487, 488, 489 and 490 of the Penal Code." The last mentioned sections of the Penal Code (486 [degrees of theft], 487 [defining grand theft], 488 [defining petty theft], 489 [punishment of grand theft], 490 [punishment of petty theft]), together with sections 484 [defining theft] and 485 [defining theft of lost property] had been amended in 1927 by Stats.1927, ch. 619, pp. 1046–1047. By such 1927 amendment the word "theft" was substituted for the former word "larceny" in the statutes and the former definition of "larceny" in section 484 was replaced by a more elaborate definition of "theft" which expressly included not only the elements of larceny but also those of embezzlement and obtaining money by false pretenses; also this 1927 amendment added section 490a of the Penal Code, which provides, "Wherever any law or statute of this state refers to or mentions larceny, embezzlement, or stealing, said law or statute shall hereafter be read and interpreted as if the word 'theft' were substituted therefor." Concerning the 1927 amendment it is said in People v. Myers (1929), 206 Cal. 480, 484, 275 P. 219, "The amendment to section 484, in connection with the other cognate legislation such as the amendments to sections 951[4] and 952[5] of the Penal Code (Stats.1927, p. 1043), is designed not only to simplify procedure but also to relieve the courts from difficult questions arising from the contention that the evidence shows the commission of some other of these crimes than the one alleged in the indictment or information, a contention upon which defendants may escape just conviction solely because of the border line distinction existing between these various crimes [i. e., crimes described in the Penal Code]."

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[3] Section 405 of the Labor Code, as previously stated, provides in part, "Any property put up by any employee or applicant as a bond shall not be used for any purpose other than liquidating accounts between the employer and employee or for return to the employee or applicant and shall be held in trust for this purpose and not mingled with the property of the employer. * * *"

[11] We do not believe that the Legislature meant to go so far, when in 1929 it enacted the statute, not a part of the Penal Code, which described misuse by an employer of money put up by an employe as a bond as "theft" punishable "in accordance with the provisions of sections 486, 487, 488, 489 and 490 of the Penal Code" (Stats.1929, ch. 559, p. 962), as to make such offense chargeable simply as "theft." Nor do we believe that the indictment's specific charge of theft by violation of subdivision 1 of section 487 of the Penal Code is sufficient to give the defendant notice that he is charged with a violation of the Labor Code. When a defendant is accused of "grand theft" by an indictment which expressly refers to the Penal Code, it cannot fairly be said that he has notice of and should be prepared to defend against accusations that he violated statutory provisions contained in other codes.

[12] The convictions of Counts 1 and 2, the counts involving the Bradfords and the Reinders, which the attorney general seeks to uphold under section 405 of the Labor Code, must be reversed because defendant was not charged with violation of such section. The convictions of Counts 9 and 10, the counts involving Dean, must be reversed because it is impossible in the state of the record to determine whether such convictions were based upon a permissible view of the evidence or upon a confusion which led the jury improperly to believe that the alleged offenses against Dean were violations of the Labor Code.

For the reasons above stated, the order denying defendant's motion for a new trial is reversed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR and SPENCE, JJ., concur.

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[4] Section 951, which concerns the form of indictment or information, was amended by Stats.1927, ch. 613, p. 1043, in respects not particularly relevant here.

[5] As previously indicated (supra, p. 16), by the 1927 amendment of section 952 (Stats.1927, ch. 612, p. 1043) there was added the provision that "In charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another."

44 Cal.2d 695

S. WOLFF, Respondent,

v.

Joseph P. FALLON et al., Defendants;

R. T. Stephens et al., Defendants and Appellants;

Ingleside Terraces Home Owners Association, a nonprofit corporation, Intervener and Appellant.

S. F. 18827.

Supreme Court of California.
In Bank.
June 21, 1955.

Action by vacant lot owner against other owners of lots in same subdivision to obtain judgment quieting title of vacant lot and declaring that building restrictions imposed upon vacant lot owner by original subdivider were no longer binding, except for setback line. The Superior Court, City and County of San Francisco, Frank T. Deasy, J., entered judgment adverse to defendants, and defendants appealed. The Supreme Court, Gibson, C. J., held that, where original subdivider had restricted use of lot to certain residential use, but lot thereafter became not suitable or desirable for residential use and was essentially business property, and its use for commercial purposes would not detrimentally affect adjoining property or neighborhood and might be beneficial, and, by reason of changed conditions in neighborhood and character of block, enforcement of restrictions would be inequitable and oppressive and would harass subsequent owner of lot without benefiting adjoining owners, relief from the restrictions should be given.

Judgment affirmed.

Spence and Traynor, JJ., dissented.

Opinion, 269 P.2d 630, vacated.

1. Covenants ⚷72

Where original subdivider had restricted use of lot to certain residential use, but lot thereafter became not suitable or desirable for residential use and was essentially business property, and its use for commercial purposes would not detrimentally affect adjoining property or neighborhood and might be beneficial, and, by reason of changed conditions in neighborhood and character of block, enforcement of restrictions would be inequitable and oppressive and would harass subsequent owner of lot without benefiting adjoining owners, relief from the restrictions should be given.

2. Covenants ⚷72

Action by vacant lot owner against neighboring landowners of land in subdivision to obtain judgment quieting title to such lot and declaring that building restrictions imposed upon lot owner by original subdivider were no longer binding, except for setback line, evidence was sufficient to establish that vacant lot was not suitable or desirable for residential use but was essentially business property, that its use for commercial purposes would not detrimentally affect adjoining property or neighborhood but might be beneficial, and that, because of changed conditions, enforcement of restrictions would be inequitable and oppressive and would harass lot owner without benefiting adjoining owners.

John A. Gorfinkel and Julian W. Mack, II, San Francisco, for appellants.

Jefferson E. Peyser and Pierce N. Stein, San Francisco, for respondent.

GIBSON, Chief Justice.

Plaintiff, owner of a vacant lot in San Francisco, obtained a judgment quieting title and declaring that building restrictions imposed on her property by the original subdivider are no longer binding, with the exception of a 15-foot setback line to which she agreed. Defendants, who are property owners in Ingleside Terraces, the tract in which the lot is located, appeal from the judgment.

When the subdivision was created in 1913, about 20 lots in each of two separate areas were left unrestricted, and approximately 740 lots were set aside for residential purposes. The original deeds to all purchasers of the residential lots contained building restrictions which were unlimited as to time and enforceable by every other owner. It was provided that no building other than a single-family dwelling not exceeding two stories in height should be placed on a lot or within certain specified distances from the side lines of the lot, that no main wall should be nearer to the street than the line indicated upon the official plat, and that no building costing less than $4,000 should be erected. Plaintiff took title to her lot in 1938, knowing of the restrictions.

Ingleside Terraces includes, all the lots but one in an area bounded by Junipero Serra Boulevard on the west, Ocean Avenue on the north, Ashton Avenue on the east, and Holloway Avenue on the south. The lot which is not part of the tract is located on the southeast corner of Ocean and Junipero Serra. In 1913 this lot was occupied by a roadhouse, and it is now used for a gasoline station. Plaintiff's property is on the southwest corner of Ocean and Paloma, which is the next street intersecting Ocean to the east of Junipero Serra. One of the two areas which were excluded from the restrictions by the subdivider consists of all the lots fronting on Ocean in the block between Junipero Serra and Paloma, except the lot owned by plaintiff. The other is a comparable area three blocks to the east and is composed of lots fronting upon Ocean and Ashton.

[1] The trial court, after making detailed findings as to changes which had occurred in the neighborhood since 1913, found and concluded that plaintiff's lot was not now suitable or desirable for residential use but was essentially business property, that its use for commercial purposes would not detrimentally affect the adjoining property or neighborhood and might be beneficial, and that, by reason of the changed conditions in the neighborhood and present character of the block, enforcement of the restrictions would be inequitable and oppressive and would harass plaintiff without benefiting the adjoining owners. The findings, if supported by the evidence, warrant granting relief from the restrictions. Marra v. Aetna Construction Co., 15 Cal.2d 375, 101 P.2d 490; Hurd v. Albert, 214 Cal. 15, 3 P.2d 545, 76 A.L.R. 1348; Hess v. Country Club Park, 213 Cal. 613, 2 P.2d 782; Downs v. Kroeger, 200 Cal. 743, 254 P. 1101.

[2] The record shows that in 1913 and for several years thereafter the lots in the tract on the south side of Ocean between Junipero Serra and Paloma were vacant. All of these lots, including plaintiff's, were zoned as a "Commercial District" in 1921, under an ordinance permitting use of the property for certain commercial purposes. Sixteen single-family dwellings were constructed on these lots in 1923, and the area was later converted into a predominantly commercial district. At the time of trial there were 19 buildings on the south side of Ocean between Junipero Serra and Paloma, with plaintiff's lot being the only vacant one. Three of the buildings were residences; the others were used for commercial purposes and included a market, a pharmacy, a dance studio, a liquor store, a power substation, and medical and dental offices. A popcorn stand and a dental office were located on a restricted lot on Ocean about three blocks east of plaintiff's property. There were also three large homes in the tract in which more than one family lived.

There was evidence that over the years there had been an increase in traffic on Ocean Avenue, which had become a "main traffic street" used by commercial vehicles to a considerable extent; that an arterial signal had recently been installed at Junipero Serra and Ocean; that increases in traffic had required more street lighting; and that there were about twice as many street lights on Ocean between Junipero Serra and Paloma as on a normal residential block of the same length. Streetcars ran on Ocean during the day and buses at night, and the streetcar traffic had substantially increased since 1913.

There was testimony by real estate brokers that plaintiff's lot was unsuitable and undesirable for residence purposes because of the parking of trucks on Ocean, the hazard to children, and the exposure to the business traffic, dirt, and noise of a main street; that there was no ready market for the lot as residential property; that it would be extremely difficult to sell the lot for construction of a home at "anything like a reasonable price"; that the value of the lot for residential use was between $3,000 and $4,000, whereas its value for commercial purposes was from $15,000 to $17,000; that an "intelligent development" of the lot, namely, its "best and highest use," would not hurt either the block or the neighborhood; and that a business similar to the other improvements on the street would not be detrimental to the adjoining owner or neighborhood and might be beneficial.

Photographs representing the conditions existing at the time of trial in the block in question were admitted in evidence. The judge stated that he would view the premises, but the record does not affirmatively show that he did so.

It is argued that the growth of business in the block where plaintiff's lot was located did not constitute such a change of conditions as would permit lifting the restrictions because commercial usage was in accordance with the plan of the original subdivider who had left that area unrestricted. As we have seen, however, there was also evidence that there had been a substantial increase in streetcar and other traffic and in the noise resulting therefrom, that encroachment within the restricted portion of the tract had occurred, and that plaintiff's lot had been zoned by ordinance as part of a commercial district.

When taken as a whole, the record is sufficient to support the findings made by the trial court.

The judgment is affirmed.

SHENK, CARTER, and SCHAUER, JJ., concur.

SPENCE, Justice.

I dissent.

Plaintiff's lot is a corner lot situated on the southwest corner of Paloma Avenue and Ocean Avenue in a high-class residence district known as Ingleside Terraces. It conforms generally in shape and size to the other restricted lots on Paloma Avenue, which lots are approximately 50 feet or more in width and 110 feet or more in depth. There are no unrestricted lots on Paloma Avenue. The relatively few unrestricted lots on the southerly side of Ocean Avenue are generally smaller in width and depth than the restricted lots in the tract, which number more than 700. There is no commercial development on the northerly side of Ocean Avenue in the near vicinity. In this connection, the trial court found that for a distance of approximately one-half mile the northerly side of Ocean Avenue "is occupied solely and exclusively by single family dwellings, a church and two public schools."

The effect of the judgment, which is affirmed by the majority opinion, is to lift the restrictions on plaintiff's lot, thereby permitting commercial development to invade the unbroken residential development on Paloma Avenue. This is said to be justified on the basis of changes which have occurred since the restrictions were imposed. I find no evidence of changes which would justify the nullification of these restrictions.

Within the tract, the development has occurred exactly as planned, except for minor deviations on 4 out of a total of approximately 800 lots in the entire tract, which deviations might be enjoined. Without the tract and in the general vicinity, no changes have occurred so as to make applicable the rule of Hess v. Country Club Park, 213 Cal. 613, 2 P.2d 782, and Downs v. Kroeger, 200 Cal. 743, 254 P. 1101. Not a single case presenting similar facts has been cited to sustain the nullification of the restrictions under consideration. On the contrary, one of the main cases upon which the majority relies clearly indicates that the changed conditions in the neighborhood must have "rendered the purpose of the restrictions obsolete." Marra v. Aetna Construction Co., 15 Cal.2d 375, 378, 101 P.2d 490, 492. This court further said: "But, if the original purpose of the covenant can still be realized, it will be enforced even though the unrestricted use of the property would be more profitable to

its owner." 15 Cal.2d at pages 378–379, 101 P.2d at page 493. See, also, Strong v. Hancock, 201 Cal. 530, 258 P. 60; Robertson v. Nichols, 92 Cal.App.2d 201, 206 P.2d 898.

There is no finding by the trial court that any alleged changes in the neighborhood have rendered the purposes of the restrictions "obsolete" or that the original purpose of such restrictions cannot be realized; and if any of the trial court's findings may be said to be to that effect, I find no evidence to support such findings.

It seems clear that a line must be drawn somewhere dividing residential and commercial development in any tract where both are to be permitted. It seems equally clear that the residential lots which are contiguous to commercial lots will necessarily be somewhat less valuable. This situation is inherent in any plan of restrictive covenants to provide for orderly development; and it cannot justify the lifting of the restrictions on such contiguous lots unless the plan itself is to be destroyed.

The plan of the original owners who imposed the restrictions was a reasonable one, which gave assurance to the purchasers of single family dwelling lots, and particularly those on Paloma Avenue, that no commercial development would invade that avenue. That plan appears as reasonable today as it was when formulated by plaintiff's predecessors. Nothing has occurred in the intervening years other than the normal and anticipated development of the tract and surrounding area. Plaintiff, as the owner of a lot which is contiguous to an unrestricted lot, as well as to a restricted lot, knew of the restrictions when he made his purchase. He should not be permitted to evade those restrictions merely because it would be to his advantage to do so. His neighbors were entitled to rely upon the restrictions and he should be bound thereby, at least until such time as there may be such abnormal and unanticipated changes as to make the restrictions "obsolete".

I would reverse the judgment.

TRAYNOR, J., concurs.

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44 Cal.2d 700

Application of Edward D. MALONE for Writ of Habeas Corpus.

Cr. 5609.

Supreme Court of California.
In Bank.

June 21, 1955.

Petition for writ of habeas corpus to obtain release from custody under judgment of conviction for grand theft. The Supreme Court, Schauer, J., held that since petitioner, serving sentence in California for grand theft, had accepted parole on conditions that he was to be released to authorities of another state to face criminal charge pending against him there, subject to return to custody of California authorities, if released by authorities of the other state prior to expiration of California sentence, California did not lose jurisdiction over his person by permitting removal of petitioner to another state, and that he was subject to imprisonment again in California under original sentence upon revocation of parole prior to expiration of such sentence.

Order to show cause discharged and petition denied.

1. Habeas Corpus ⚷85(1)

Affidavits in support of petition for writ of habeas corpus to obtain release from custody under judgment of conviction for grand theft failed to sustain allegations that deputy sheriffs illegally prevented petitioner from preparing and presenting his defense before jury by depriving him of right to use his own lawbooks, beating him repeatedly, and destroying jury instructions prepared by petitioner. Pen. Code, § 489; West's Ann.Const. art. 1, § 13.

2. Habeas Corpus ⚷85(1)

In habeas corpus proceeding to obtain release from custody under judgment of conviction, petitioner had the burden of proving the facts which rendered his detention illegal.

3. Stipulations ⚷=14(7)

Where petitioner expressly requested Supreme Court to decide the matter on affidavits submitted in support of and in opposition to petition for writ of habeas corpus to obtain release from custody under judgment of conviction, respondent acquiesced in such request and neither petitioner nor respondent offered evidence other than by affidavit or requested a reference, the issues would be resolved on the evidence submitted.

4. Pardon ⚷=14.4

Where prisoner serving sentence in California for grand theft accepted parole on conditions that he was to be released to authorities of another state to face criminal charge pending against him there, subject to return to custody of California authorities, if released by authorities of the other state prior to expiration of California sentences, California did not lose jurisdiction over his person by permitting removal of prisoner to another state and he was subject to imprisonment again in California under original sentence upon revocation of parole prior to expiration of such sentence. Pen.Code, § 489.

Edward D. Malone, in pro. per., and James A. Clayton, Sacramento, for petitioner.

Edmund G. Brown, Atty. Gen., Doris H. Maier and G. A. Strader, Deputy Attys. Gen., for respondent.

SCHAUER, Justice.

Edward D. Malone is imprisoned under a judgment of conviction of grand theft, rendered November 18, 1948, pursuant to a jury verdict of guilty. By petition for habeas corpus he seeks release from custody. He attacks (1) the validity of such judgment, which he claims was rendered after deputy sheriffs had prevented him from presenting his defense, and (2) the right of this state presently to hold him after jurisdiction over his person was assertedly waived by California in 1950 when petitioner was paroled and taken to Arizona to answer a charge of crime there. The basis of each of these claims is hereinafter set forth. We have concluded that each claim is without merit.

Petitioner prepared and filed his petition for habeas corpus and various documents supplemental thereto in propria persona. Thereafter, pursuant to petitioner's request, Mr. James A. Clayton, who consented to serve, was appointed as attorney to represent petitioner. The return to the order to show cause shows that petitioner is held under a judgment of November 18, 1948, regular on its face, that petitioner was convicted of "Grand Theft, a felony" and sentenced "for the term prescribed by law." (Section 489 of the Penal Code provides that the maximum punishment for grand theft is 10 years.)

(1) Claimed Mistreatment of Petitioner by Deputy Sheriffs which Assertedly Prevented Him from Presenting His Defense Before the Jury.

Petitioner alleges that while he was awaiting jury trial, "after it had been duly stipulated that petitioner would conduct his own defense; the deputy Sheriffs Okie Morris,[1] and Ollie Gastineau, did illegally, maliciously, and feloniously deprive the petitioner of the right to use his own law books for the purpose of preparing a defense. That said deputies did illegally, maliciously, and intentionally beat him severely for making notations for the purpose of a defense. That said deputies did destroy petitioner's jury instructions before he could reach the court with same. That said deputies threatened to kill the petitioner upon his return to jail, if he attempted to inform the court of the treatment. That said deputies did maliciously, illegally, feloniously, and with ill intent, take the petitioner into a room just before his final appearance in court, and just before his closing argument to the jury, and in said room of the Stanislaus County jail, did beat the petitioner so severely * * * that, petitioner had great difficulty in talking after reaching the court. That said deputies again threatened to kill the petitioner if he attempted to inform the court. That for the foregoing reasons the petitioner could not prepare any defense whatsoever." Petitioner further avers that when he was taken into court after the last-mentioned beating he told the judge "that he was sick, and that he was having great difficulty in talking, and that he would appreciate the Court's allowing him a few minutes rest, so that he might recuperate, whereupon, the Court stated that, it did not seem necessary, and that the Court did not wish to waste time."

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[1] This deputy sheriff is sometimes referred to by petitioner as "Okie Morris" and sometimes as "Okie Morse."

Section 13 of article I of the state Constitution provides that "In all criminal prosecutions, in any court whatsoever, the party accused shall have the right * * * to appear and defend, in person and with counsel."

While petitioner does not spell out his theory of deprivation of his right to defend, it seems to be as follows: Although a defendant is not entitled to special privileges because he elects to represent himself (see People v. Chessman (1951), 38 Cal.2d 166, 174, 238 P.2d 1001), an accused's right to quietly prepare his own defense in his own cell without interference by beatings, threats of death, and destruction of papers by his jailers is closely related to the established right to counsel of accused's choice, with time and opportunity to consult privately with such counsel so that there can be adequate preparation for trial (see Powell v. Alabama (1932), 287 U.S. 45, 69–71, 53 S.Ct. 55, 77 L.Ed. 158; House v. Mayo (1945), 324 U.S. 42, 46, 65 S.Ct. 517, 89 L.Ed. 739; People v. Simpson (1939), 31 Cal.App.2d 267, 270–272, 88 P.2d 175; People v. Kurant (1928), 331 Ill. 470, 163 N.E. 411, 415; Turner v. State (1922), 91 Tex.Cr.R. 627, 241 S.W. 162, 23 A.L.R. 1378, and Annotation, 23 A.L.R. 1382), the right to have a reasonable time to prepare for trial (People v. Sarazzawski (1927), 27 Cal.2d 7, 17, 161 P.2d 934), the right of accused to be present at all stages of the trial, at least where his presence bears a reasonably substantial relation to his opportunity to defend (Snyder v. Massachusetts (1933), 291 U.S. 97, 106, 54 S.Ct. 330, 78 L.Ed. 674; People v. Bush (1886), 68 Cal. 623, 628, 631–634, 10 P. 169), the right of accused to be not merely physically in attendance but also physically and mentally able to understand what is going on (People v. Berling (1953), 115 Cal.App.2d 255, 267–268, 251 P.2d 1017), the right of accused to represent himself if he desires and is competent to do so (People v. Rose (1919), 42 Cal.App. 540, 553–554, 183 P. 874; Annotation, 17 A.L.R. 266), the right to interview witnesses before trial (People v. Cordero (1925), 72 Cal.App. 526, 529, 237 P. 786), the right to consult privately with a psychiatrist in the preparation of a defense (In re Ochse (1951), 38 Cal.2d 230, 238 P.2d 561), and the right not to be brought before the court in manacles where no need for such restraint is shown (People v. Harrington (1871), 42 Cal. 165, 168). Deprivation of the rights concerned in the last-cited cases, like the asserted conduct of the deputy sheriffs here complained of, bears substantially upon the accused's preparation and presentation of his case.

In the Harrington case, supra, it is said (page 168 of 42 Cal.), "any order or action of the Court which, without evident necessity, imposed physical burdens, pains and restraints upon a prisoner during the progress of his trial, inevitably tends to confuse and embarrass his mental faculties, and thereby materially to abridge and prejudicially affect his constitutional rights of defense." The Harrington case was one where a judgment of conviction was reversed on appeal, and the other cases cited in the preceding paragraph do not concern the availability of habeas corpus to attack a final judgment of conviction. Holdings of this court and the United States Supreme Court establish that invasions of some of those rights affecting the presentation of a defense furnish grounds for attack by writ of habeas corpus upon a final judgment of conviction. (Hawk v. Olson (1945), 326 U.S. 271, 276, 278, 66 S.Ct. 116, 90 L.Ed. 61; In re Masching (1953), 41 Cal.2d 530, 261 P.2d 251.)

[1–3] It is unnecessary in the present case to define the extent of the assertedly invaded right of petitioner, or to decide whether an invasion of such right would make an ensuing judgment vulnerable to attack on habeas corpus, for petitioner has not established the factual basis of his claim. The truth of his allegations has been submitted to us upon conflicting affidavits, and we have resolved their averments against petitioner.[2]

Petitioner's averments of mistreatment (threats, beatings, deprivation of books, destruction of notes) by deputy sheriffs Morris[3] and Gastineau are denied by affidavits of those officers. The allegation "That said deputies did destroy petitioner's jury instructions before he could reach the court with same" is shown to be untrue by records of the superior court which include instructions requested by the defendant and refused, some as inapplicable and some as covered by instructions given.

(2) Asserted Waiver of Jurisdiction over Petitioner when He was Paroled.

As previously stated, on November 18, 1948, petitioner was convicted of grand theft, the maximum punishment for which is 10 years' imprisonment (Pen.Code, § 489). The following facts appear from the return of the warden to the order to show cause and other documents filed by the attorney general: On November 7, 1949, the Adult Authority ordered, "Term fixed at three years. Granted last eighteen months on parole. Subject to Hold." On April 19, 1950, petitioner signed a "Waiver of Extradition" by which he agreed to accompany an agent of Arizona as a prisoner from San Quentin to Arizona to answer the charge pending there. On May 22, 1950, petitioner signed an "Agreement by Parolee" by which he waived extradition to California from any other state and any territory outside the United States, and agreed to abide by the usual conditions of parole. On October 17, 1951 (before expiration of petitioner's California term for grand theft as originally fixed), the Authority ordered his parole revoked, his term fixed at maximum, and his return to prison; after hearing, the Authority on January 15, 1952, again ordered revocation of parole.

The petition for habeas corpus alleges that "on May 22, 1950, petitioner was duly extradited from * * * California; that he was placed in chains, and taken to * * * Arizona, for the purpose of trial." A letter from petitioner to this court dated July 1, 1954, says that he "was never on parole, but instead, while still serving sentence, was extradited from the State Prison at San Quentin, to the State of Arizona, for the purpose of trial, conviction and service of a new sentence"; he was "transported to Arizona, against my will, and without my consent." Petitioner, according to his allegations, was tried and convicted in Arizona and placed on probation for five years; he then returned to California and was convicted of vagrancy in this state.

[4] Petitioner relies upon the proposition that "where a prisoner serving a sentence is extradicted as a fugitive from justice and delivered to another State, jurisdiction over his person is forever waived

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2. The burden of proof was on petitioner to prove the facts which render his detention illegal (see e. g., In re De La Roi (1946), 28 Cal.2d 264, 269, 169 P.2d 363; In re Wallace (1944), 24 Cal.2d 933, 938, 152 P.2d 1; In re Bell (1942), 19 Cal. 2d 488, 501, 504–505, 122 P.2d 22; In re Connor (1940), 16 Cal.2d 701, 707, 108 P.2d 10) and neither he nor respondent offered evidence other than by affidavit or requested a reference. Moreover petitioner expressly requested the court to decide the matter on the affidavits and the respondent acquiesced in this request. Under such circumstances the issues will be resolved on the evidence submitted. (In re Berry (1955), 43 Cal.2d 838, 845–846, 279 P.2d 18; In re De La Roi (1946), supra, 28 Cal. 2d 264, 276, 169 P.2d 363; In re Bell (1942), supra, 19 Cal.2d 488, 505, 122 P.2d 22; In re Connor, (1940), supra, 16 Cal.2d 701, 707, 108 P.2d 10; see also Soares v. Ghisletta (1934), 1 Cal. App.2d 402, 404, 36 P.2d 668; Falk v. Falk (1941), 48 Cal.App.2d 780, 789, 120 P.2d 724.

3. The People filed affidavits of Riley F. Morse and Ollie Gastineau. A letter of a deputy attorney general states that this "Riley F. Morse" is "named in the petition for habeas corpus as 'Okie' Morse."

by the asylum State." (People ex rel. Barrett v. Bartley (1943), 383 Ill. 437, 50 N.E. 2d 517, 521, 147 A.L.R. 935; accord, In re Whittington (1917), 34 Cal.App. 344, 347, 167 P. 404.) This proposition does not apply where a prisoner accepts a California parole with the conditions that he is to be released to the authorities of another state and, if he should be released by them prior to expiration of his California sentence, he will be returned to the custody of California authorities. (In re Marzec (1945), 25 Cal.2d 794, 798, 154 P.2d 873; In re Kimler (1951), 37 Cal.2d 568, 575, 233 P. 2d 902.) The purport of petitioner's "Waiver of Extradition" and "Agreement by Parolee" brings him within the holdings of the Marzec and Kimler cases.

Since the essential allegations of the petition for habeas corpus appear to be untrue and petitioner is held under process legal on its face, no cause for issuance of the writ appears.

For the reasons above stated, the order to show cause is discharged and the petition is denied.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR and SPENCE, JJ., concur.

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133 Cal.App.2d 700

William R. PHILLIPS and Esther F. Phillips, Plaintiffs and Respondents,

v.

Charles BURKE and Marjorie Burke, also known as Marge Burke, his wife, Defendants and Appellants.

Civ. 8473.

District Court of Appeal, Third District, California.

June 20, 1955.

Hearing Denied Aug. 17, 1955.

Action to establish an easement for discharge of surplus irrigation water from plaintiff's lands across defendants' lower adjoining lands, enjoin defendants from obstructing flow of such water, and recovered damages for obstruction thereof. From a judgment of the Superior Court, Sutter County, Arthur Coats, J., for plaintiffs, defendants appealed. The District Court of Appeal, Peck, J., held that the part of the judgment granting the injunction was proper and not erroneous in specifying that ditches which defendants were ordered to construct across their lands be of such capacity as to carry in summer volume of water equal to winter flow, but that evidence was insufficient to establish creation of easement by prescription for flow of excess artificial irrigation water across defendants' lands.

Judgment modified and affirmed as modified.

1. Waters and Water Courses 🔑38

Generally, "water course" consists of running stream of water following regular course or channel, with bed and banks, or channel through which water of particular district or watershed usually or periodically flows.

See publication Words and Phrases, for other judicial constructions and definitions of "Water Course".

2. Waters and Water Courses 🔑38

While "water course" is ordinarily defined as a stream, containing bed banks and channel and flowing into a river, another stream, lake or sea, none of such characteristics is absolute fixed factor, but water course may exist, though it serves as mere channel by means of which a particular watershed is drained and may be dry in certain seasons.

3. Waters and Water Courses 🔑38

A particular channel or water course is natural in sense that it was made by waters themselves and not by man; importance lying, not in its manner of creation, but rather in fact that watershed has naturally drained in to such channel for long period of time.

4. Waters and Water Courses 🔑126(3)

An injunction restraining defendant landowners from interfering with right of owners of adjoining higher lands to discharge surface and irrigation waters flowing in natural water courses across defendants' lands was proper, but such right must be limited to use which is reasonable and not injurious.

5. Waters and Water Courses ⚷126(3)

A portion of judgment restraining defendant landowners from interfering with right of owners of adjoining higher lands to discharge surface and irrigation waters flowing in natural water courses across defendants' lands was not erroneous in specifying that ditches which court ordered defendants to dig be of such capacity as to carry volume of water in summer equal to winter flow thereof, as right, if any, to discharge surplus irrigation waters must be for use during summer as well as winter months.

6. Waters and Water Courses ⚷152(8)

Evidence was insufficient to establish creation of easement by prescription for flow of excess artificial irrigation water from lands of parties claiming easement across other parties' lower adjoining lands, in absence of showing that claimants' use of natural watercourses across lower lands caused damage to owners thereof.

7. Waters and Water Courses ⚷150

The privilege of turning imported water into natural channel may ripen into easement, but only if there is interference with another's rights.

◆

Busick & Busick, Sacramento, for appellants.

Murle C. Shreck, Sacramento, for respondents.

PEEK, Justice.

This is an appeal by defendants from a judgment decreeing that plaintiffs have an easement for the discharge of surplus irrigation water over and across the lands of defendants; that defendants be enjoined from obstructing the flow of such water; and, that plaintiffs have damages for loss they suffered by reason of defendants' obstruction of the flow of said water.

The evidence shows that plaintiffs are the owners of certain lands in Sutter County lying immediately to the east of and at a higher elevation than the adjoining lands of defendants. Both parcels are a part of the same watershed, whose waters for many years have drained from east to west by meandering natural streams and watercourses or channels of varying widths and depths. One of such channels existed at the southerly boundary and one at the northerly boundary of plaintiffs' land. As the waters accumulate in the area to the east of defendants' land they flow through said channels across said land, thence west to a canal of Reclamation District 1000, and finally discharge into the American River. From time to time during the past 20 years, various tracts of land in this vicinity have been leveled for irrigation purposes, and the streams have been straightened or altered, but the general course and capacity thereof have not been changed. Irrigation waters have, by drainage, seepage or other means, flowed in said streams during the irrigation season, particularly during the months of April to November. During the year 1951, defendants leveled their land, and in so doing filled the natural watercourses on said land and replaced the same with ditches. The ditches so dug by defendants were insufficient to carry off the surface and drainage waters accumulating in the lands to the east of defendants' property. Prior to the commencement of this action defendants erected barriers across two streams on their land, thereby preventing such waters from flowing through said watercourses. The barriers caused the water to back up upon plaintiffs' land, resulting in damage to them in the sum of $300. The surplus irrigation water accumulating on plaintiffs' land and that of other owners to the east of defendants was substantially less than the surface and rain water and had never overflowed the banks of any of the channels or watercourses on defendants' land. According to the plaintiffs, the amount of the irrigation run-off from their land was approximately four thousand gallons per hour. Additionally there was testimony by witnesses for both parties, as well as by they themselves, to the effect that the growth of tules and other vegetation had been stimulated by the irrigation run-off, but no one testified that any of such growth was on defendants' land. There was also testimony that because of the irrigation run-off it was impossible to farm defendants' land as before. Specifically defendant Charles Burke testified that such waters had, in effect, so divided his land that he was compelled to farm it as though it were three separate parcels.

In substance the findings of the court follow the evidence as summarized. The findings pertinent to the questions now raised are that the flow during the rainy season was far greater than the artificial flow during the summer months, and that such artificial flow had not exceeded the capacity of such streams; that the ditches dug by defendants as a part of their leveling operations were of insufficient capacity to permit the free flow of drainage waters; that had defendants not interfered with such natural watercourses, no damage would have occurred; that the barriers erected by defendants prevented such irrigation and drainage waters from flowing through said watercourses over and across the lands of defendants; that for more than five years prior to the institution of the action, and particularly during the period between April and November, plaintiffs had drained approximately four thousand gallons of water per hour into said watercourse; and that "plaintiffs use of said easement" has at all times during said period been "continuous, open and notorious, hostile to the defendant owners, exclusive and under a claim of right * * * uninterrupted and adverse * * *"

The judgment thereafter entered, specifically adjudged plaintiffs to have an easement by prescription over the lands of the defendants for the discharge of surplus irrigation water. The defendants were ordered to remove all obstructions placed by them in the natural watercourses on their land; to restore such natural watercourses to their original size and capacity, or in the alternative to construct other ditches or channels across their lands so that the water from the channels and streams on the northerly and southerly boundary lines of plaintiffs' land would flow across defendants' land as previously; that such ditches or channels so constructed should have the capacity to carry the same amount of water as the original natural watercourses and streams carried before their obstruction by defendants; and enjoined defendants from in any way interfering with the free flow on, over and across the lands of defendants of the surface and irrigation waters flowing in said natural watercourses from the lands of plaintiffs.

[1, 2] Defendants now contend that the evidence is insufficient to sustain the finding that natural watercourses existed across their lands. As noted by the court in Costello v. Bowen, 80 Cal.App.2d 621, at page 627, 182 P.2d 615, at page 619:

> "It is difficult to define the term 'water course' in language that is uniformly applicable, since the topography and surrounding conditions which contribute to its existence vary greatly. In general terms it has been said to consist of a running stream of water following a regular course or channel and possessing a bed and banks. [Citing cases.] It is the channel through which the water of a particular district or watershed usually or periodically flows. While it is ordinarily defined as a stream, containing a definite bed, banks and channel, which flows into some other river, stream, lake or the sea, none of those characteristics is an absolute fixed factor. A watercourse may exist even though it serves as a mere channel by means of which a particular watershed is drained, and although it may be dry in certain seasons * * *."

[3] It has further been held that a particular channel or watercourse "is natural in the sense that it was made by the waters themselves and not by man." The importance lies not in its manner of creation, but rather in the fact that for a long period of time the watershed has naturally drained into that channel. Weck v. Los

Angeles County Flood Control Dist., 80 Cal.App.2d 182, 193, 181 P.2d 935.

By their next argument defendants would have this court reverse its former decisions in Fell v. M. & T., Inc., 73 Cal.App.2d 692, 166 P.2d 642 (hearing in Supreme Court denied), and Cheesman v. Odermott, 113 Cal.App.2d 26, 247 P.2d 594 (hearing also denied). Their contention is that plaintiffs are not entitled to discharge *any* artificial irrigation waters through the natural watercourses across the lands of defendants in the absence of any right acquired by prescription.

[4] The injunction herein restraining defendants from in any way interfering with the right of plaintiffs to discharge surface and irrigation waters flowing in the natural watercourses across defendants' lands was proper, and is in conformity with the law as enunciated in the Fell and Cheesman cases. However, plaintiffs' right as so recognized must clearly be limited to a use which would be reasonable and noninjurious.

[5] In their reply brief appellants contend that this part of the judgment is erroneous in specifying that the ditches must be of such capacity as to carry a volume in summer equal to the winter flow. It is their position that winter flow is no measure of reasonable and noninjurious summer use, and thus the right of plaintiffs has not been limited; that the farming operations of defendants will be seriously impaired by the maintenance of ditches across their lands the year around, and that the judgment does not conform to the law as set forth in the cited cases.

The answer to this would seem to lie in the plain meaning and logic of the Fell and Cheesman decisions. The right to discharge surplus irrigation waters would of necessity be used primarily during the summer months, there being little if any need to irrigate during the winter season. If the right exists, it must also be for use during the summer months. Thus to argue, as defendants do, that for the use to be reasonable and noninjurious it must be limited to use outside of the summer irrigating season, is but to wholly deny the right.

[6, 7] Finally appellants contend that the evidence is insufficient to establish the creation of an easement by prescription for the flow of excess artificial irrigation water over and across defendants' lands.

With this we are inclined to agree. As recognized in Fell v. M. & T., Inc., supra, 73 Cal.App.2d at page 695, 166 P.2d at page 643, the privilege of turning imported water into a natural channel may ripen into an easement but only if there should be an interference with the rights of another. In that case, however, there was a showing that the discharge of irrigation water into a natural watercourse caused substantial damage to the lower owner. Here, although there was some evidence that the growth of tules and other vegetation had been stimulated by the irrigation run-off, it was not shown that such growth was on the land of defendants nor that defendants had suffered any damage by reason thereof, and the court did not so find. To the contrary, the court specifically found that whatever damage if any was suffered by defendants was the result of their own acts in leveling their land, obliterating the natural watercourses and failing to provide compensating ditches of sufficient capacity. The present case presents a factual situation more closely analogous to that which was before this court in the Cheesman case. There likewise the injuries complained of by defendants would not have occurred save for the leveling of their land, the destruction of the natural watercourses and the digging of inadequate ditches.

It necessarily follows that in the absence of a showing that the use made by plaintiffs of the natural watercourses in question caused damage to defendants, paragraph III of the judgment, wherein it is adjudged that plaintiffs have an easement over the lands of defendants for the flow of surface waters, must be stricken.

As so modified, the judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

Gipson E. SIMMONS, Plaintiff and Appellant,
v.
RHODES & JAMIESON, Limited, a corporation, and Harold Aydelotte, Defendants and Respondents.
Civ. 16388.

District Court of Appeal, First District, Division 1, California.
June 14, 1955.
Rehearing Denied July 14, 1955.
Hearing Granted Aug. 11, 1955.*

Action by buyer of cement against seller and its agent for burns sustained while handling cement. The Superior Court, County of Contra Costa, Harold Jacoby, J., granted nonsuit, and plaintiff appealed. The District Court of Appeal, Peters, P. J., held, inter alia, that evidence was sufficient to take to jury question whether seller had breached statutory implied warranty that cement was reasonably safe for purpose of laying floor.

Judgment affirmed as to agent; judgment reversed as to seller.

1. Principal and Agent 🔑136(1)

Cement company's agent, who made sale of ready-mixed cement, was not "seller" within statute relating to implied warranties and was not liable for breach of implied warranty. West's Ann.Civ.Code, § 1735.

See publication Words and Phrases, for other judicial constructions and definitions of "Seller".

2. Sales 🔑279

Statutory implied warranty of reasonable fitness is not limited to safety of end product and includes a warranty that goods furnished can be safely used in construction of end product. West's Ann.Civ. Code, § 1735(1).

3. Sales 🔑273(3)

Where buyer of ready-mixed cement made known to seller's agent particular purpose for which cement was required, and relied upon seller's superior knowledge as to safety in handling cement, there was a statutory implied warranty that cement was reasonably safe for the purpose. West's Ann.Civ.Code, § 1735(1).

4. Sales 🔑279

Under the statutory implied warranty of reasonable fitness, seller is not an insurer that goods can be used with absolute safety or that they are perfectly adapted to the intended use. West's Ann.Civ. Code, § 1735(1).

5. Evidence 🔑7

It is a matter of common knowledge that cement contains lime.

6. Sales 🔑445(4)

In action by buyer of ready-mixed cement against seller for damages for burns sustained while spreading cement, evidence was sufficient to take to jury question whether seller had breached statutory implied warranty that cement was reasonably safe for purpose of laying floor. West's Ann.Civ.Code, § 1735(1).

7. Negligence 🔑136(18)

In action by buyer of cement against seller and seller's agent for burns sustained while handling ready-mixed cement, evidence whether agent had been negligent or had any control over cement mixture was insufficient to take case against him to jury.

8. Negligence 🔑121(2)

Res ipsa loquitur applies (1) if it can be reasonably concluded from basis of experience, either common to community or brought out in evidence, that accident was of a kind that does not normally occur unless some one was negligent; (2) if accident was caused by instrumentality in exclusive control of defendant; and (3) if it was not contributed to by voluntary action on part of plaintiff.

9. Negligence 🔑121(2)

Where it appears that accident is of such nature that it can be said, in light of past experience, that it probably was result of negligence by some one and that defendant is probably the person who was responsible, the res ipsa loquitur requirement that accident be of a kind that does not normally occur unless some one was negligent is met.

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* Opinion vacated 293 P.2d 26.

10. Negligence ⚷117, 136(26)

Contributory negligence is an affirmative defense, and, in case of nonsuit, is involved only if evidence shows, as a matter of law, that plaintiff was contributorily negligent.

11. Negligence ⚷121(2)

Defendant may be found to have had exclusive control of instrumentality, for purpose of determining applicability of res ipsa loquitur, even though he may have relinquished control of instrumentality, and even though he may not be in a better position than plaintiff to explain the accident.

12. Negligence ⚷24, 27

Where a seller of ready-mixed cement uses a material in mixture that it sells, he is under a duty to inspect reasonably that material to determine whether it is defective, especially where seller knows, or should know, that buyer has no means of testing the product.

13. Negligence ⚷121(2)

Res ipsa loquitur is not applicable where it is at least equally probable that accident was caused by another.

14. Negligence ⚷136(26)

In action by buyer of ready-mixed cement against seller for burns sustained while handling cement, whether buyer had handled product reasonably after receiving possession was question of fact for jury.

15. Negligence ⚷136(6)

In action by buyer of ready-mixed cement against seller for burns sustained while handling cement, evidence whether accident was of a kind that does not normally occur unless some one is negligent, whether it had been contributed to by voluntary action on part of plaintiff, and whether cement was an instrumentality in exclusive control of seller, presented case for jury under doctrine of res ipsa loquitur, even though accident occurred after seller had relinquished control of cement and even though seller had incorporated materials supplied by others.

Russell F. King, Richmond, for appellant.

Weinmann, Rode, Burnhill & Moffitt, John N. James, Alameda, Hoey, Hall & Conti, Martinez, for respondents.

PETERS, Presiding Justice.

Plaintiff, Gipson Simmons, purchased some ready-mixed cement from defendant Rhodes & Jamieson, Ltd., through its employee, defendant Harold Aydelotte. After using the mixture for the purpose for which it was intended plaintiff suffered severe burns. He brought this action against the two defendants, setting forth causes of action for a breach of warranty and for negligence. The trial court granted a nonsuit at the close of plaintiff's case. Plaintiff appeals.

The facts most favorable to the plaintiff are as follows:

Plaintiff, a welder by trade, during his spare time, was constructing his own home. Shortly after laying the foundations, he met defendant Aydelotte, an employee of defendant Rhodes & Jamieson. Plaintiff showed Aydelotte around the premises, and, in particular, showed him the area where it was proposed to lay the concrete basement floor, an area 13½′ x 52′ x 4″. The state of construction existing when Aydelotte inspected the premises made it apparent that such slab could only be laid by working inside the basement area. Aydelotte solicited the sale of cement for his company, and plaintiff agreed to buy, leaving the type of mixture up to the seller. At 10:30 a. m. of November 10, 1952, the defendant company delivered its first load of mixed cement. In order to reach the basement area the cement was poured down a chute through a window opening and into the forms. Because the mixture was not wet enough, the plaintiff added ten gallons of water to it and requested that the succeeding loads be wetter. Three loads in all were delivered. Because plaintiff had difficulty in spreading the cement he secured the assistance of a neighbor. They leveled the cement by pushing it into position, using shovels and a long board for this purpose. During this maneuver plaintiff frequently got down on his hands and knees to shove the leveling board. At this time he was wearing goloshes, jeans, a khaki shirt and rubber gloves. Plaintiff testified that the goloshes and gloves were not worn to protect him from burns, but to protect his feet from getting wet and to enable him to handle the slick shovel. Plaintiff also testified that he had never seen anyone use rags and padding on their legs to protect them from the cement. He had observed that most cement workers worked while standing on boards, but believed they did this to keep from getting wet and dirty. No one had ever warned him of the danger of getting burned by cement, although he did know that exposure to wet cement caused a drying out of the skin.

Plaintiff, prior to the accident, had had some experience with cement. He had helped to build some cement water tanks, had helped two neighbors pour cement foundations and flooring, and had occasionally poured cement while working with construction crews. On none of these occasions, although he had handled the cement barehanded, had he ever been injured by the use of the cement other than a roughening of the skin of his hands.

Plaintiff worked leveling the cement floor from 10:30 a. m. to 3:15 p. m. During half of this period his knees and legs were in contact with the wet cement. His neighbor assistant did not come in direct contact with the wet cement to the same extent as did plaintiff. Shortly after 1 p. m. plaintiff began to notice a "tingle" on his legs which became increasingly irritating. He continued to work, however, because of the necessity of leveling the floor before the cement set. Upon finishing the job he washed his legs with soap and water, observed that his legs "looked green," changed his clothes and got a neighbor to drive him to the hospital. There he was bathed again, medication placed on his legs, penicillin administered, and his attending doctor, because there were not beds available in the hospital, allowed him to go home. Plaintiff returned to the hospital the next day for further treatment, and the doctor visited him at home. Two days after the exposure to the cement plaintiff's temperature reached 103 degrees and the doctor had him hospitalized. It was then discovered that plaintiff was severely burned over 15 per cent of the area of his body, most of the burns being of the third degree type. This means that for the most part the burn extended through the entire thickness of the skin, that is, through both the epidermis and corium and down to the subcutaneous fatty tissue. This required two extensive skin grafting operations, the first, with three doctors, requiring 8 hours, and the second 5½ hours. Plaintiff was hospitalized for nearly two months. The doctor testified that plaintiff was not allergic to cement, and that "in my opinion this was definitely a chemical burn, due to contact with cement." Although defendant claims that this answer was stricken, no order striking it was made. At any rate, the fact that the burns were caused by contact with the cement is at least a reasonable, if not inevitable, inference.

The Street Superintendent of Richmond, after qualifying as an expert in concrete construction, testified that during his twenty-five years of experience he had seen men many times work for three or four hour periods in cement doing hand troweling without the protection of boards or padding, and during that entire time he had never seen a man burned to the extent of requiring medical care, having observed, at most, a few pimples or chapping caused by the exposure to the cement. The attending physician testified that prior to treating plaintiff he had observed but one prior burn caused by exposure to concrete, and that was a small burn. He also testified that there was very little medical literature on the subject of cement burns, he having seen only one article on the subject. In that article no case was reported so severe as to require skin grafting.

A dermatologist, who had examined and treated plaintiff, testified that he had never seen or heard or read of a concrete burn as extensive or deep as that suffered by plaintiff, and that the burn suffered by plaintiff was a chemical burn which, in his opinion, based on the history of the case, was due to the cement or some substance in it. The burn was not caused by an allergy towards cement. This had been determined by certain allergy tests of various kinds of cement, including one test made from the very slab here involved.

Notice of breach of warranty was reasonably and properly given.

On this evidence, on both causes of action, at the close of plaintiff's case, a nonsuit was granted.

Propriety of Nonsuit on Warranty Cause of Action.

Section 1735 of the Civil Code provides:

> "* * * there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:
>
> "(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.
>
> "(2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality."

[1] Clearly, it was proper to grant the nonsuit as to defendant Aydelotte as to this cause of action. Obviously, he was the agent of Rhodes & Jamieson, and was not himself the seller within the meaning of the section.

As to defendant Rhodes & Jamieson it appears that for the purposes of a nonsuit, all the elements required by the quoted section can be found in the evidence or in reasonable inferences therefrom. There can be no reasonable doubt that plaintiff made known to the agent of the seller the particular purpose for which the goods were required. It is also a reasonable inference that plaintiff relied on the seller's skill and judgment to pick the proper type and mixture of cement for the flooring. There is no dispute that the cement furnished made a good cement floor. If it be assumed that the warranty here involved includes a warranty that the cement was safe to handle, a point later discussed, then it seems clear that it is a reasonable inference from the evidence that plaintiff relied on the seller's skill and judgment as to the cement being safe to handle. Plaintiff, to the seller's knowledge, had no means of testing the cement, and could not be reasonably expected to do so. The evidence shows that the seller used the service of a testing laboratory. Thus, it can reasonably be inferred that plaintiff relied upon the seller's superior knowledge as to to safety in handling the cement.

The only debatable question is whether the implied warranty of fitness for a particular purpose includes not only the primary warranty that the cement was fit for the purpose of a cement floor, but also a secondary warranty that the cement was reasonably safe to handle in constructing the floor. On this subject there is a difference of opinion. There is at least one out-of-state authority directly in support of the seller's contention that the implied warranty here involved does not include a warranty of reasonable safety in handling. The case is Dalton v. Pioneer Sand & Gravel Co., 37 Wash.2d 946, 227 P.2d 173. There, as here, ready-mixed cement was purchased to construct a cement floor and the purchaser, while laying the floor, received severe burns from coming into contact with the cement. There, as here, the purchaser relied upon a breach of the implied warranty. A motion for dismissal was granted at the close of plaintiff's case. This was affirmed. The opinion on the point in question is quite short, contains no analysis of the nature of the warranty, and cites no cases in support of its conclusions. The court first pointed out, 227 P.2d at page 174, that: "No evidence was introduced to show that this cement contained any unusual substance, or differed from ordinary cement in any way."[1] The court then disposed of the point in the following cursory manner: "'Merchantable quality' means that the substance sold is reasonably suitable for the ordinary uses it was manufactured to meet. 27 Words and Phrases, Perm.Ed., Pocket Part. No contention is made by the appellant that the cement was not satisfactory for the purpose of laying a basement floor. This is the only purpose for which the test of merchantability could be applied under the act. We find the act to be inapplicable to the situation here presented."

The other cases cited by respondent on this issue are not directly in point. They are primarily concerned with the question of whether, under the facts involved, there was a breach of warranty, and do not discuss the existence of the warranty with which we are here concerned.

As opposed to the Washington case, there are several out-of-state cases that do extend the warranty of fitness to include, logically, a warranty of safety in the article's use. Thus, in Dushane v. Benedict, 120 U.S. 630, 7 S.Ct. 696, 30 L.Ed. 810, the seller sold the buyer rags to be used in the manufacture of paper. The rags were infected with smallpox. Workmen in the factory became infected. The finished product—the paper—was apparently not dangerous because the manufacturing process killed the germs. But nevertheless the court held that there was a breach of the warranty of fitness for a particular purpose. After setting forth the facts, the court stated, 120 U.S. at page 646, 7 S.Ct. at page 702: "This was of itself [furnishing infected rags] sufficient evidence to be submitted to the jury of a warranty and a breach of it. A warranty, express or implied, that rags sold are fit to be manufactured into paper, is broken, not only if they will not make good paper, but equally if they cannot be made into paper at all without killing or sickening those employed in the manufacture."

Plaintiff also cites a series of clothing and cosmetic cases that are not directly in point. In all of them clothing or cosmetics caused injury to the wearer or user. In all of them the court found a breach of the implied warranty. In such cases the purpose for which the clothing or cosmetics were sold was to wear or use them. Obviously, if they could not be worn or used safely they were not fit for the purpose for which they were sold. Thus, the cases are not directly in point. In one of them, however—the case of Flynn v. Bedell Co., 242 Mass. 450, 136 N.E. 252, at page 253, 27 A.L.R. 1504—there appears the following pertinent language:

> "It well may be that the scope of an implied warranty of fitness does not extend to fitness in respect of matters wholly unknown to the dealer and peculiar to the individual buyer. A seller of food presumably does not warrant that the particular kind of food which the buyer calls for will be suited to his peculiar idiosyncracies. * * * But it appears that the particular 'defect' which injured the plaintiff would have similarly injured any normal person. * * *
>
> "The scope of the statutory implied warranty cannot be limited so as to exclude a warranty against the latent presence of foreign substances which are injurious in the course of the normal use of the garment for the purpose intended."

Although the exploding bottle case of Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, at page 464, 150 P.2d 436, at page 441, is not directly in point, in the concurring opinion of Mr. Justice Traynor, there appears some language that is helpful. It is as follows: "The retailer, even though not equipped to test a product, is under an absolute liability to his customer, for the implied warranties of fitness for proposed use and merchantable quality include a warranty of safety of the product."

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[1] In this respect the Washington case differs from our case. In our case there is evidence from which it can be inferred that exposure to cement normally does not cause severe burns to the user.

[2, 3] On principle it would be unreasonable and unjust to hold that the warranty is limited to the safety of the end product and does not include a warranty that the goods furnished can be safely used in the construction of the end product. For that reason we are impressed with the reasoning of the United States Supreme Court in the Dushane case and are not impressed with the reasoning of the Washington court in the Dalton case. We, therefore, hold that for purposes of nonsuit there was an implied warranty that the cement was reasonably safe for the purpose of laying a concrete floor.

[4] The next question is whether there was any evidence of a breach of this warranty. In this connection, it must be kept in mind that as to this warranty the seller is not an insurer that the goods can be used with absolute safety or that they are perfectly adapted to the intended use. Section 1735 of the Civil Code merely requires that the goods be "reasonably fit" for the intended use. See also Tremeroli v. Austin Trailer Equipment Co., 102 Cal. App.2d 464, 227 P.2d 923; Mix v. Ingersoll Candy Co., 6 Cal.2d 674, 59 P.2d 144.

[5] On this question of breach, it is a matter of common knowledge, and was known to plaintiff, that cement contains lime. Plaintiff knew that lime is a caustic, and that exposure to it irritated the skin. Plaintiff also knew that cement workers customarily wore boots and worked from boards, although he testified that he thought that the purpose of this was to keep from getting dirty, not to keep from getting burned.

On the other hand, there is direct evidence that these burns were of unusual severity, and it can be inferred that such burns do not normally occur upon exposure to wet cement. The Street Superintendent testified that he had seen men working unprotected in wet cement for long periods and never had seen anyone burned, although he had observed some chapping and some pimples. Both doctors testified that they had never seen, heard or read of a case of cement burn severe enough to require skin grafting. Plaintiff was not peculiarly allergic to cement. The evidence shows that it was reasonably necessary, in laying the floor, at least by an amateur, for plaintiff to expose himself to the cement, and that defendant knew the conditions under which the cement was to be used.

For the purposes of a nonsuit, there can be no doubt that the evidence shows that the cement caused the burn. The two doctors so testified, and the hospital record indicated a cement burn. The irritation started two hours after exposure to the wet cement, and there is no evidence that plaintiff came into contact with any other substance that could have caused the burn.

[6] Thus, for the purposes of defeating a nonsuit, there was ample evidence of a breach of the warranty of fitness.

It was, therefore, error to grant a nonsuit on the implied warranty cause of action.

[7] We now turn to the negligence cause of action. There is no evidence that defendant Aydelotte was negligent or had any control over the cement mixture. The nonsuit was proper as to him on this cause of action.

[8] As to defendant Rhodes & Jamieson, Ltd., whether the nonsuit was properly granted depends upon whether the doctrine of *res ipsa loquitur* is applicable to the facts. There has been a great deal written as to the scope of this doctrine in recent years, much of it by the California courts. It is not necessary to review those many cases in this opinion. It is now settled that the doctrine applies (1) if it can be reasonably concluded from a basis of experience, either common to the community, or brought out in the evidence, that the accident is of a kind that does not normally occur unless someone was negligent; (2) and, if it was caused by an instrumentality in the exclusive control of the defendant; (3) and, if it was not contributed to by a voluntary action on the part of the plaintiff. See generally Ybarra v. Spangard, 25 Cal.2d 486, 154 P.2d 687, 162 A.L.R. 1258; Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 150 P.2d

436; Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, 247 P.2d 344; Prosser on Torts, p. 295.

[9] The first condition is here present. The two doctors, and the Street Superintendent, testified that they had never seen, heard of or read about cement burns of the severity of those here involved. It was shown that plaintiff was not peculiarly susceptible or allergic to cement. This is all that was needed to comply with the first requirement. As was said in Stanford v. Richmond Chase Co., 43 Cal.2d 287, 292, 272 P.2d 764, 766, this requirement is met "where it appears that the accident is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone and that the defendant is probably the person who is responsible." See, also, in addition to the authorities cited, supra, LaPorte v. Houston, 33 Cal.2d 167, 199 P.2d 665; Prosser, Res Ipsa Loquitur in California, 37 Cal.L.Rev. p. 183, at p. 195.

It is equally clear that, for the purpose of getting by a nonsuit, the third requirement—reasonableness of use by the plaintiff—was here shown. The plaintiff, of course, assumed the normal risks of the ordinary effects of exposure to wet cement—roughening of the skin and a rash—but there is no evidence or no inference from the evidence that as a reasonable man he knew, or should have known, that there was a risk of third degree burns. In fact, the inference is quite to the contrary. The defendant knew that the cement had to be spread from inside the basement, and knew, or should have known, that exposure to the wet cement was reasonably possible. The method used to spread the cement was reasonable under the circumstances.

[10] On this appeal from a judgment of nonsuit we are, of course, not concerned with contributory negligence. That is an affirmative defense, and can only be involved if the evidence shows, as a matter of law, that plaintiff was contributively negligent. No such showing was here made.

[11] The only debatable issue is whether the defendant had "exclusive control" of the instrumentality causing the injury. In this connection the courts have held that the fact the accident occurred sometime after the defendant relinquished control of the instrumentality causing the injury does not, *per se*, preclude the application of the doctrine, nor does the fact that the defendant may not be in a better position than plaintiff to explain the accident preclude its application if it appears more probable than not that the injury resulted from the acts of defendant. In Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, at page 443, 247 P.2d 344, at page 347, these principles, supported by many authorities, were stated as follows:

> "The defendant, of course, should not be liable unless it appears from all the facts and circumstances that there is a sufficient causal connection between his conduct and the plaintiff's injury, and it has been held that res ipsa loquitur will not apply if it is equally probable that the negligence was that of someone other than the defendant. [Citing cases.] * * * In dealing with this problem the courts have usually said that the defendant must have 'management' or 'control' of the agency or instrumentality which caused the injury. [Citing cases.] It has been stated that the purpose of this requirement is to eliminate the possibility that the accident was caused by someone other than the defendant. [Citing authorities.] Accordingly, its use is merely to aid the courts in determining whether, under the general rule, it is more probable than not that the injury was the result of the *defendant's* negligence.
>
> "The requirement of control is not an absolute one. Although, as we have seen, the doctrine will not ordinarily apply if it is equally probable that the negligence was that of someone other than the defendant, the plaintiff need not exclude all other persons who might possibly have been responsible where the defendant's

> negligence appears to be the more probable explanation of the accident. [Citing authorities.] Further, it is settled that the fact that the accident occurs some time after the defendant relinquishes control of the instrumentality which causes the accident does not preclude application of the doctrine provided there is evidence that the instrumentality had not been improperly handled by the plaintiff or some third person, or its condition otherwise changed, after control was relinquished by the defendant. [Citing cases.] Of course, it must appear that the defendant had sufficient control or connection with the accident that it can be said that he was more probably than not the person responsible for plaintiff's injury.
>
> "* * * As recently held by the Supreme Court of Oregon in a well reasoned opinion, a plaintiff may properly rely upon res ipsa loquitur even though he has participated in the events leading to the accident if the evidence excludes his conduct as the responsible cause. Gow v. Multnomah Hotel, 191 Or. 45, 224 P.2d 552, 555–560, 228 P.2d 791."

The court also discussed what place the question of the defendant's superior knowledge of the cause of the accident has in the application of the doctrine, in the following language, 39 Cal.2d at page 445, 247 P.2d at page 348:

> "Another factor which some of the cases have considered in applying the doctrine is that the defendant may have superior knowledge of what occurred and that the chief evidence of the cause of the accident may be accessible to the defendant but inaccessible to the plaintiff. [Citing authorities.] It seems clear, however, that the doctrine may be applied even though the defendant is not in a better position than plaintiff to explain what occurred if it appears more probable than not that the injury resulted from negligence on the part of defendant. [Citing authorities.]"

The court then went on to hold that there was a duty on the part of the bottling company to inspect and test the bottles for defects, and that the fact the bottles were furnished by another did not preclude application of the doctrine.

[12, 13] The problem involved in the instant case is that the cement used by defendant in its mixture was furnished by the Ideal Cement Company. Ideal is not a party to this action. We have no way of knowing, nor has the plaintiff, whether the overly dangerous qualities of the mixture were the result of the defendant's actions, or whether it was caused solely by the cement furnished by Ideal. Either possibility is reasonable. But even if it be assumed that it is more reasonable that the burns were caused by the cement and not by anything the defendant added, this would not preclude the application of the doctrine as to defendant. When the defendant uses a material in a mixture that it sells, such defendant is under a duty to inspect reasonably that material to determine whether the material incorporated in its product is defective. This is certainly so where, as here, the defendant knows, or should know, that the plaintiff has no means of testing the product. Although the doctrine is not applicable where it is at least equally probable that the accident was caused by another, LaPorte v. Houston, 33 Cal.2d 167, 199 P.2d 665, this rule is not applicable where the defendant is under a duty to inspect. This was the precise holding in the Escola and Zentz cases, cited supra. Although it appears that defendant used the services of a testing firm, the nature and scope of such service, or its reasonableness, do not appear in the evidence. The reasonableness of such inspection, if any, is, of course, a matter of defense, and here the nonsuit was granted at the close of plaintiff's case.

[14] There was evidence that plaintiff added water to the cement after he received possession, but there was no evidence that this in any way was unreasonable or contributed to the injury. Whether plaintiff handled the product reasonably after receiving possession is a question of fact for the jury. Gordon v. Aztec

Brewing Co., 33 Cal.2d 514, 203 P.2d 522. The mere fact that water was added does not make the doctrine inapplicable as a matter of law. In the Zentz case the plaintiff put ice around the coke bottle. This was held not to preclude the application of the doctrine. The two situations are comparable.

[15] For the foregoing reasons we conclude that on the negligence cause of action the plaintiff, with the aid of the doctrine of *res ipsa loquitur*, made out a case sufficient to put the burden on defendant to show that it acted as a reasonable and prudent person would act under the circumstances.

Thus, on both causes of action, it was error to grant the nonsuit.

The judgment is affirmed as to defendant Aydelotte; it is reversed as to defendant Rhodes & Jamieson, Ltd. Plaintiff to recover costs from defendant Rhodes & Jamieson, Ltd.

BRAY and FRED B. WOOD, JJ., concur.

133 Cal.App.2d 665

In the Matter of the ESTATE of Della Wagner HALSELL, Deceased.

Clara W. WILSON and Andrew W. Wilson, Petitioners and Appellants,

v.

Raymond Louis BRANNAN, Executor of the Will of Oliver L. Halsell, Deceased, and Halsell Foundation, Respondents.

Civ. 5065.

District Court of Appeal, Fourth District, California.

June 16, 1955.

Petition by residuary beneficiaries to require administrator with will annexed to disclose in estate of administrator's deceased wife the nature and extent of community property and include such property in inventory. The Superior Court of Orange County, Raymond Thompson, J., entered order and judgment construing the decedent's will and denying the petition, and petitioners appealed. The District Court of Appeal, Mussell, J., held that will of married woman declaring intention to thereby dispose of her separate property and bequeathing all of her estate to named sister, disposed of separate property only and did not dispose of any interest of testatrix in community property.

Judgment and order affirmed.

1. Wills 🔑577

Will of married woman, declaring intention to thereby dispose of her separate property which she was entitled to dispose of by will and bequeathing all her estate to named sister, made no disposition of community property testatrix may have had.

2. Wills 🔑487(2, 3)

In construing will of married woman, declaring intention to thereby dispose of her separate property and bequeathing all of her estate to named sister, evidence as to circumstances surrounding execution of will and declarations of testatrix to scrivener was admissible to show that testatrix intended to dispose of her separate property only.

3. Wills 🔑577

Construction of will of married woman, declaring intention to thereby dispose of her separate property and bequeathing all her estate to named sister, as disposing of separate property only and not of any community property testatrix may have had was not unreasonable.

4. Appeal and Error 🔑1008(3)

Where construction given to an instrument by trial court is reasonable and appears to be consistent with intent of party making it, reviewing court will not substitute another interpretation, even though it may seem equally tenable.

5. Wills 🔑450, 470

Different parts of will must be harmonized if possible, giving expression to all of the terms therein and forming from them one consistent whole.

6. Appeal and Error 🔑1071(1)

Where record discloses substantial evidence to support judgment, findings of trial court on an inconsistent theory may be disregarded as surplusage.

7. Husband and Wife 🔑276(1)

Interest of testatrix in community property not disposed of by will passed to surviving husband without administration.

8. Wills 🔑449

Will was not open to construction so as to avoid partial intestacy merely because it did not dispose of interest of testatrix in community property.

◆

Blodget & Blodget, Santa Ana, for appellants.

Forgy, Reinhaus, Miller & Kogler, Santa Ana, Latham & Watkins and A. R. Kimbrough, Los Angeles, for respondents.

MUSSELL, Justice.

Della Wagner Halsell died in Orange county on or about September 15, 1952. Her will was admitted to probate and on November 3, 1952, O. L. Halsell, husband of the deceased, was appointed administrator with the will annexed. On April 23, 1953, an inventory and appraisement was filed by Halsell. On August 13, 1953, appellant Clara W. Wilson, sister of the decedent and devisee under the will, filed a petition to require the administrator to disclose in the estate the nature and extent of the community property and include the same in his inventory. The administrator in his reply to this petition alleged in effect, among other things, that the decedent's will did not dispose of her interest in the community property and denied that she had any such interest. The court, in a pretrial order, ordered a trial on the issue as to "Whether or not the terms of the will comprehend the community property of the decedent, if any." Trial was had on this issue and the petition was denied. Petitioner Clara W. Wilson and Andrew W. Wilson, the contingent beneficiary under the will who joined in the petition, appeal from the judgment and order denying the petition.

The pertinent provisions of the will are as follows:

> "Last Will and Testament of
> Della Wagner Halsell
>
> "I, Della Wagner Halsell, a resident of the City of Santa Ana, Orange County, State of California, declare this to be my last will and revoke all former wills:
>
> "I I direct my executor to pay *must* just debts, last illness and burial expenses.
>
> "II I do hereby declare that I am a married woman and that my husband is Olive*er* Halsell, residing in the City of Santa Ana, County of Orange, State of California.
>
> "III It is my intention hereby to dispose of all of my separate property, real and personal, whatsoever and wheresoever situated, which I am entitled to dispose of by will.
>
> "IV I give, devise and bequeath all of my estate, both real and personal, whatsoever and wheresoever situated, to my sister Clara Wagner Wilson.
>
> "In the event that my sister Clara Wagner Wilson shall have predeceased the distribution of my estate then I give, devise and bequeath all of my estate, both real and personal whatsoever and wheresoever situated to my nephew Andrew Wilkins Wilson, who resides in the City of Newport Beach, County of Orange, State of California, and in the event that Andrew Wilkins Wilson shall have predeceased distribution of my estate and shall have died with issue then I give, bequeath and devise all of my estate, both real and personal, whatsoever and wheresoever situated, to the issue of my nephew Andrew Wilkins Wilson."

The trial court found that:

> "9. In interpreting the will, an uncertainty and ambiguity arose in respect to the nature and amount of the real and personal property upon which

the will operates, and in respect to the meaning of the word 'estate' in paragraph IV of said will in view of the circumstances under which the will was executed."

Evidence was admitted over objection of counsel for appellants as to the circumstances under which the will was executed and in that connection the court found as follows:

"10. Three days prior to the execution of said will, decedent had her attorney prepare a draft of said will which was substantially the same as the executed will with the exception that in said draft, paragraph III read as follows: 'It is my intention hereby to dispose of all of my property, real and personal, whatsoever and wheresoever situated, which I am entitled to dispose of by will.' Decedent's attorney gave said draft of the will to decedent to take home with her for study, which she did.

"11. Decedent's attorney, three days prior to the date of the execution of the final draft of said will, explained to decedent the effect such a will as set forth in said first draft of the will would have upon any separate property and any community property which she owned at her death. At that time, or shortly thereafter and prior to the execution of said will, decedent's attorney wrote upon his copy of said draft of said will the words: 'if community property, undiv. one-half int.; if by will, bad set-up.'

"12. On the same day that decedent executed her will and prior to such execution, she returned to the office of her attorney and instructed him to change the draft to said will which had been prepared to add the word 'separate' to paragraph III of said will so that it would no longer read, 'It is my intention hereby to dispose of all of my property', but instead would read, 'It is my intention to dispose of all my separate property'. Said attorney made said change, and several minor other changes, in said draft and then had typed the final draft of said will, which decedent then executed."

The court further found as follows:

"13. As interpreted by the court, paragraph III means that decedent intended by her will to dispose of only her separate property and not any community property in which she may have owned an interest at the date of her death.

"14. As interpreted by the court, paragraph IV disposes of only decedent's separate property and not any community property in which she may have had any interest at the date of her death; and the word 'estate' in said paragraph IV means decedent's 'estate' of her separate property.

"15. Decedent intended to and did dispose by her will of only her separate property. Decedent did not intend to and did not dispose by her will of any community property in which she may have owned an interest at her death."

The court concluded in part as follows:

"1. Paragraph III of decedent's will makes it sufficiently clear that decedent intended only to dispose of her separate property and not any community property, and the court so construes the will without consideration of any evidence of the circumstances surrounding execution of said will or of any declarations of decedent.

"2. Any ambiguity in the will of Della W. Halsell is a latent ambiguity in respect to the nature and amount of property, and the nature of the 'estate' disposed of by decedent through said will.

"3. Properly construed by giving effect to all parts of the will and by other applicable rules of construction, and in the light of the circumstances surrounding execution of said will and the testimony as to the oral declarations of decedent, the words 'all of my estate' found in paragraph IV of said will mean and refer only to decedent's separate property, and said will disposes of only the separate property of decedent and does not dispose of community property, if any, in which decedent may have owned an interest at the time of her death.

"4. Construing the wording of said will in the light of the circumstances surrounding its execution and the testimoney as to oral declarations of decedent, decedent intended by said will to devise and bequeath to the beneficiaries specifically named therein only her separate real and personal property and nothing else.

[1] We conclude that the trial court correctly found and concluded that the will made no disposition of any community property the decedent may have had.

In Re Estate of Lawrence, 17 Cal.2d 1, 6, 108 P.2d 893, 896, it was held:

> "In the construction of wills the paramount rule, to which all others must yield, is that a will is to be construed according to the intention of the testator, as expressed therein, and this intention must be given effect as far as possible. In re Estate of Wilson, 184 Cal. 63, 66, 67, 193 P. 581; In re Estate of Newman, 68 Cal.App. 420, 423, 229 P. 898; In re Estate of McCurdy, 197 Cal. 276, 282, 240 P. 498; In re Estate of Phelps, 182 Cal. 752, 756, 190 P. 17; In re Estate of Ritzman, 186 Cal. 567, 568, 569, 199 P. 783.
>
> "Of course, as stated in the case of In re Estate of Wilson, supra, 184 Cal. at page 68, 193 P. at page 583: 'Of this class of questions, it may be said, with more truth, perhaps, than of any other, that each case depends upon its own peculiar facts, and that precedents have comparatively small value. Except for the establishment of general principles, very little aid can be procured from adjudged cases in the construction of wills.'"

[2–4] In the instant case the testatrix clearly expressed and stated her intention to dispose of all her *separate* property. No mention is made of her community interest, if any.

In Re Estate of Resler, 43 Cal.2d 726, 732, 278 P.2d 1, 5, it was held:

> "The sole objective in the interpretation of a will is to ascertain the intention of the testator as disclosed by the language he has used. In re Estate of Brunet, 34 Cal.2d 105, 107, 207 P. 2d 567, 11 A.L.R.2d 1382; In re Estate of Lawrence, 17 Cal.2d 1, 6, 108 P.2d 893; Probate Code, § 105."

It was further held therein, 43 Cal.2d at pages 734, 735, 278 P.2d at page 6, as follows:

> "The general rule is that when 'an uncertainty arises upon the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, excluding' the oral declarations of the testator as to his intentions. Probate Code, § 105. An exception to the exclusion of oral declarations of the testator is his instructions to a scrivener when offered to resolve an ambiguity in a will concerning the amount of a bequest. In re Estate of Dominici, 151 Cal. 181, 186, 90 P. 448; In re Estate of Donnellan, 164 Cal. 14, 17, 127 P. 166."

It appears to us in the light of this decision that the evidence admitted by the trial court herein as to the circumstances surrounding the execution of the will and declarations of the testatrix to the scrivener who drew it was properly admitted to show the amount of the bequest to appellants and definitely shows that the testatrix intended to dispose of her *separate* property only. The record shows that the testatrix, after she had studied the draft of the will prepared and delivered to her by her attorney, and which disposed of all of her property, instructed her attorney to change her will so as to dispose of her *separate* property and stated in substance as follows: "I have decided not to dispose of all my property, but just my separate property." Furthermore, the trial court concluded that paragraph III of the will "* * * [m]akes it sufficiently clear that decedent intended only to dispose of her separate property and not any community property, and the court so construes the will without consideration of any evidence of the circumstances surrounding execution of said will or of any declarations of decedent." The construction placed on the terms of the will, under the circumstances shown, is not unreasonable, and, as was said in Re Estate of Northcutt, 16 Cal.2d 683, 690, 691, 107 P.2d 607, 611:

> "Furthermore, the construction placed by the probate court on the terms of the will is not unreasonable. And the rule is well settled that where the construction given to an instrument by a trial court is reasonable and appears to be consistent with the intent of the party making it, courts of appellate jurisdiction will not substitute another interpretation, even though it may seem equally tenable with that accorded by the trial court. In re Estate of Maloney, 27 Cal.App.2d 332, 334, 80 P.2d 998; In re Estate of Mallon, 34 Cal.App.2d 147, 93 P.2d 245; In re Estate of Boyd, 24 Cal.App.2d 287, 74 P.2d 1049; In re Estate of Wilson, [40 Cal.App.2d 229] 104 P.2d 716; In re Estate of Bourn, 25 Cal.App.2d 590, 78 P.2d 193."

Appellant argues that this case is governed by the rules laid down in Re Estate of Granniss, 142 Cal. 1, 75 P. 324, 325. In that case the testator, in the first paragraph of his will, gave his wife the sum of $20,000 and certain personal property. In the second paragraph he gave his daughter all the rest, residue and remainder of his estate, and in the fourth paragraph he declared " 'that all my estate herein devised is my separate property, and was the community property of my first wife and myself.' " The court held that what was said by the testator in paragraph four of the will could not control or in any way effect the plain and explicit declaration contained in the second paragraph wherein he declared that all of the rest, residue and remainder of his estate, both real and personal and wherever situated went to his daughter. It is apparent that paragraph four of this will was a declaration that the property devised was of a certain kind and the court held that the declaration could not affect the devise to the daughter.

[5] Paragraph three of the will here involved is not a description of property but is a clear statement of intention. It is a well recognized rule that different parts of a will must be harmonized if possible, giving expression to all of the terms therein and forming from them one consistent whole. In re Estate of Salmonski, 38 Cal. 2d 199, 209, 238 P.2d 966. Under this rule we cannot disregard the clear statement of decedent's intention as contained in paragraph three of her will.

[6] Appellant contends that the court erred in making findings which were inconsistent with each other. However, where a record discloses that there is substantial evidence to support the judgment, the findings on an inconsistent theory may be disregarded as surplusage. Baird v. Ocequeda, 8 Cal.2d 700, 703, 67 P.2d 1055.

[7, 8] It is also argued that the court erred in interpreting the will so as to create partial intestacy. However, the community property omitted from the will of the decedent would pass to her husband without administration. And as was said in Re Estate of Beldon, 11 Cal.2d 108, 112, 113, 77 P.2d 1052, 1054:

> "To say that because a will does not dispose of all of the testator's property it is ambiguous and must be construed so as to prevent intestacy, either total or partial, is to use a rule of construction as the reason for construction. But a will is never open to construction merely because it does not dispose of all of the testator's property. 'Courts are not permitted in order to avoid a conclusion of intestacy to adopt a construction based on conjecture as to what the testator may have intended, although not expressed.' In re Estate of Hoytema, 180 Cal. 430, 181 P. 645, 646. Only where there is an ambiguity may the rule, which directs

a court to prefer that mode of interpretation which prevents intestacy, be applied. Section 102, Prob.Code. A court may not, under the guise of construction, make a will for a testator to take the place of the one made by him if its intent is plain. And this is so regardless of the consequences of the testator's will."

The judgment and order are affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

133 Cal.App.2d 569

William SHYVERS, Plaintiff and Appellant,

v.

Edward J. MITCHELL and E. Chester Robinson, Defendants,

E. Chester Robinson, Respondent.

Civ. 8494.

District Court of Appeal, Third District, California.

June 13, 1955.

Rehearing Denied July 13, 1955.

Hearing Denied Aug. 11, 1955.

Action on a guaranty of defendant's payment of codefendant's indebtedness to a bank, which was plaintiff's predecessor in interest, on a note. From a judgment of the Superior Court, Stanislaus County, Stanley Murray, J., for defendant guarantor, plaintiff appealed. The District Court of Appeal, Schottky, J., held that the evidence established defense of fraud and justified trial court's conclusion that guarantor was induced to execute guaranty by false representations of bank's president that bank held ample security for the note.

Judgment affirmed.

1. Evidence 🔑441(12)

In assignee's action on defendant's written guaranty of payment of codefendant's indebtedness to assignor bank on note, evidence of bank president's promises that guarantor would never be held liable under guaranty or expected to pay note and that such president would pay it if codefendant failed to do so could not properly be received or considered as constituting defense to action, as it varied terms of written contract in violation of parol evidence rule. West's Ann.Code Civ.Proc. § 1856.

2. Contracts 🔑99(2)

Evidence of promise which would, if counted on, supersede written contract because it is squarely against terms of writing, cannot be received or counted on to support finding of fraud in inducing execution of contract, though promise was made without intent by promisor to keep it.

3. Appeal and Error 🔑1054(1)

Where court, trying without jury action on defendant's written guaranty of payment of codefendant's note to bank, stated that he would let evidence of bank president's promises that guarantor would not be expected to pay note and that such president would pay it, if codefendant failed to do so, go in, subject to motion to strike it out, because fraud inducing execution of contract was charged and court wanted to see what background was, District Court of Appeal will not hold admission of such evidence reversible error and judgment for guarantor without evidentiary support, as record showed that trial court did not base decision on such promises.

4. Guaranty 🔑25(2)

In assignee's action on defendant's guaranty of payment of codefendant's indebtedness to assignor bank on note, court properly allowed guarantor to testify that he was told by bank president that bank had security of codefendant's half interest in certain realty and legal title to automobile in support of guarantor's defense of fraud in obtaining guaranty contract by false representations.

5. Contracts 🔑94(6)

Inducement of execution of contract by promise made without intention to perform it constitutes such fraud that contract may be declared null and void, but distinction must be made between parol promise superseded by final written contract inconsistent therewith and promise made without intention to perform it, which was not inconsistent with writing, but was inducing cause thereof.

6. Guaranty ⚷20

A bank president's material false representations, made to one relying thereon in executing written guaranty of another's payment of indebtedness to bank on note, that bank had security of maker's half interest in certain realty and legal title to automobile, was sufficient to justify defense of fraud and defeat action by bank's assignee on guaranty.

7. Fraud ⚷31

A defrauded party to contract may obtain relief by cancellation or rescission of contract, action to recover compensation for injuries sustained by fraud, where no cancellation is necessary as basis for such recovery, or assertion of fraud as defense to defeat action to enforce his apparent obligation or liability under contract.

8. Stipulations ⚷14(7)

In assignee's action on written guaranty of defendant's payment of codefendant's indebtedness to assignor bank on note, admission of evidence of superior court judge's sworn written statement that he was told by guarantor that bank president said that guarantor would not be held liable on guaranty because bank held sufficient security for payment of note and warned guarantor that if he signed guaranty, containing no such representations, he had better be prepared to pay full amount of note, if codefendant did not pay it, was not error as violating parol evidence and hearsay evidence rules, in view of prior stipulation between parties' counsel that such statement would be prepared and submitted in evidence. West's Ann.Code Civ. Proc. § 1856.

9. Appeal and Error ⚷1054(1)

In assignee's action on defendant's written guaranty of payment of codefendant's indebtedness to assignor bank on note, admission in evidence of former district attorney's sworn written statement that he was told by guarantor that bank president said that guarantor would not be held liable on guaranty because bank held sufficient security for note and warned guarantor that he had better be prepared to pay full amount of note, if codefendant did not pay it, was not prejudicial to plaintiff, though statement contained some hearsay evidence, where trial court stated that, there being no jury, he would overrule objections to statement and let it be filed because he understood that parties' counsel would get together and have such statement filed.

10. Guaranty ⚷25(3)

In assignee's action on defendant's guaranty of payment of codefendant's indebtedness to assignor bank on note, evidence was sufficient to establish defense of fraud and justify trial court's conclusion that guarantor was induced to execute guaranty by bank president's false and fraudulent representations that bank held ample security for note.

◆

Edmund J. Dunning, Richmond, for appellant.

Zeff & Halley, Modesto, Breed, Robinson & Stewart, Oakland, for respondent.

SCHOTTKY, Justice.

This is an appeal from a judgment entered in favor of the respondent in an action to recover upon a continuing guaranty whereby respondent agreed to pay all past and future indebtedness of one E. J. Mitchell to the First National Bank in Richmond, the predecessor in interest of the appellant herein.

Respondent admits that he executed the written agreement on June 6, 1949, to secure a promissory note of even date of E. J. Mitchell in the principal amount of $3,500 and payable to the First National Bank in Richmond. He testified that he did so in order to enable Mr. Mitchell, a lifelong friend, to procure $1,000 which he needed immediately to prevent threatened criminal prosecution for issuing a $1,000 check which had been dishonored. However, at the suggestion of Mr. Partridge, the then president of the payee bank, the note was made in the larger amount in order to discharge three outstanding notes of smaller amounts and thereby consolidate Mr. Mitchell's total indebtedness into one written obligation due the bank. The note of June 6, 1949, was renewed by the execution on December 15, 1949, by Mr. Mitchell of a new note in like amount, but respondent does not claim to have been released from liability because of such extension of time. It is his contention that the guaranty was void because its execution was induced by the fraudulent representations of Mr. Partridge that respondent would never be held liable thereunder, that his bank held ample security for the note, and that respondent's guaranty was needed solely for the purpose of satisfying the rules of the bank examiners.

Over appellant's objection, and subject to his motion to strike, respondent and Mr. Mitchell testified that Mr. Partridge, the president of the payee bank, told respondent that "he wouldn't come back on" him and that if Mr. Mitchell didn't repay the loan, "he would do it himself."

The court, over appellant's objection, also permitted respondent to testify that at the time of the transaction Mr. Partridge told him that the bank "had security" of Mr. Mitchell's one-half interest in certain real property which was worth about $15,000. In this respect, Mr. Mitchell testified that he and his wife then owned said realty as joint owners but that he was restrained from disposing of, or hypothecating, his interest therein by a court order issued in his wife's pending divorce action. He further testified that Mr. Partridge told respondent that he "certainly would get half of it, and that would be sufficient to liquidate a $3,500 note, which had I received it, I would have done." However, Mr. Mitchell permitted a default judgment to be taken against him and the whole of the property was awarded to his wife.

Respondent also testified, over appellant's objection, that Mr. Partridge told him that the First National Bank of Richmond, appellant's assignor, held as security for any and all obligations of Edward J. Mitchell then owing or which might become owing to said First National Bank in Richmond the legal title to a 1947 Convertible Buick automobile, having a value of approximately $2,000. The fact was that the payee bank did not have this pink slip but it was in the hands of another bank of which Mr. Partridge was an officer and to which Mitchell was also indebted. The trial court found that these representations of Partridge, as president of said bank, were false and fraudulent and were made without any intention on the part of said Partridge to perform them and that respondent executed the guaranty relying on said representations, and that no valid contract of guaranty was ever entered into.

Respondent also testified that before signing the guaranty he insisted upon discussing it with Sherrill Halbert, then District Attorney of Stanislaus County, and at the time of the trial Superior Judge of said county. The reason respondent assigned for this was that he "wanted to be sure that the representations made to me were correct." Respondent did not testify as to what advice Judge Halbert tendered.

At the conclusion of first day of the trial a stipulation was entered into between counsel for respondent and Mr. Milich, the then counsel for appellant, that a written statement of Judge Halbert would be prepared and would then be admitted in evidence. A recess was taken and when the court reconvened a little over three months later appellant was represented by different counsel who objected to the introduction of Judge Halbert's statement, but the court admitted it, stating that it had been so stipulated. Judge Halbert's statement was to the effect that respondent told him that Mr. Partridge said he would not be held liable on the guaranty as the bank held more than sufficient security to assure payment of Mr. Mitchell's note. Judge Halbert stated that he pointed out that such representations were not contained in the guaranty and that if respondent signed it, "he had better be prepared to pay the full amount of the loan in case Mr. Mitchell did not pay it." Despite such forewarning, respondent executed the agreement.

In arguing for a reversal of the judgment appellant makes three major contentions: (1) The court erred in admitting parol evidence to vary the terms of the written contract of guaranty; (2) the court erred in admitting the written statement of Judge Sherrill Halbert; and (3) the evidence was insufficient to establish fraud on the part of appellant's assignor.

Appellant relies upon and cites section 1856 of the Code of Civil Procedure which reads as follows:

> "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases:
>
> "1. Where a mistake or imperfection of the writing is put in issue by the pleadings;
>
> "2. Where the validity of the agreement is the fact in dispute.
>
> "But this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in section 1860, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term agreement includes deeds and wills, as well as contracts between parties."

Appellant argues that the court erred in admitting evidence of the statements of Mr. Partridge that respondent would not be expected to pay the note and that if Mitchell didn't pay the loan he (Partridge) would pay it himself.

He states that the instant case is quite similar to Bank of America National Trust and Savings Association v. Pendergrass, 4 Cal.2d 258, 48 P.2d 659, wherein an attempt was made to contradict a specific provision in a written contract—an unconditional promise to pay money contained in a promissory note and mortgage—by pleading, as fraud, a promise, allegedly made without intention to perform, that no payment would be exacted during a particular year. In that case the court held that the defense was not available because it was a direct contradiction of the unconditional promise in the writing to pay the money on demand, and stated, 4 Cal.2d at page 263, 48 P.2d at page 661:

> "This promise is in direct contravention of the unconditional promise contained in the note to pay the money on demand. The question then is: Is such a promise the subject of parol proof for the purpose of establishing fraud as a defense to the action or by way of cancelling the note, assuming, of course, that it can be properly coupled with proof that it was made without any intention of performing it? Our conception of the rule which permits parol evidence of fraud to establish the invalidity of the instrument is that it must tend to establish some independent fact or representations, some fraud in the procurement of the instrument, or some breach of confidence concerning its use, and not a promise directly at variance with the promise of the writing. We find apt language in Towner v. Lucas' Exr., 54 Va. (13 Grat.) 705, 716, in which to express our conviction: 'It is reasoning in a circle, to argue that fraud is made out, when it is shown by oral testimony that the obligee contemporaneously with the execution of a bond promised not to enforce it. Such a principle would nullify the rule: for conceding that such an agreement is proved, or any other contradicting the written instrument, the party seeking to enforce the written agreement according to its terms, would always be guilty of fraud. * * *' "

In 38 California Law Review, 536, 538, it is stated:

> "* * * The California courts * * * will admit evidence of an oral promise made with intent not to perform it only if it is 'not inconsistent with the writing, and * * * is the inducing cause thereof.' As a result,

> a wrongdoer escapes liability where the writing conflicts with the terms of his prior oral promise made without an intention of performance, but is liable if the writing has been induced by false representations of existing facts other than the state of the promisor's mind.
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> * * * * * *
>
> "* * * In the leading supreme court case of Bank of America v. Pendergrass [4 Cal.2d 258, 48 P.2d 659], however, the court stated that evidence of any prior promise directly at variance with the writing was inadmissible, even though the promise was made without intention of keeping it."

[1, 2] We think it is clear that evidence of the promises of Partridge hereinbefore set forth could not properly be received or considered as constituting a defense to the action, for to do so would in our opinion violate the parol evidence rule. While it may be true that "where the execution of a contract has been induced by a promise made without any intention of performing it, this constitutes such fraud in obtaining the contract that it may be declared null and void", Cobbs v. Cobbs, 53 Cal.App.2d 780, 783, 128 P.2d 373, 374, yet when that promise which, because it is squarely against the terms of the writing, does by its very nature, if counted on, supersede that writing, then, even though it be made with intent on the part of the promisor that the promise will not be kept, evidence of it can neither be received nor counted upon to support a finding of fraud. Simmons v. Cal. Institute of Technology, 34 Cal.2d 264, 274, 209 P.2d 581.

[3] If the judgment in the instant case depended upon the admission of the promises of Partridge we would be required to hold that it was reversible error to admit them and that the judgment was without evidentiary support. However, it must be borne in mind that the instant case was tried by the court without a jury, and that when this evidence was offered and objected to the court stated: "I will let the matter go in subject to a motion to strike out. Fraud is charged here. I want to see what the background is." It is evident from the record that the court desired to understand the entire background and that the court was familiar with the parol evidence rule, and we are satisfied that the court did not base its decision in the case on these promises of Partridge.

[4, 5] We believe that the court properly allowed respondent to testify that at the time of the transaction Partridge told him that the bank "had security" of Mr. Mitchell's one-half interest in certain real property which was worth about $15,000, and also that Partridge told him that valuable security consisting of the legal title of an automobile worth $2,000 was held and in effect would be held by the bank making the loan to Mitchell. For as stated in Simmons v. California Institute of Technology, supra, 34 Cal.2d at page 274, 209 P.2d at page 587:

> "It is clear that 'where the execution of a contract has been induced by a promise made without any intention of performing it, this constitutes such fraud in obtaining the contract that it may be declared null and void' but that 'a distinction must be made between * * * a parol promise * * *, which by its very nature is superseded by the final writing, inconsistent with it, and a promise made with no intention of performing the same, not inconsistent with the writing, but which was the inducing cause thereof.' Cobbs v. Cobbs, 53 Cal.App.2d 780, 783, 785, 128 P.2d 373, 374. Exhibit 'A' provided that 'the royalty on said invention shall be paid to the * * * Institute, or committees or other agencies or bodies which the * * * Institute may designate. * * *' The promises of Dr. Clark were that the money, although paid to the Institute as a matter of administrative procedure, nevertheless was to be used exclusively for Impact Research. Therefore, the promise was directed to the matter of the *use* of the money, whereas the terms of the memorandum dealt with nothing more than the form of the payment of it. These promises by Dr. Clark as to the use of the

royalties were the fraudulent inducement, or motive, for the contract, but they were not incorporated in or superseded by the terms of the agreement as to payment. The two are not inconsistent or 'at variance', inasmuch as they deal with wholly different matters. It was, therefore, proper to receive parol evidence to prove the promises of Dr. Clark. [Citing cases.]"

[6, 7] The court found that these representations were false, that they were material, and that respondent relied upon them. The evidence supported these findings. These misrepresentations, which were relied upon by respondent, were sufficient alone to justify the defense of fraud which can be pleaded as a defense against the obligation contained in the guaranty and are sufficient to wholly defeat the action. Said the Supreme Court in Field v. Austin, 131 Cal. 379, 382, 63 P. 692, 693, in reversing a judgment based on promissory notes:

> " 'There are three methods by which, in cases like the present, a party defrauded may obtain relief: (1) Cancellation or rescission, etc. * * * (2) Affirmative relief by an action to recover compensation for the injury sustained by the fraud of the defendant, where no cancellation is necessary as * * * the basis of such recovery. (3) Defensive relief, whereby the fraud is set up by way of defense to defeat an action brought to enforce an apparent obligation or liability.' * * * And in the last case 'it is permissible for the defendant to recoup to a partial extent, or to defeat the action to the entire extent of the note, for fraud in the obtention of the note or in its consideration (even) where it is admitted that the party who gave the note retained the goods, and made no offer to return them.' * * * Or, in other words, 'in cases like the present fraud may be given in evidence as a defense, and will be an answer to the whole demand, or in abatement of the damages, according to the circumstances of the case.' "

[8] Appellant contends also that the admission into evidence of Judge Halbert's statement was a violation of both the parol evidence rule and the hearsay evidence rule and was prejudicial to appellant's right. However, the record shows that it was stipulated between counsel for respondent and appellant in open court that a statement of what Judge Halbert had told counsel would be prepared and that "the statement as finally approved by Judge Halbert will be submitted in evidence and given the same consideration as though he were present." When the trial resumed some three months later the statement signed and sworn to by Judge Halbert was offered and the new counsel for appellant objected to its introduction. However, the court ruled that the stipulation had been entered into and admitted the statement in evidence. We are satisfied that the record supports the court's view that the stipulation had been entered and that the court did not err in admitting it.

[9] Furthermore, we do not believe that appellant suffered any prejudice from its admission, for while the statement did contain some hearsay statements the court stated in admitting it: "There's no Jury here, and so I am going to overrule the objections, and let the statement be filed, because I know we discussed this case here with the understanding at that time, in Chambers, or wherever it was, I left here with the full understanding that counsel could get together and have Judge Halbert file a written statement with counsel, which has been done here. Now, as to the legality of the thing, it is here for what it is worth, at least one part in there. I think it is all right, but, on the legal point, I am not going on anything else but the law, and I am following the law as to hearsay rule. I know what that is. I know surely that certain part of it is hearsay, no doubt about it at all, * * *."

No other points raised require discussion.

[10] We are satisfied that in the instant case the evidence was sufficient to establish the defense of fraud, and that while the court may have been extremely liberal

in the admission of evidence there was no error which resulted in a miscarriage of justice. The court was fully justified in concluding from the evidence that respondent was induced to execute the guaranty by the false and fraudulent representations of Partridge that the bank held ample security for the loan to Mitchell and that such fraud was a complete defense to the action upon the guaranty.

The judgment is affirmed.

VAN DYKE, P. J., and FINLEY, Justice pro tem., concur.

133 Cal.App.2d 506

Ethel H. HILL, Plaintiff and Appellant,

v.

Walter C. KRAFT, Rose A. Kraft, and Lyman L. Forker, Defendants and Respondents.

No. 16280.

District Court of Appeal, First District, Division 1, California.

June 9, 1955.

Rehearing Denied July 8, 1955.

Hearing Denied Aug. 3, 1955.

Vendor's action for damages or for rescission of contract and for declaratory relief. The Superior Court, County of Alameda, Thomas J. Ledwich, J., rendered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Fred B. Wood, J., held, inter alia, that evidence, including evidence of practical construction by parties before controversy, supported finding that obligation of repair under contract was intended to rest upon vendor, not upon purchasers.

Judgment affirmed.

1. Evidence 🔑450(8)

Where contract for sale of real estate provided that vendor should retain possession of all but one apartment but that purchasers had duty to keep premises in a neat and orderly condition, language was not so clear and explicit as to exclude possibility of an intent to impose duty of repair upon purchasers, and extrinsic evidence was admissible on this question.

2. Evidence 🔑448

Vendor and Purchaser 🔑43

Where words of contract for sale of real estate are not clear and explicit, extrinsic evidence is admissible as an aid to interpretation, and construction given contract by parties before controversy is entitled to great weight.

3. Vendor and Purchaser 🔑80

In vendor's action to rescind contract or for damages and declaratory relief in respect to contract which provided that vendor should retain possession of all but one apartment and that purchasers had duty to keep premises in a neat and orderly condition, evidence, including evidence of practical construction by parties before controversy, supported finding that obligation of repair was intended to rest upon vendor, not upon purchasers. West's Ann.Civ.Code, §§ 1635–1662, 1636, 1638, 1639.

4. Appeal and Error 🔑169

Question ignored at trial could not be raised on appeal.

5. Vendor and Purchaser 🔑191

Contract for sale of property which provided that vendor should retain all apartments but one and that purchaser should occupy a specific apartment was not intended to require that purchasers should personally occupy their apartment, and they could properly sublet it.

6. Vendor and Purchaser 🔑104, 329

In vendor's action for damages or for rescission of contract for sale of real estate, evidence supported finding that purchasers had fulfilled contract requirement of maintaining premises in a neat and orderly condition.

7. Vendor and Purchaser 🔑104

In vendor's action to rescind contract for sale of real estate, evidence sustained finding that vendor had not tendered back to purchasers everything received by vendor under contract over and above benefits received by purchasers.

8. Appeal and Error ⚬═1152

Where purchasers, defendants in vendor's action for rescission, tendered checks for monthly payments during trial, and vendor retained them, trial court's finding that contract had been paid and performed by purchasers in full to date was amended by reviewing court to disclose that payment had been in form of uncashed checks rather than in cash.

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Bernal & Bernal and Dick Rockwell, Berkeley, for appellant.

Dyer B. Pierson, Berkeley, for respondents.

FRED B. WOOD, Justice.

On June 13, 1947, plaintiff entered into a contract in writing with the defendants for the sale of a house and lot in Berkeley. In September, 1952, she gave defendants a notice of rescission and in February, 1953, filed this action for rescission or damages and for declaratory relief predicated upon asserted defaults by the defendants and allegedly substantial failure of consideration to the plaintiff. From a judgment that she take nothing, plaintiff has appealed.

These are the questions: (1) did the contract obligate defendants to make repairs to the improvements; (2) did the contract obligate the defendants to personally occupy one of the apartments; (3) is the finding that defendants maintained the premises in a neat and orderly condition sustained by the evidence; (4) did the plaintiff tender to the defendants the return of everything of value she received under the contract; (5) did the checks which plaintiff received from defendants after giving notice of rescission, but did not cash, constitute payment of the monthly rentals for which they were tendered?

(1) *The question whether defendants were obligated to make repairs calls for an interpretation of the contract.* In conducting such an inquiry we must bear in mind the cardinal rules that a "contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful", Civ.Code, § 1636, that the "language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity", Civ.Code, § 1638, and that when a "contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this Title [§§ 1635–1662]." Civ.Code, § 1639.

Plaintiff promised to convey if defendants pay her $60 a month for 12 years and then make an additional final payment of $2,000.

It was "understood and agreed that the second party [defendant-vendees] shall occupy the upper rear apartment free of rent with water, gas, electricity and garbage bills to be paid by the first party [plaintiff-vendor], and that the rents of the remaining four apartments shall be retained by the first party until final payments on this contract are made, at which time all further payments of rent will accrue to the second party."

It was "further understood and agreed that the second party [defendants] shall maintain and keep the premises in a neat and orderly condition, including the yard and garden."

It was also "agreed that all taxes and assessments on said property subsequent to the date hereof, to whomsoever assessed, shall be paid by said party of the first part [plaintiff], who shall also keep the buildings on said land insured for at least the sum of Six Thousand Dollars ($6,000.00) payable in case of loss to the said party of the first part, and if any of said sums of taxes, assessments or insurance are not so paid, and are paid by said parties of the second part, the same shall be repaid by said party of the first part on demand, in like Lawful Currency, with interest at the highest rate allowed by law and no deed of said land shall be given until such last named payment shall be made."

We observe that there is here no express undertaking upon the part of the defendants to make repairs to the improvements.

Plaintiff's retention of possession of all except one apartment and her retention of the rents for the other apartments (four in number), her obligation to pay all taxes and assessments and her promise to pay the water, gas, electricity and garbage bills in respect to the apartment possessed by the defendants furnish no basis for an inference of a promise and a duty upon the part of defendants to repair.[1]

[1, 2] Plaintiff claims defendants' promise to "maintain and keep the premises in a neat and orderly condition, including the yard and garden" includes by necessary implication a promise to make repairs, including major structural repairs. The defendants do not so view it, nor did the trial court, nor do we. The words "neat and orderly condition" suggest a janitorial function which comes far short of an undertaking to replace electric wires, plumbing fixtures, and portions of floors, walls, and foundations. However, the language is not so clear and explicit as to exclude the possibility of an intent to impose a duty of repair upon the defendant-vendees. In such a situation extrinsic evidence becomes admissible as an aid to interpretation and the construction given the contract by the parties before any controversy had arisen is entitled to great weight as such an aid. MacIntyre v. Angel, 109 Cal.App.2d 425, 428–431, 240 P.2d 1047, and cases there reviewed or cited.

There is evidence that for a period of more than 5 years the parties treated the duty of repair as that of the plaintiff, not that of the defendants. This contract was negotiated and executed on plaintiff's behalf by her father-in-law acting as her duly authorized agent. He had been managing the property theretofore and continued thereafter to do so until July, 1950, which was shortly before his death in the fall of that year. He made a number of repairs on the building (plumbing and carpentry work), laid linoleum and dug a sewer ditch. He kept the basement locked and had the key. In October, 1949, because of an emergency, defendant Kraft broke the lock and thereafter had access to the basement. Plaintiff contends there is a lack of proof that her father-in-law acted as her agent after the execution of the contract. The court has found that he did so act. The power of attorney which plaintiff executed and acknowledged before a notary in June of 1946 is in evidence. It is a general power and plaintiff in her complaint alleged that he managed the property for her by virtue of this power, not limiting the period of management other than to the period "while plaintiff was residing in the State of Georgia" which commenced prior to the date of the contract of sale and continued for a considerable period of time thereafter. The father-in-law's interpretation of the contract is significant not alone because he continued as plaintiff's managerial agent but also and especially because he negotiated and executed the contract of sale on her behalf.

After his demise, the plaintiff herself for some time evinced the belief that she bore the duty of repair. In January, 1951, she wrote a certain real estate agent in Berkeley, indicating that she was contemplating having an agent to make rent collections from tenants other than the Krafts and "to handle repairs, taxes, utilities, etc." In March of that year, in response to a request from defendant Walter Kraft that plaintiff repair the ceiling and roof over a kitchen, she indicated she had retained the services of this real estate agent and suggested that Kraft take up with that agent the matter of roof repair.

[3, 4] We conclude that the trial court correctly found that the obligation of repair rested upon the plaintiff, not upon the defendants.[2]

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[1] The needed repairs were substantial in character "including repair of dilapidations to walls, floors and steps, in the approximate sum of $1500.00, painting and decorating in the approximate sum of $600.00, repair of wiring in the approximate sum of $535.00, and plumbing repairs in the approximate sum of $400.-00," as found by the court.

[2] A word should be said concerning a contention of the plaintiff that defendants in a cross-complaint alleged they had possession of the premises; that plain-

[5] (2) *Did the contract require defendants to personally occupy their apartment?* The trial court properly found that it did not. The agreement that the vendees "shall occupy the upper rear apartment on said premises free of rent" etc.—is an expression more in the nature of a right or privilege than of a duty. The argument that it expressed a duty because of the obligation to keep the premises "in a neat and orderly condition" is not persuasive because the janitorial function was not one which the vendees must personally perform. They could employ other persons to do it, being responsible to the plaintiff for its being properly done. The parties themselves so interpreted the contract. There was evidence that both plaintiff and her agent were aware of a period of time during which the defendants did not live on the premises, subletting their apartment to others who performed on defendants' behalf this janitorial function. Neither plaintiff nor her agent objected to that arrangement.

[6] (3) *The finding that defendants maintained the premises in a neat and orderly condition* is supported by substantial evidence.

There was evidence that defendants and their subtenants mowed and watered the lawn, kept the weeds down and generally looked after the yard; that they cleaned the front porch, stairways and halls when necessary, and that the condition of that portion of the premises had improved since they took over the responsibility of maintenance. There was evidence that the garbage situation was unsatisfactory from the accumulation of refuse caused by the insufficient capacity and state of disrepair of the garbage cans. However, plaintiff's agent had assumed the responsibility of removing the garbage and defendants considered that the sole responsibility of plaintiff. The basement was used for the storage of furniture and other articles which the fire inspector deemed a fire hazard, but none of the property in the basement belonged to defendants. Until defendant Kraft broke into the basement it was under the sole control of plaintiff's agent. There was testimony that one of the defendants' subtenants attempted to keep it orderly.

[7] (4) *The finding that plaintiff did not tender back to defendants everything received by her under the contract over and above benefits received by defendants* is supported by the evidence that while the use and occupancy of the apartment assigned to defendants was worth the $60 per month which they paid, it was a fact that they made extensive improvements in that apartment. The value of those improvements and the value of defendants' services in keeping the premises in a neat and orderly condition would seem properly reimbursable. Plaintiff tendered defendants no reimbursement of any kind. Moreover, the lack of cause for rescission renders immaterial the question whether plaintiff made a proper tender.

[8] (5) *The finding that consideration for the contract had been "paid and performed" by the defendants in full to the 17th of September, 1953,* embraced rental payment checks for the period following September 18, 1952 (the date of plaintiff's notice of rescission) which defendants delivered and plaintiff received without objection to the form of the tender, but did not cash.

During the trial plaintiff's counsel directed attention to these checks, saying they were twelve in number, each for $60, received after plaintiff gave her notice of rescission, and that "I am holding the checks, and I am willing to give them to Mr. Pierson [defendants' counsel] or keep them. That was the ordinary method of paying and the

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tiff's answer admitted that allegation; wherefore, any finding inconsistent therewith is necessarily erroneous.

That feature of the pleadings seems to have been ignored at the trial. The contention comes too late upon appeal.

Plaintiff in her complaint pleaded the contract in haec verba and defendant admitted its execution. At the trial, as we read the record, the parties treated the question of "possession" as turning upon the proper interpretation of this contract, an attitude necessarily predicated upon an assumption that it was an issue in the case.

tenders were made but not accepted." Defendants' counsel responded: "That may be stipulated."

Plaintiff fears that if she loses any of these checks or if the bank refuses payment because of delayed presentation, the finding that defendants have "paid and performed" will operate as a determination that defendants have paid in cash. No such effect was, of course, intended. If plaintiff had brought this to the attention of the trial court the language of this finding doubtless would have been modified. Accordingly, now that the question has been brought to attention we insert in that finding clarifying words calculated to assure avoidance of the feared res judicata effect, as the trial judge would have done if it had been brought to his attention.

Finding of Fact No. IX is amended by striking out "1953" and inserting in its place "1952, and was duly and properly tendered thereafter to the 17th day of September, 1953".

The judgment is affirmed; defendants will recover their costs upon this appeal.

PETERS, P. J., and BRAY, J., concur.

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133 Cal.App.2d 695

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Claudell FORD, Jesse Lee Randolph and Ulysees Grant Leakes, Defendants,

Claudell Ford and Ulysees Grant Leakes, Defendants and Appellants.

Cr. 5322.

District Court of Appeal, Second District, Division 3, California.

June 20, 1955.

Prosecution for kidnaping for purpose of robbery, robbery and burglary. Two defendants were found guilty as charged in each count, and appealed from the judgment of the Superior Court of Los Angeles County, Clement D. Nye, J., and from an order denying motion for new trial. The District Court of Appeal, Vallée, J., held that it was, under the evidence, error by the trial court to refuse an instruction that jury should view with caution the testimony of any witness which purports to relate an oral admission of defendant or oral confession by him, but that, in view of entire record, the error was not prejudicial.

Affirmed.

1. Criminal Law 🔑564(2)

Venue is question of fact which prosecution must prove by preponderance of evidence, but not beyond reasonable doubt.

2. Criminal Law 🔑304(6)

In prosecution for kidnaping for purpose of robbery, robbery and burglary, courts would take judicial notice that Bell, California, was in County of Los Angeles, in which county defendants were informed against, tried and sentenced.

3. Criminal Law 🔑564(3)

Venue can be established by circumstantial evidence.

4. Criminal Law 🔑564(3)

In prosecution for kidnaping for purpose of robbery, robbery and burglary, circumstantial evidence was sufficient to establish venue.

5. Criminal Law 🔑862

In prosecution for kidnaping for purpose of robbery, robbery and burglary, jury was justified, under facts of case, in concluding as jurors what they well knew as men and women, that streets named by some of the witnesses meant certain well known and so-named streets in the County of Los Angeles.

6. Burglary 🔑41(1)

Kidnapping 🔑5

Robbery 🔑24(1)

Evidence sustained conviction of two defendants on charges of kidnaping for purpose of robbery, robbery and burglary.

7. Criminal Law 🔑781(6), 1173(2)

In prosecution for kidnaping for purpose of robbery, robbery and burglary, it was error under evidence, to refuse requested instruction that jury should view with caution testimony of any witness purporting to relate oral admission of defendant or an oral confession by him, but in view of entire record, error was not prejudicial. West's Ann.Code Civ.Proc. § 2061, subd. 4.

8. Criminal Law ⚿1162

Test of whether error is prejudicial is whether, on review of entire evidence, it can be said that jury could reasonably have reached contrary verdict if such error had not been committed.

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Earl C. Broady and Rufus W. Johnson, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., and Marvin Gross, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

Ford and Leakes were charged, with one Randolph, in three counts with kidnapping for the purpose of robbery, robbery and burglary. Ford and Leakes were found guilty by a jury as charged in each count. Randolph was acquitted on all counts. Ford and Leakes, referred to as defendants, appeal from the judgment and the order denying their motions for a new trial.

Defendants' specifications of error are: 1. Venue was not established. 2. The evidence was insufficient to sustain the convictions. 3. The court erred in refusing to give their requested cautionary instruction with respect to oral admissions of a defendant.

The Clock Drive-In restaurant was located in Bell. In the early morning of March 15, 1954 two janitors were on the premises. About 5:30 that morning three colored men entered the restaurant. At least two of them were armed with revolvers. Each wore a baseball-type cap and had his face covered with a handkerchief. They tied up the two janitors and then removed a safe weighing about 1,000 pounds and containing about $4,700 from the building. Platt, a milkman, arrived at the restaurant on his regular run. One of the men with a gun ordered him to assist in loading the safe onto a black panel truck parked at the rear entrance. As the safe, mounted on a dolly, was skidded across the back of the truck, the dolly left skid marks. There was a Cadillac emblem affixed to the rear bumper of the truck. The men put Platt in the boiler room and left with the truck about 5:45 a. m. Platt released the janitors and telephoned the police. When officers arrived they found a torn part of a temporary license on the ground in tracks left by the tires of the truck.

At 7:00 a. m. that morning defendant Ford, wearing a baseball-type cap, was apprehended by the police as he was driving the panel truck in a westerly direction on 92nd Street near its intersection with Hoover Street. He had in his pocket a handkerchief which was identified by one of the janitors as the one which covered the face of one of the three robbers. The officers asked Ford who was with him "on the burglary." Ford replied he could not tell "because he had certain principles and he didn't go that route." Ford told two officers he would return all the money that was taken plus $1,500 if they would turn him loose.

Defendant Leakes was arrested just after midnight on March 16. He had $450 on him and appeared to be intoxicated. He told the officers he got the money "from scratching," which means "playing the horses." He was kept in custody, and on the 18th was taken by the officers to his apartment which was unlocked. The officers found two money wrappers in a wastebasket in the apartment which were identified as wrappers which had been filled with money and placed in the Clock Drive-In safe. They asked Leakes where he had obtained the wrappers. He refused to answer. An officer asked him why he did not answer. He replied that "if he answered that question he would get 15 years for it."

[1–5] Venue was established. Venue is a question of fact which the prosecution must prove by a preponderance of the evidence, not beyond a reasonable doubt. People v. Megladdery, 40 Cal.App.2d 748, 764, 106 P.2d 84. Platt testified that on March 15, 1954 the Clock Drive-In was located at 7000 Atlantic Boulevard in Bell, California. There was no direct evidence that Bell, California, is in the County of Los Angeles, in which county defendants were informed against, tried, and sentenced. The courts take judicial notice that Bell, California, is in the County of Los Angeles. Bruce v. Bruce, 121 Cal.App.2d 661, 663–664, 263 P.2d 895. Defendants argue that the failure of the court to instruct the jury that Bell is in the County of Los Angeles precludes a finding that the venue of the action is in that county. The conclusion does not necessarily follow. Venue can be established by circumstantial evidence. People v. McGregar, 88 Cal. 140, 143–144, 26 P. 97; People v. West, 34 Cal.App.2d 55, 59, 93 P.2d 153. There was evidence that Bell is in California. The officers who arrested Ford were police officers of the City of Los Angeles. One of the officers who questioned Ford testified he was a Deputy Sheriff of the County of Los Angeles. Leakes' apartment was in Los Angeles. The chemist who examined the panel truck and testified with respect to it was employed in the office of the Sheriff of the County of Los Angeles. The officers who arrested Randolph on the day of the robbery were police officers of the City of Los Angeles. One of them testified Randolph's home was in Los Angeles. Without going further into detail, it is enough to say that the evidence directly and logically points to the single inference that the offenses were committed in the County of Los Angeles. See People v. De Soto, 33 Cal.App.2d 478, 480, 92 P.2d 466. As said by Mr. Presiding Justice White in People v. West, supra, 34 Cal.App.2d 55, at page 59, 93 P.2d 153, at page 155: "Under the facts of this case the jury were justified in concluding, as jurors, what they well knew as men and women, that the streets named by some of the witnesses meant certain well known and so named streets in the" County of Los Angeles.

[6] The evidence was sufficient to sustain the verdict. Within less than an hour and a half after the offenses were committed, Ford was driving the truck that was used to carry the safe away. He was wearing a baseball-type cap and was carrying a handkerchief used by one of the robbers. He offered to return all the money taken plus $1,500 if he was released. He told the court and jury an improbable story as to his movements on the morning of the robbery and with respect to his possession of the truck, which the jury could have concluded was an intentional fabrication indicating a consciousness of guilt. He had previously been convicted of burglary on one occasion and of attempted burglary on another. He met Leakes in San Quentin. Although Leakes testified, he did not go into his whereabouts at the time the offenses were committed. He had no explanation for the presence of Clock Drive-In money wrappers in the wastebasket in his apartment. He was unemployed. His explanation of the possession of $450 at the time of his arrest was that he was bookmaking and had accepted bets totaling that amount that day, March 15; that he was a traveling bookmaker going from house to house. He could not name a single person from whom he had accepted a bet or a single horse that anyone had bet on. He said he had burned the tickets he had made out when he accepted bets before the officers arrested him. He made inculpatory statements to the police. The jury could reasonably have inferred from all the evidence that defendants were two of the perpetrators of the offenses charged.

[7, 8] The court declined to give this instruction requested by defendants:

> "The law of this state admonishes you to view with caution the testimony of any witness which purports to relate an oral admission of the defendant or an oral confession by him."

Defendants assert prejudicial error. It was error to refuse to give the instruction. Code Civ.Proc. § 2061(4); People v. Cornett, 33 Cal.2d 33, 39–40, 198 P.2d 877; People v. Bemis, 33 Cal.2d 395, 398–399, 202 P.2d 82; People v. Deloney, 41 Cal.2d 832, 840, 264 P.2d 532. The question is whether the failure to give the instruction was prejudicial in view of the entire record. We think not. The test of prejudice is whether on a review of the entire evidence it can be said that the jury could reasonably have reached a contrary verdict. From the entire record it is not reasonable to believe that if the cautionary instruction had been given, the jury would have disregarded the testimony relative to the admissions, accepted the far-fetched testimony of defendants at the trial, and have come to the conclusion that there was a reasonable doubt as to the guilt of either defendant. It is highly improbable that any different verdict would have been rendered by the jury had the omission to give the instruction not occurred.

The judgment and the order denying a new trial are affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

133 Cal.App.2d 725

Samuel BRIGHT and Annie Wilson Bright, Plaintiffs, Cross-Defendants and Appellants,

v.

K. GINESTE and Lawrence Walter, also known as L. H. Walter, Defendants, Cross-Complainants and Respondents.

Civ. 16294.

District Court of Appeal, First District, Division 2, California.

June 21, 1955.

Rehearing Denied July 21, 1955.

Hearing Denied Aug. 17, 1955.

Action by lessees for conversion of personal property, which had been mortgaged to lessors as security for rent and which was used in connection with cleaning and dyeing business, which had been purchased from the lessors. From adverse judgment of the Superior Court, San Mateo County, Gregory Maushart, J., the lessees appealed. The District Court of Appeal, Kaufman, J., held that evidence sustained finding that lessees had abandoned and surrendered the personal property when one of lessees told his foreman that he was quitting and to give the keys to one of the lessors, and that the lessees had executed a written cancellation of the lease.

Judgment affirmed.

1. Landlord and Tenant ⚷161(3)

In action by lessees for conversion of personal property used in connection with cleaning and dyeing business, which had been purchased from lessors, evidence sustained finding that lessees had abandoned and surrendered personal property when one of lessees gave keys to plant to his foreman for delivery to one of lessors and said he was through, and that lessees had executed a cancellation of the lease.

2. Appeal and Error ⚷1010(1)

Reviewing court is bound by finding of trial court which is supported by substantial evidence.

3. Chattel Mortgages ⚷240

Where lessees, who gave a mortgage on personal property used in connection with cleaning and dyeing business as security for rent, surrendered personal property to lessors following financial difficulties, lessors-mortgagees acquired estate of lessees-mortgagors, the mortgage interest was merged in the fee, the mortgage extinguished and title to property vested in lessors.

4. Evidence ⚷441(1)

Parol evidence is admissible to show a collateral agreement if it does not vary the terms of the written agreement.

5. Evidence ⚷419(9)

In action by lessees for conversion of personal property, which was used in connection with cleaning and dyeing business and which had been surrendered prior to execution of written cancellation of lease following financial difficulties, it was proper to show that consideration for cancellation of lease was the surrender to the lessors of the mortgaged personal property. West's Ann.Civ.Code, § 1625.

6. Fixtures ⚷27(2)

Where lessees surrendered mortgaged personal property to lessors and executed written cancellation of lease, lessees could not avail themselves of law concerning fixtures in asserting claim to the personal property. West's Ann.Civ.Code, § 1019.

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Louis Ferrari, San Francisco, for appellant.

Norman S. Menifee, Redwood City, for respondent.

KAUFMAN, Justice.

This is an appeal from a judgment in favor of defendants in an action by plaintiff for the alleged conversion of personal property. Defendants also filed a cross-complaint but having presented no evidence in support thereof, judgment was entered against them on the cross-complaint.

The complaint herein is for conversion of personal property of the alleged value of $80,000. It was alleged that appellants were lessees and respondents lessors of certain real property in the City of San Carlos, California, and that appellants and certain other parties executed a chattel mortgage on the aforesaid personal property for the purpose of securing rentals under the lease, that said lease was cancelled by respondent Gineste with the consent and approval of respondent Walter on August 22, 1950, and that said cancellation released appellants from all liabilities under said lease. It was further alleged that on September 27, 1950, appellants demanded that defendants as mortgagees deliver a certificate that the mortgage of chattels had been discharged by the cancellation of the lease, or enter such satisfaction of record, which requests defendants decline and still decline to fulfill. Respondents in their answer alleged that prior to the execution of the cancellation of the lease, appellant vacated and abandoned all of the personal property referred to and described in the complaint. For another and separate defense it was alleged that in consideration of the release of claims for further rentals, claims for taxes and other obligations, appellants agreed to relinquish any claim to any personal property located on the leased premises, and particularly all of the personal property described in Exhibit A attached to appellants' complaint.

Defendants and respondents Gineste and Walter, had been for many years engaged in the cleaning and dyeing business as a corporation, the San Carlos Cleaning & Dyeing Works, Inc. The corporation owned real property in San Carlos, five retail stores, rolling equipment, and all the fixtures and personal property used in the operation of the business, as well as the good will that had been built up through the years. On October 17, 1947, this business, the retail stores and all fixtures, personal property and equipment, together with the good will of said business, were sold to M. D. Rutledge for $100,000. A lease of the real property was agreed upon, and before the completion of the transaction, appellant Samuel Bright purchased a one-half interest in the business, personal property, name and good will purchased by Rutledge from the corporation.

On or about August 21, 1949 a new lease for a ten-year term providing for a total rent of $70,000 was entered into between respondents as lessors and Rutledge as lessee. Subsequently, on or about February 4, 1950, this lease was transferred from Rutledge to appellant Bright upon his purchase of Rutledge's interest in the business, personal property, fixtures, equipment and assets of the business. Appellant testified that he paid $20,000 in cash and assumed an indebtedness of more than $50,000 to complete this transaction.

In June 1950, appellants negotiated with certain parties who were to acquire a half interest in the business, and together with them appellants executed a chattel mortgage on the personal property, fixtures and equipment of the San Carlos Cleaners to secure the rentals to become due under the lease. Appellant Bright's negotiations for a sale of a half-interest in the business fell through, and he continued to operate as sole proprietor.

Appellant Bright and Rutledge had both operated the business at a loss, and in mid-August, 1950, appellant became so financially involved that further operation appeared impossible. He was on a cash basis with his employees and was unable to meet other indebtedness. Rent under the lease was paid up until August 20, 1950, but there were personal property taxes in the sum of more than $600 which were unpaid and to which a ten percent penalty would be attached on September 1, 1950.

There was testimony that in August, 1950, the business consisted only of the main plant, equipment was run down, and the retail stores had all been closed.

On the morning of August 22, 1950, appellant Bright told his foreman, Mr. Lerman, that he was "through", and told Lerman to telephone respondent Gineste and to so advise him. Bright delivered the keys of the plant to Lerman, took his personal belongings and left the premises. Appellant Bright's testimony was in conflict with this version of the events on the morning of August 22, 1950. He testified that Mr. Gineste and Mr. Lerman came into his office and that Mr. Gineste produced a paper and demanded that he sign it, saying that it would release him from the lease. He said that he asked who had drawn it up, was advised that an attorney had drafted it, that he signed it, and that there was no further conversation. He stated that his intent in signing the release was solely to cancel the lease and that he did not intend to surrender or abandon the personal property.

Mr. Lerman stated that on that morning Bright went into his office, put some papers in his brief case, then called him in and asked him to call Mr. Gineste and tell him to take the place over, as he was giving it up. He gave him the key to deliver to Gineste, and left the premises immediately. Respondent Gineste arrived about an hour later, and Lerman told him what had occurred. Some time later in the day the document referred to as the "cancellation of the lease" was prepared and was signed, according to Lerman and Gineste in the afternoon of August 22 at the home of Mr. Bright's daughter in Redwood City with Bright, Lerman and Gineste present.

Mr. Lerman testified that when they met at the home of appellants' daughter Gineste asked appellant why he was giving up the plant and he replied that things were going too far in the hole, he could see no way out, and would just as soon not owe any more money on the lease, that he would sign the paper if Gineste would release him from the balance on the lease, and he would in turn give Gineste the equipment and the mortgage. Lerman said he did not see appellant again until he asked him to testify in his behalf, but that he asked him how he could sue for the equipment when he had given it away in Lerman's presence.

Appellant Bright testified that he made an oral demand for the personal property about one week after August 22, 1950, but this was denied by Gineste. A written demand therefor was made on September 27, 1950.

The property and equipment was sold to a partnership of which respondent Gineste was a member, for $12,000 but was encumbered to the extent of $7,000 which was paid off by Gineste. He stated that the property and equipment installed were worth $12,000 but if removed would be worth only $5,000.

[1] The trial court found that appellant Samuel Bright surrendered the premises to defendants and vacated and abandoned them and relinquished and abandoned the personal property therein on the morning of August 22, 1950; that the reasonable value of the abandoned property was $12,000 and that it was encumbered to the extent of $6,000. It was further found that appellant Bright through his attorneys on September 27, 1950, made a demand on respondents for release of the chattel mortgage and delivery of the personal property which had previously been abandoned by appellant; that appellant at the time of the surrender of the property was under obligation to pay rentals under the lease for a period of approximately nine years, and that he was otherwise in financial difficulties; that a cancellation of the lease was executed by appellant Bright and respondent Gineste in the afternoon of August 22, 1950, after the actual abandonment and surrender previously mentioned.

The essence of appellants' argument on this appeal is that there is no evidence to support the trial court's finding that an abandonment and surrender of the personal property occurred on the morning of August 22, 1950, and that only one transaction is here involved, that of the execution of the release which contains no reference to the personal property. The trial court found that there were two transactions on August 22, the abandonment and surrender of the property by appellant Bright in the morning and the afternoon meeting of the parties at which respondent Gineste presented the written release which he had prepared following the surrender, to appellant Bright for his signature. This finding finds support in the testimony of the witness Lerman.

[2] Appellants' evidence at the trial was that Gineste walked into his office at the plant in the morning and asked him to sign the release. The testimony of the other witnesses, however, which the trial court accepted as true, was that Bright walked out of the plant early in the morning, gave the keys to his foreman for delivery to Gineste, said he was through, collected his personal papers and left. The afternoon meeting was arranged by respondent to secure the written release. Respondents note that although they testified that the afternoon meeting was held at the home of Mr. Bright's daughter in Redwood City, Bright did not call her as a witness to deny that such meeting took place, although he now contends that the transaction was completed in the morning at the plant in San Carlos. There is clearly evidentiary support for the finding that there were two distinct transactions on August 22, 1950. Also well supported in the evidence are the findings that the value of the property surrendered was $12,000 subject to encumbrances in the sum of $6,000; that appellant Bright was in financial difficulties, and that he was at the time of the surrender, still under obligation to pay rentals under the lease for a period of approximately nine years. Appellant's statement that they were deprived by this judgment of property worth nearly $100,000 is simply an argument that the trial judge should have believed their testimony instead of respondents. That conflict has been resolved against them, and this court is bound by the finding of the value of the property which is supported by substantial evidence.

[3] Appellants argue that the written cancellation of the lease terminated the mortgage, for when a mortgagee releases the grantee, that also discharges the mortgagor's liability. Glenn on Mortgages, Vol. II, p. 1203, sec. 280. Singleton v. Hartford Fire Insurance Co., 127 Cal.App. 635, 642, 16 P.2d 293, is cited, wherein it is held that a mortgagee cannot foreclose upon the property independently of enforcing payment of the promissory note, and when the promissory note is cancelled or surrendered, no right of foreclosure remains. Appellants argue that this rule is applicable to the instant case. However, if the finding is supported that there was a surrender of the personal property on the morning of August 22, 1950, then the respondent mortgagees acquired the estate of the mortgagors, the mortgage interest was merged in the fee, the mortgage extinguished, and title vested in respondents. Anglo-California Bank v. Field, 146 Cal. 644, 80 P. 1080; Jensen v. Burton, 117 Cal.App. 66, 3 P.2d 324. The trial court here did find that there was relinquishment and surrender of the personal property on the morning of August 22, 1950.

Apparently the findings use the term "abandonment" not in the technical legal sense but as synonymous with relinquishment or surrender. For to constitute an abandonment in the strict legal sense there must be a parting with title that is unilateral, the owner must leave the property free to the acquisition of whoever wishes to claim it, and indifferent as to what may become of it. 1 Cal.Jur.2d p. 3, sec. 3. A transfer of property from one person to another cannot be effected by abandonment, and abandonment cannot be made to a particular individual. A relinquishment by one person to another is not an abandonment. See, 1 Cal.Jur.2d p. 5, sec. 4 and cases there cited. In the opinion of the trial court there is a reference to the abandonment of the premises even though the trial court refers to the evidence by which this was accomplished as the direction of the foreman by appellant Bright to deliver the keys to respondent and advise him that he was through. Again, in that opinion the trial court speaks of the "surrender of the personal property that was secured by the chattel mortgage." The finding that there was a "surrender" of the personal property herein is sufficient to support the judgment rendered. That surrender was accomplished by appellant Bright through his foreman by instructing him to call respondent Gineste "to come in and take the place over, as he was giving it up." This language and the delivery of the keys to the foreman for transfer to the respondent was subject to the construction that a delivery of the entire dry cleaning plant then in operation, was intended to be made to Gineste. That Gineste accepted such delivery from the agent is evidenced by his conduct in calling his attorney and having a written cancellation of the lease prepared on the same day.

[4, 5] It is urged that oral conversations before and at the time of the execution of the cancellation of the lease were ineffectual to change the terms of the written cancellation of lease. Appellants cite sec. 1625, Civil Code, which provides that the execution of a contract in writing supersedes all negotiations concerning its matter which preceded or accompanied the execution of the instrument. But, as respondents point out, the instrument of cancellation makes no reference whatever to the personal property which the trial judge found had been previously surrendered on the morning of August 22. Parol evidence is admissible to show a collateral agreement if it does not vary the terms of the written agreement. Parker v. Meneley, 106 Cal.App.2d 391, 402, 235 P.2d 101; O'Melia v. Adkins, 73 Cal. App.2d 143, 166 P.2d 298. Here the transaction involving the surrender of the personal property had occurred and was complete some hours prior to the execution of the written document. Also it was proper to show that the consideration for the cancellation of the lease was the surrender of the mortgaged property to respondents.

[6] Appellants maintain that the leaving of personal property in leased premises after termination of the lease does not constitute abandonment of such property. A tenant in this state is given the right by statute to remove fixtures. Civil Code, sec. 1019. Even where a tenant is dispossessed he has the right to remove fixtures. McAdam on Landlord and Tenant, 5th Ed., p. 722, par. 168. Furthermore, appellants say that the lease by its terms provided that upon termination, the lessee might remove his personal property. Of course, in the present case, the lease still had nine years to run before it would terminate, and appellants had not faithfully performed all the conditions and covenants on their part that were to have been faithfully performed. Respondents call attention to paragraph 3 of the lease which provides that "if the lessee abandons, vacates or surrenders the premises during the term, personal property left on the premises shall be deemed abandoned at the lessor's option except such property as may be mortgaged to the lessors." Since the property herein was mortgaged to the lessors, that paragraph of the lease does not aid the respondents' contention that they would have acquired title to this property in any event by the terms of the lease.

However, the arguments in the briefs concerning the law as to fixtures and the general rules pertaining to personal property of tenants appear to be irrelevant in view of the fact that the personal property herein which was mortgaged by appellants to respondents was found to have been surrendered and given to respondents prior to the cancellation of the lease.

Respondents gave ample consideration to appellants for the surrender and gift of said mortgaged property when they cancelled the lease and released appellants from all obligation thereunder.

The record before us discloses ample evidence to support the findings and judgment of the trial court. No prejudicial error appearing in the record the judgment must be affirmed.

Judgment affirmed.

NOURSE, P. J., and DOOLING, J., concur.

133 Cal.App.2d 672

Robert L. ROSA, Plaintiff and Appellant,

v.

PACIFIC GAS & ELECTRIC CO., Defendant and Respondent.

Civ. 16339.

District Court of Appeal, First District, Division 1, California.

June 20, 1955.

Rehearing Denied July 20, 1955.

Hearing Denied Aug. 17, 1955.

Action to recover for injuries sustained by plaintiff as result of intersection collision between his motorcycle and a taxicab, allegedly caused by negligent parking of defendant's truck. The Superior Court, City and County of San Francisco, Albert C. Wollenberg, J., entered judgment of nonsuit and plaintiff appealed. The District Court of Appeal, Patterson, J. pro tem., held that where driver of taxicab approaching intersection did not observe plaintiff who was plainly visible or having observed him decided he could proceed safely without slowing down and yielding right of way as required, and where it was taxicab driver's duty to slow down and yield right of way to plaintiff who had entered intersection but instead he traveled at unabated speed striking plaintiff's vehicle, taxicab driver's failure to lessen speed was sole proximate cause of plaintiff's injuries, and his failure to yield right of way was not attributable to defendant whose truck was illegally parked at intersection.

Judgment affirmed.

Peters, J., dissented.

1. Automobiles ⚷242(1)

Under statute providing that certain parking restrictions should not apply to vehicles owned or operated by public utility when stopped or parked at site of work involving construction, operation, removal, or repair of utility on or adjacent to street or highway, fact that vehicle was employed in one of the activities enumerated is affirmative defense which must be specially proven. Vehicle Code, §§ 586, 588, 592.1.

2. Automobiles ⚷173(3)

Where defendant in automobile accident case failed to show for what purpose its truck was illegally parked, it could not claim any exception from parking restrictions by virtue of statute rendering inapplicable parking restrictions to public utility vehicles when used in construction or repair of utility. Vehicle Code, §§ 586, 588, 592.1.

3. Negligence ⚷136(25)

Ordinarily proximate cause is question of fact, but when facts are undisputed and only one conclusion may be drawn from them, it becomes question of law.

4. Automobiles ⚷171(13)

Where automobile has actually entered intersection before other approaches it, driver of first automobile has right to assume that he will be given right of way and be permitted to pass through intersection without danger of collision, and he has right to assume that driver of other automobile will obey law, slow down, and yield right of way, if slowing down be necessary to prevent collision. Vehicle Code, § 550(a).

5. Automobiles ⚷201(2, 5)

Where driver of taxicab approaching intersection did not observe plaintiff who was plainly visible or having observed him decided he could proceed safely without slowing down and yielding right of way as required, and where it was taxicab driver's duty to slow down and yield right of way to plaintiff who had entered intersection but instead he traveled at unabated speed striking plaintiff's vehicle, taxicab driver's failure to lessen speed was sole proximate cause of plaintiff's injuries, and his failure to yield right of way was not attributable to defendant whose truck was illegally parked at intersection. Vehicle Code, §§ 511, 550(a), 586, 588, 592.1, 670.

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Rettig & Dunn, San Francisco, for appellant.

Robert H. Gerdes, William S. Love, San Francisco, for respondent.

PATTERSON, Justice pro tem.

Plaintiff appeals from a judgment of nonsuit in an action to recover for personal injuries. At the time of the collision which forms the basis of this action the plaintiff was traveling north on Sansome Street in San Francisco. He was operating a three-wheel parcel carrier motorcycle which is 5 or 6 feet in length. As he approached the intersection of Sacramento Street he observed a truck owned by the defendant, Pacific Gas & Electric Company, which was parked on Sacramento Street at right angles to the easterly curb and within the southerly painted crosswalk of Sacramento Street. The truck was 20 feet long and extended approximately to the middle of Sansome Street. Plaintiff slowed down to 5 to 10 miles per hour as he passed the front of the truck and entered the intersection. When he was 5 feet into the intersection he observed a taxicab traveling westerly on Sacramento Street. At that time the cab had not entered the intersection and was approximately 6 feet from the extended easterly curb line of Sansome Street. The cab was traveling from 20 to 25 miles per hour. The plaintiff could have stopped within 2 to 10 feet. However, he concluded it was safe to proceed and that the cab would slow down and let him through. Then he looked away, and when he arrived at a point three-fourths of the way across the intersection, he again looked at the cab which was 10 feet from him and had not slowed down. The plaintiff accelerated his speed and at a point approximately 21 feet from where he first observed the cab the right front bumper of the cab struck the rear of the motorcycle. At the time of the impact the cab was still traveling at least 20 to 25 miles per hour and had traveled 25 feet from the point where the plaintiff first observed it. The plaintiff received personal injuries. The owner of the taxicab, who was joined as a defendant, paid the plaintiff the sum of $1,750 in consideration for a covenant not to sue. The action proceeded against the defendant Pacific Gas & Electric Company alone. Plaintiff claims that negligent parking of defendant's truck was a proximate cause of the injuries sustained. At the conclusion of the plaintiff's case the court granted a nonsuit on the grounds that there was no causal connection between the parking of the defendant's truck and the collision. The only evidence offered by the plaintiff as to the cause of the accident was his own testimony.

[1, 2] We are of the opinion that, under the state of the evidence, the defendant's truck, as urged by plaintiff, was negligently parked in violation of section 586 of the California Vehicle Code which prohibits parking in a crosswalk and section 588 which requires parallel parking. Defendant pleaded as an affirmative defense, and here contends, that it was exempted from the parking restrictions by the provision of section 592.1 of the Vehicle Code. This section provides that these restrictions shall not apply to a vehicle owned or operated by a public utility "when such vehicle is stopped, standing or parked at the site of work involving the construction, operation, removal or repair of such utility or public utility property or facilities upon, in, over, under or adjacent to a street or highway." To bring a defendant within the provisions of this section it must be shown that the vehicle at the time of the accident was employed in one of the activities enumerated in the section. It is an affirmative defense which must be specially proven. Isaacs v. City & County of San Francisco, 73 Cal.App.2d 621, 624, 625, 167 P.2d 221. The purpose for which the truck was parked is not disclosed by the record. Defendant cannot therefore claim any exemption from the parking restrictions.

[3, 4] This brings us to the question of proximate cause. Ordinarily proximate cause is a question of fact. However, when the facts are undisputed and only one conclusion may be drawn from them, it becomes one of law. Warner v. Santa Catalina Island Co., 44 Cal.2d 310, 282 P.2d 12; Card v. Boms, 210 Cal. 200, 202, 291 P. 190; Traylen v. Citraro, 112 Cal.App. 172, 175, 297 P. 649. The plaintiff observed the truck. He slowed down and entered the intersection at a low speed. When he had passed the defendant's truck and was 5 feet into the intersection he first observed the taxicab which had not as yet entered the intersection. He testified that he could have stopped within 2 to 10 feet. He ob-

served the position and speed of the cab and determined it was safe to proceed. Having entered the intersection first the plaintiff had the right of way, Vehicle Code, § 550(a). He had the right to assume that the taxicab would slow down and yield the right of way as he proceeded through the intersection. The rule is stated in Couchman v. Snelling, 111 Cal.App. 192, 195, 196, 295 P. 845, 847, as follows: "Where a car has actually entered an intersection before the other approaches it, the driver of the first car has the right to assume that he will be given the right of way and be permitted to pass through the intersection without danger of collision. He has a right to assume that the driver of the other car will obey the law, slow down, and yield the right of way, if slowing down be necessary to prevent a collision. Keyes v. Hawley, 100 Cal.App. 53, 60, 279 P. 674." Clearly the plaintiff's determination at this point to proceed rather than slow down or stop was not influenced by the position of the defendant's truck.

The final question which presents itself is whether the position of the truck influenced the conduct of the driver of the cab. He was not called as a witness. The plaintiff has cited a number of cases which were decided on conflicting testimony. The factual situations in these cases are distinguishable from the present one, and it would serve no purpose to analyze them. The diagram introduced by plaintiff indicated that buildings which extended to the sidewalk were located on all four corners of the intersection. The cab was approaching an obstructed intersection as defined by Vehicle Code section 511 regardless of the presence of the defendant's truck. That section provides, in effect, that as the cab driver, during the last 100 feet of his approach to the intersection, did not have a clear and unobstructed view for a distance of 100 feet of the street upon which plaintiff was driving, the cab driver was required to reduce his speed to 15 miles per hour. The intersection was obstructed both by the buildings and the truck. The double obstruction required additional caution to that required by section 511.

Under section 670, Vehicle Code, the cab driver, driving as he was required to do under section 511, could have stopped in 20.8 feet. Assuming that the first time the cab driver could have observed plaintiff was when the plaintiff first observed the cab, namely, 25 feet from the point of impact, the cab driver, had he been obeying the law as he was required to, could have avoided the accident. Moreover, this computation fails to include another vital element, that is, that it was the duty of the cab driver not only to enter the intersection at not over 15 miles per hour, but also to assume before entering that a car might enter from alongside the truck before he entered the intersection, and hence he must be on the lookout for such car.

[5] The driver either did not observe the plaintiff who was plainly visible or having observed him decided that he could proceed safely without slowing down and yielding the right of way as required by law. At that point his view of the plaintiff's vehicle was not obstructed in any way by the defendant's truck. It was his duty to slow down and yield the right of way to the plaintiff who had entered the intersection. Instead he traveled at an unabated speed. The right front of the cab struck the rear of the plaintiff's vehicle. If the cab driver had lessened his speed to any appreciable extent the collision would not have occurred. His failure to do so was the sole proximate cause of the plaintiff's injuries. It was the result of a deliberate choice unaffected at the time by the position of the defendant's truck. The failure to yield the right of way is not attributable to the defendant.

The judgment is affirmed.

BRAY, J., concurs.

PETERS, Presiding Justice.

I dissent.

The facts are fully, fairly and accurately set forth in the majority opinion. From these facts the majority correctly conclude that, for purposes of nonsuit, the evidence shows that the defendant Pacific Gas &

Electric Company was negligent, and that plaintiff was not guilty of contributory negligence. But the majority also conclude that the evidence shows, as a matter of law, that the negligence of the cab driver was the sole proximate cause of the accident, that is, was an intervening cause that broke the chain of causation. It is with this conclusion that I disagree.

This is an appeal from a judgment of nonsuit. Such a judgment is proper when, and only when, the appellate court can say, after resolving all conflicts in the evidence in favor of the plaintiff, and after indulging in all reasonable inferences from that evidence in favor of the plaintiff, that there is no evidence or no reasonable inference from that evidence that would support a verdict for the plaintiff. It is this fundamental rule that I believe has been violated by the majority.

We are dealing with a question of proximate cause. All of us are agreed that the evidence shows that the taxicab driver was guilty of negligence that was *a* proximate cause of the accident. The majority hold that such negligence, as a matter of law, was not only "a" proximate cause of the accident, but was "the sole" proximate cause. Normally, this is a question of fact and not of law.

The majority are wrong if, under any reasonable interpretation of the evidence, there is an inference that the negligence of defendant in unlawfully parking its truck at the corner of the intersection at right angles to the curb *could have contributed in any degree* to the accident. In other words, the problem is not whether the negligence of the taxicab driver was *a* proximate cause of the accident, but whether there is any reasonable interpretation of the evidence that would support the inference that the negligence of the defendant company concurred *in any degree* with that of the cab driver to cause the accident.

For present purposes we may assume, as the majority assume, that plaintiff's own evidence demonstrates that the accident was not caused by the obstruction of *plaintiff's* view by the truck. The real problem of causation is whether the obstruction, in any degree, could have contributed to the accident by causing the cab driver to proceed into the intersection in violation of plaintiff's right-of-way. If it is a reasonable inference from the evidence that the view of the taxicab driver may have been wholly or partially obstructed by defendant's truck, then we have a case where the jury could have found that the negligent parking of the truck was a contributing factor to the accident. It is my view that the evidence, reasonably, can be so interpreted.

Unfortunately, the taxicab driver was not called as a witness, so we do not know from his testimony whether or not his view was partially obstructed by the truck. But we do have other evidence from which this fact can reasonably be inferred. Plaintiff testified that he first saw the cab after he had proceeded around the truck and had got five feet into the intersection. At that moment the cab was 25 feet from the point of impact, traveling 20 to 25 miles per hour. It certainly is a reasonable inference that this was the first time the cab driver could have observed plaintiff, because the testimonial evidence and the exhibits indicate that the cab driver's view was obscured to the same extent as plaintiff's. Section 670 of the Vehicle Code fixes 37 feet as the proper distance a vehicle traveling at 20 miles an hour should be brought to a stop if its braking equipment is operating correctly. The same section fixes 58 feet as the stopping distance for a vehicle traveling 25 miles per hour. Thirty-seven feet is 12 feet, while 58 feet is 33 feet, beyond the point of impact, which occurred 25 feet after the plaintiff, and inferentially the taxi driver, first observed each other. Looking at the exhibits it can readily be ascertained that, had the truck not been negligently parked, both plaintiff and the taxicab driver could have seen each other a very appreciable distance before they did so. Had the cab driver seen plaintiff many feet before he did we cannot say, as a matter of law, that he would not have slowed down so as to have avoided the accident. While the taxi driver was undoubtedly driving too fast through an obstructed intersection, and should have yielded the right-of-way to plaintiff, it cannot be said, as a matter of law, that the cab driver's conduct should not have been anticipated by the negligent defendant, or that the defendant's negligence did not concur with that of the cab driver to cause the accident. While the most reasonable explanation of the accident is that it was caused by the negligence of the cab driver, it cannot be said that such intervening negligence, as a matter of law, broke the chain of causation. Thus, the case is one in which the jury could have found concurrent negligence. This being so, in my opinion, the judgment of nonsuit should be reversed.

Hearing denied; CARTER, J., dissenting.

133 Cal.App.2d 579

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Frank MARCUS, Defendant and Appellant.

Cr. 2498.

District Court of Appeal, Third District, California.

June 13, 1955.

Hearing Denied July 13, 1955.

Prosecution of prisoner who was charged with assault with a deadly weapon upon a fellow inmate and with possessing a sharp instrument or knife while an inmate of a state prison. From adverse judgment of the Superior Court, Sacramento County, Raymond T. Coughlin, J., and from order denying a new trial, the prisoner appealed. The District Court of Appeal, Van Dyke, P. J., held that the evidence was sufficient to sustain the conviction.

Judgment and order affirmed.

1. Convicts 🔑5

In prosecution of prisoner, who was charged, among other things, with possession of a sharp instrument or knife, prisoner's intentions and purposes in possessing a deadly weapon were wholly irrelevant. Pen.Code, § 4502.

2. Criminal Law 🔑409

In prosecution of prisoner, who was charged, among other things, with possessing a sharp instrument or knife, prisoner's admission that he possessed a sharp knife or instrument while so imprisoned established a violation of statute prohibiting a prisoner from possessing certain designated deadly weapons. Pen.Code, § 4502.

3. Convicts 🔑5

In prosecution of prisoner, who, among other things, was charged with assault with a deadly weapon upon a fellow inmate, prisoner's intent was an essential element in the proof of his guilt of the assault charge. Pen.Code, § 4500.

4. Convicts 🔑5

Evidence was sufficient to sustain conviction of prisoner for assault with a deadly weapon upon a fellow inmate. Pen. Code, §§ 240, 4500.

5. Criminal Law 🔑641(1), 1166½(1)

A defendant has the right to defend in person, and he cannot be compelled to accept assistance of counsel, but a violation of such right does not in every case constitute reversible error. West's Ann. Const. art. 1, § 13; Pen.Code, § 686.

6. Criminal Law 🔑1186(4)

Even though trial of prisoner, who was charged with assault with a deadly weapon upon a fellow inmate and with carrying a deadly weapon, was ordered to proceed with court-appointed counsel over prisoner's announcement that he did not think he would get a fair trial if court-appointed counsel represented him, no miscarriage of justice resulted in refusing to allow prisoner to defend himself personally when the record disclosed that prisoner was conscientiously represented by counsel and far more ably than he could have represented himself. Pen.Code, §§ 240, 686, 4500, 4502; West's Ann.Const. art. 1, § 13; art. 6, § 4½.

7. Criminal Law ⚷1171(3)

In prosecution of prisoner, who was charged with assault with a deadly weapon upon a fellow inmate and with possessing a sharp instrument or knife, prisoner was not prejudiced by conduct of deputy district attorney in alluding to fact that prisoner had been placed in isolation for investigation of a murder of a fellow inmate when that fact had already been placed in evidence by prisoner's counsel. Pen.Code, §§ 4500, 4502.

8. Criminal Law ⚷1171(3)

In prosecution of prisoner, who was charged with assault with a deadly weapon upon a fellow inmate and with possessing a sharp instrument or knife, remark by deputy district attorney insinuating that testimony of a fellow prisoner might not be trustworthy was not prejudicial when prisoner was acquitted of alleged assault upon that witness. Pen.Code, §§ 4500, 4502.

9. Criminal Law ⚷1171(1)

In prosecution of prisoner, who was charged with assault with a deadly weapon upon a fellow prisoner and with possession of a sharp instrument or knife, prisoner was not prejudiced by statement by deputy district attorney that he preferred not to have prisoner show the jury something about the knife which had been introduced in evidence. Pen.Code, §§ 4500, 4502.

◆

Richard M. Grossberg, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., for respondent.

VAN DYKE, Presiding Justice.

[1] This is an appeal from an order denying a new trial and from a judgment entered upon a jury's verdict which convicted appellant of an assault with a deadly weapon upon one Richard Smith, and of three counts of possessing a sharp instrument or knife while he was an inmate of a state prison. Penal Code, secs. 4500 and 4502. He was acquitted upon a fifth count charging him with an assault with a deadly weapon upon one George Heck.

Appellant has been imprisoned at Folsom Prison since 1949. The victim of the assault of which he was found guilty was a fellow inmate. Appellant challenges the sufficiency of the evidence and also contends that as to all the offenses of which he was convicted he acted without criminal intent and for the sole purpose of being brought to trial so that he could testify to the cruel and inhuman treatment to which he has been subjected at the prison.

[2] Appellant's intentions and purposes in possessing a deadly weapon in violation of Section 4502 of the Penal Code are wholly irrelevant. That section "absolutely prohibits all prisoners in any state prison, without qualification, from possessing or carrying on their persons certain designated deadly weapons. The intention with which the weapon is carried on the person is not made an element of the offense." People v. Wells, 68 Cal.App.2d 476, 481, 156 P.2d 979, 981; People v. Marcus, 120 Cal.App.2d 347, 348, 260 P.2d 1051. There was no need of proof of evil motivation. Appellant's admission that he possessed a sharp knife or instrument while he was imprisoned at Folsom established the three violations of Section 4502 of the Penal Code.

[3] Appellant's intent was an essential element in the proof of his guilt of the assault charge. People v. Wells, 33 Cal.2d 330, 346, 202 P.2d 53. The trial court admitted evidence of the mental state of the appellant at the time of the commission of the overt acts. Appellant testified in his own behalf and was permitted to narrate at length as to how he had schemed to be charged with some offense for which he would be brought to trial so that he could thereat expose the bestial treatment to which he claimed the inmates at Folsom Prison were subjected. Twelve fellow inmates, the prison physician, and a priest testified that appellant had frequently declared that he intended to get caught doing something for which he would be brought to court where he could denounce the prison officials. Into this matter of intent he was allowed to go fully. But he complains that his court-appointed counsel failed to call

witnesses who would testify as to the facts of mistreatment, such as that he had been left in a cell for forty hours without a drink of water. Such evidence would have been at most cumulative on the issue of intent and immaterial for any other purpose. Moreover, the record does not show that the court refused to subpoena any witnesses requested by the appellant. George Heck, a victim of one of the charged assaults, was brought from Folsom to attend the trial. He testified that the assault committed upon him was feigned and done pursuant to a prearranged plan between him and appellant and in furtherance of appellant's desire to do something for which he would be brought to trial so that he could testify to the conditions that prevailed at Folsom. The jury obviously afforded credence to this explanation as appellant was acquitted of the charged assault upon George Heck. However, no such excuse for the assault upon Smith was asserted. Appellant admitted that a fist fight started between the two and that after the officers separated them, he deliberately scratched Smith with a knife. He said he did so in such manner that no serious injury could be caused thereby. He disavowed any intent to do more than he did, that is, nick or scratch Smith. The prison physician, who examined Smith immediately after the incident, testified that he found a superficial scapular wound which penetrated the outer surface of the skin and which amounted to no more than a scratch. The doctor further testified that this could not have been done by "a direct pressure against one point in the skin. It had to be scuffed one way or the other from the point of entrance to cause that type of wound" and it appeared "that there was a limited amount of force, or it certainly would have gone through the skin."

[4] There is no direct evidence that appellant struck Smith with sufficient strength "to commit a violent injury", Penal Code, sec. 240, or that he wielded the blow with such force as could cause great bodily harm. However, the jury's implied finding that appellant so did must be upheld. Two guards testified that after they overpowered and disarmed appellant, he threatened to kill Smith. Appellant admitted that prior to the altercation he had had "an argument" with Smith and told him "if we have to fight, we are going to fight". From that evidence the jury could infer that, due to animosity, appellant intended to and did strike Smith with sufficient force "to commit a violent injury". Penal Code, sec. 240.

Appellant argues that at the time he assaulted Smith he was not "undergoing a life sentence" within the purview of Section 4500 of the Penal Code. The basis of this contention is that although a life sentence had been imposed on appellant it was not to commence to run until after the expiration of the term of a sentence of 1 to 15 years under which he was then imprisoned and serving time. We need not adjudge the merits of this technical argument as appellant was not convicted of the charged offense of committing an assault with a deadly weapon while undergoing a life sentence in a state prison, Penal Code, sec. 4500, but of the lesser offense, included therein, of assault with a deadly weapon. Penal Code, sec. 245.

[5, 6] Appellant assigns as error the fact that he was denied the right to defend himself without the assistance of the public defender. At the outset of the trial appellant announced that he did not think he would get a fair trial if his court-appointed counsel represented him as he had failed to call certain witnesses upon the argument of a motion for a change of venue. The court ordered the trial to proceed with counsel due to the circumstances and the fact that the death penalty would be mandatory if appellant were convicted upon the two counts charging violations of Section 4500 of the Penal Code. It is true that a defendant has the right "to * * * defend, in person", Cal.Const. Art. I, sec. 13; Penal Code, sec. 686, and that he cannot be compelled to accept the assistance of counsel. See State v. Townley, 149 Minn. 5, 182 N.W. 773, 17 A.L.R. 266. However, a violation of such right does not in every case constitute reversible error. People v. Mayfield, 85 Cal.App. 77, 79, 259 P. 75. It does not appear from the record here that such error led to the verdicts which were reached. Appellant complains that counsel failed to call additional witnesses who would have

testified as to his mistreatment and the reason why he wished to commit some offense for which he would be brought to trial. We have already said that such evidence would have been merely cumulative. Appellant admitted the commission of the acts of which he was accused and he was in no way curtailed in explaining his reasons therefor. Appellant was acquitted of the charged assault on Heck and was convicted of a lesser offense than that charged in respect to the assault on Smith. A review of the entire record compels the conclusion that appellant was conscientiously represented by counsel and far more ably than he could have represented himself. Under such circumstances, it cannot be said that refusing to allow appellant to defend personally without counsel resulted in a miscarriage of justice. Cal.Const. Art. VI, sec. 4½.

[7–9] We need not consider at length the three instances which appellant cites as prejudicial misconduct upon the part of the prosecution. Appellant complains that the deputy district attorney alluded to the fact that he was placed in isolation in 1949 for investigation of murder of a fellow inmate. That fact had already been placed in evidence by appellant's counsel. Moreover, the court, of its own volition, admonished the jury to disregard it "absolutely and entirely". Likewise, the court instructed the jury to disregard a remark of the deputy district attorney which insinuated that George Heck's testimony might not be trustworthy. It may again be observed that the jury acquitted appellant of the alleged assault upon George Heck. Obviously, in so doing, they gave credence to his explanation of the matter. Appellant has no cause to object because the deputy district attorney stated he preferred not to have him show the jury something about the knife which had been introduced in evidence. The prosecution was entitled to proceed with its cross-examination of appellant without volunteer demonstrations upon his part.

The judgment and the order appealed from are affirmed.

PEEK and SCHOTTKY, JJ., concur.

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134 Cal.App.2d 3

Anthony ZANARDI, Plaintiff and Appellant,

v.

The PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation and Jane Doe Dubois, Defendants and Respondents.

Civ. 8536.

District Court of Appeal, Third District, California.

June 22, 1955.

Hearing Denied Aug. 17, 1955.

Action against telephone company and its employee for injuries sustained by plaintiff when automatically controlled oil-fueled heater exploded while plaintiff was checking it at request of employee, who knew nothing about the stove's operation and who merely informed plaintiff that the stove was not heating. From adverse judgment of the Superior Court, Calaveras County, J. A. Smith, J., the plaintiff appealed. The District Court of Appeal, Van Dyke, P. J., held that the evidence was insufficient to establish that the company or its employee was guilty of negligence.

Judgment affirmed.

1. Explosives 🔑7

In action against telephone company and its employee for injuries sustained by plaintiff when automatically controlled oil-fueled heater exploded while plaintiff was checking it at request of employee, who knew nothing about the stove's operation and who had merely informed plaintiff that stove was not heating, evidence was insufficient to establish that company or its employee was guilty of negligence.

2. Explosives 🔑7

In action against telephone company and its employee for injuries sustained by plaintiff when automatically controlled oil-fueled heater exploded while plaintiff was checking it at request of employee, who knew nothing about stove's operation and who had merely informed plaintiff that stove was not heating, company and employee were not chargeable with knowledge that if hot gas had accumulated in the heater the sudden intrusion of a quantity of air sufficient for quick combustion of gas in heat chamber could cause an explosion and they were not guilty of negligence for not warning plaintiff as to such a potentially dangerous situation.

3. Master and Servant ⚷107(3)

Rule requiring an employer to furnish his employees with a safe place to work is inapplicable to employees hired to make a dangerous place safe or to effect repairs.

4. Explosives ⚷7

Res ipsa loquitur doctrine was not applicable to action against telephone company and an employee for injuries sustained by plaintiff when automatically controlled oil-fueled heater exploded while plaintiff was checking it at request of employee, who had informed plaintiff that stove was not heating the telephone office.

5. Appeal and Error ⚷1079

Where appellant's brief dealt entirely with the attack upon judgment in favor of two defendants and made no mention of judgment entered upon order of nonsuit against two other defendants, appeal from judgment entered on order of nonsuit was deemed to have been abandoned.

◆

C. Ray Robinson, by Wallace W. Everett, Jr., Merced, for appellant.

Pillsbury, Madison & Sutro, by John B. Bates, San Francisco, and Virgil M. Airola, San Andreas, for respondents Pacific Tel. Co. and Dubois.

Leonard G. Husar, San Andreas, for respondents Hale and Simondet.

VAN DYKE, Presiding Justice.

Plaintiff appeals from the judgment entered upon a jury verdict in favor of defendants, Pacific Telephone and Telegraph Company, a corporation, hereinafter called "the company", and Jane Dubois, its employee.

Appellant was injured by an explosion occurring within an automatic oil-burning circulating heater manufactured by H. C. Little Company. The explosion occurred when appellant removed a so-called inspection plate, allowing a large indraft of air. The respondents put on no evidence material here.

[1] Appellant's evidence may be summarized as follows: The heater operates by vaporizing fuel oil into gas and then burning the gas. The oil reaches the heater by gravity from an oil tank located without the company's building. The flow into the heater of the oil is subject to automatic control. As the oil reaches the control unit it remains there until a valve, operated by thermostatic control, opens to allow the oil to flow into the combustion chamber of the heater. The amount of oil in the control unit is limited by a float and valve operating somewhat on the same principle as the carburetor for a gasoline engine. A second float in the control unit is designed to trip a mechanism on the side of the heater, referred to by the witnesses as a "trip", shutting off the oil supply in case there is an excess of oil. A feed control on the outside of the control unit determines the amount of oil which can flow from the control unit into the heater in a given space of time. The device has a setting range divided into six positions and can be manually set at any of the positions numbered 1 to 6. The higher the setting the more oil can flow into the heater, and the maximum flow at position 6 amounts to 45 cubic centimeters per minute. After the oil leaves the control unit it flows into the lower portion of the combustion chamber, known as the firebox, where it is ignited by an electrically heated element. The resulting heat vaporizes the oil into gas, sending it into the heat chamber, a separate portion of the heater located above the firebox. There the gas is consumed, providing heat. The inspection plate is a 2-inch by 2¼-inch plate attached to the firebox by two screws. When the heater is operating it is possible, by opening a door on the side of the heater, to observe the flame in the firebox through a small hole in the inspection plate. It is not uncommon for this or for other automatic oil heaters to become flooded and when this occurs the combustion flame may be located entirely in the heat chamber and not be visible through the hole in the inspection plate. But there is no danger of

such a heater exploding under these conditions if it is left alone. If, on the other hand, the heater is flooded with oil and the combustion is confined to the heat chamber, the gases therein not being all consumed, the sudden intrusion of additional air supply into the combustion area can cause an explosion. Removing the plate may supply this condition through allowing a larger supply of air to enter. This does not happen unless the plate is either removed or opened by loosening one screw and removing the other so that it swings free. Plaintiff's expert witness, one Mills, who sells and services the H. C. Little automatic heaters, testified that the inspection plate is removed: 1. To replace the element which ignites the oil; 2. To replace the asbestos wick, a part of the burning device, and, 3. To clean out carbon that has accumulated. He testified that usually the heater is drained of oil before the inspection plate is removed. He testified that generally, and as a precaution against explosion, accumulated oil is drained out of the heater before the inspection plate is removed; that the burner would have to be warm before it would generate gas sufficient to cause an explosion, since a cold burner would not do that; that after the accident out of which this suit arose he was called in to service the heater and found that about a quarter of an inch of oil had gathered in the bottom of the firebox; that the manually operated feed control was set at 6, the maximum setting; that after servicing the heater and putting it back into operation he reset this control at 4 to 4½, allowing less oil to feed into the firebox; that normally there would be little oil in that form in the firebox, it being vaporized practically as fast as it entered unless, as he put it, "the feed control is set too high". Neither this witness nor any witness testified that the setting of the feed control at position 6 was a dangerous thing to do and it is apparent from the testimony that the setting range was one fixed by the manufacturer as permissible in the use of the heater. There was testimony that this manual control was sometimes locked into the position at which it was set by the installer of the heater if there were either children about who might vary the setting or persons described by the witness as being persons who never can leave things alone. It appears that the heater is one designed and sold for use as an ordinary household appliance, appellant himself testifying that he supplied oil to more than a hundred of such heaters in his community as a part of his business of running a gas service. Mills testified that he had sold and installed upwards of 150 of such heaters.

Coming now to what happened immediately leading up to the injuries for which appellant brought this action, we find there is little dispute between the parties. This heater belonged to the company and was used to heat its office in Angels Camp, California, wherein someone was always on duty. Respondent Dubois was on duty as a night operator December 18, 1951 and was alone. The weather was cold and about 11:30 she noticed that the office was cold and she raised the thermostat setting for the heater. No heat came from the heater, so she telephoned her immediate superior who suggested that she call appellant. This she did at about 12:45 A.M. She told him she thought the heater was out of oil, but he told her he had made a delivery to the outside tank a few days before, and asked her if she would test the trip on the heater to see if it had been accidentally turned off and to call him back. In about ten minutes she called back and told him she had found the trip was on. She then asked him if he would come down and check the heater. Although he supplied oil to the outside tanks of many of these heaters as part of his business and used one of them to heat his own residence, yet he was not in the business of servicing heaters. However he agreed to go down and he took with him a screwdriver and a pair of pliers. He described his purpose as that of seeing what was wrong with the heater. Respondent Dubois was alone in the office and let him in when he knocked on the door. He testified that they held no conversation whatever except to exchange greetings. She returned to her switchboard. Appellant alone testified as to the actual circumstances of the explosion. He said when he entered the office he noticed the smell of oil. He put his hand on top of the heater and found it cold and he checked the trip and found it on. He checked the feed control and found the manual control set at position 6. He removed the oil plug and, finding that oil came out, he screwed the plug back in. He looked through the hole in the inspection plate and saw no flame. He proceeded to unscrew the plate from the firebox, either, as he said, loosening one screw and removing the other so the plate could drop down or removing both screws and taking the plate off. Whichever he did, the plate was effectually removed from the opening in the cover and, as he put it, "when that dropped down the air hit and it exploded". The heater was not blown apart by the explosion but the force of the explosion threw flaming oil against him as he stood in front of the opening from which the plate had been removed and he suffered the injuries for which he brings this action. It is to be noted that he was neither given nor did he ask any information as to the condition of the heater, except that he was told the heater was not giving off heat. There is nothing to indicate that Dubois knew anything about the heater which she could have told him. Expert testimony supplied by appellant was to the effect that if gases produced by heating fuel oil accumulated, without burning as they were given off, through lack of oxygen supply from air introduced into the combustion chamber, a potentially dangerous condition would be set up; that if, into the heated gases, air in sufficient quantity was suddenly introduced the resulting immediate combustion of the accumulated gas could generate explosive force. It was the opinion of the experts that this situation existed and that when appellant removed the inspection plate he in effect triggered the explosion by thus suddenly introducing a large quantity of air into the heated gases in the heating chamber.

Appellant, acting on the assumption that he proved a prima facie case of negligence on the part of the company and Dubois, contends that certain instructions given by the court were prejudicially erroneous. Respondents make the counter-argument that no case was proved against them and that, therefore, appellant's case could not have been injured, even assuming erroneous instructions to have been given, since respondents were in any event entitled to a verdict as a matter of law. We have concluded that these contentions of respondents must be sustained. Respondents pleaded both contributory negligence and assumption of risk, but we think that there was complete failure to prove primary negligence of respondents. Automatically controlled oil-fueled heaters are in common use. There was no attempt made to prove that this particular heater was in any way faulty in design, or that whoever set the manual control at position 6, permitting, subject however to the automatic controls, the maximum inflow of fuel oil, was guilty of doing a negligent act. We say this over the protests of appellant who largely bases his claim of negligence upon it. No witness, however, testified that such a setting was negligent. Appellant's expert witness said this control was set at 4 to 4½, but not for reasons of safety. This was done because at that setting maximum efficiency was achieved. Appellant argues that when Mills serviced the heater about six or seven hours after appellant was injured he (Mills) found the bottom of the firebox covered with oil and therefrom drained enough to half fill a two-pound coffee tin; and that this shows the maximum setting of the control to have been the cause of flooding the firebox. But this does not prove negligence of respondents, assuming they made the setting. The heater was designed to operate at this setting. We have searched this record in vain for proof of any negligent act or omission of respondents in so far as operation or maintenance of the heater by them is concerned. Indeed, there is no proof of any sort of operation other than the automatic operation as planned and designed by the maker of the heater.

[2] Appellant contends further that respondents were guilty of negligence in asking him to come upon their premises and check and adjust the heater without warning him as to the potentially dangerous situation into which he entered, charging them with the duty of knowing that this situation existed. Says appellant: "De-

fendants were under a duty to know intimately their own appliances and to relay information regarding their condition to those whom they ask to work on them." And he cites Moran v. Zenith Oil Co., 92 Cal.App.2d 236, quoting from page 242, 206 P.2d 679, at page 682, the following:

> "In asserting that the court should have granted each motion made by it at the trial, appellant puts much stress upon its claim that respondent knew as much about the defective cable as appellant knew and with such knowledge freely elected to use it. This may be conceded, but the argument misses the point that the duty of appellant was to know intimately the true condition of its own appliances and to relay such information to workmen who were to decide whether or not to make use thereof."

The quotation demonstrates that the rule there enforced does not apply to the situation here. There plaintiff, as a member of a work crew, made use of a cable furnished by defendant for the purpose of pulling pipe from oil wells. The cable proved too weak for its task and plaintiff was injured. The rule relied upon is related to the duty of one who furnishes tools and appliances for use in doing work on his premises to take reasonable care that such appliances are safe for such use. No such situation is presented here. Defendants here furnished no tools or appliances to appellant for use by him in the task he had assumed. The situation is much more akin to that presented in such cases as Kowalsky v. Conreco Co., Inc., 264 N.Y. 125, 190 N.E. 206, 208, where a landowner employed a contractor who engaged a subcontractor to make repairs to shutter and window fastenings, and the court declared:

> "* * * The owner is not liable for this unfortunate accident on the ground that he had furnished John and his employees or subcontractor, an unsafe place to work, as Kowalsky, John's employee or subcontractor, was killed through defects which John was in the act of repairing."

[3] In 56 C.J.S., Master and Servant, § 250, it is said:

> "The rule requiring an employer to furnish his employees with a safe place to work is inapplicable to employees hired to make a dangerous place safe or to effect repairs."

It does appear from the evidence that, assuming hot gas had accumulated, the sudden intrusion of a quantity of air sufficient for the quick combustion of the gas in the heat chamber could cause an explosion. Thus the heater may be said to have constituted a potential hazard to anyone who did what appellant did, that is, complete the conditions of explosion by removing the inspection plate. We know of no rule of law by which a knowledge of this condition could be charged to respondents upon the basis of an active duty to ascertain if that condition existed; and there is no evidence that respondents had actual knowledge. We think it would be just as unreasonable to charge them with a duty to ascertain that condition as it would be to charge a housewife with such a duty when her cooking stove failed to perform its functions and she called in a repairman. To be sure, the heater belonged to respondent company, and respondent Dubois was in the office which the heater was intended to keep warm. It is true also that she called appellant for aid. She did not pretend to tell him or to be able to tell him what was wrong with the heater and he asked no questions, but apparently acted upon his own assumption that he needed no information. Treating him as a business invitee upon the premises of the respondent company, we find that his case does not meet the requirements for imposing liability upon the respondent as possessor of land to business visitors thereon. This liability is thus stated in Restatement of the Law of Torts, section 343:

> "A possessor of land is subject to liability for bodily harm caused to business visitors by a natural or artificial condition thereon if, but only if, he
>
> "(a) knows, or by the exercise of reasonable care could discover, the con-

> dition which, if known to him, he should realize as involving an unreasonable risk to them, and
>
> "(b) has no reason to believe that they will discover the condition or realize the risk involved therein, and
>
> "(c) invites or permits them to enter or remain upon the land without exercising reasonable care
>
> "(i) to make the condition reasonably safe, or
>
> "(ii) to give a warning adequate to enable them to avoid the harm without relinquishing any of the services which they are entitled to receive, if the possessor is a public utility."

This record is utterly lacking in proof of actual knowledge that unconsumed combustible gases heated to the point of ignition were contained in the heat chamber which would explode if air should suddenly be introduced by the removal of the inspection plate. It is equally barren of proof that ordinary care would have revealed that condition.

[4] Appellant argues that the rule res ipsa loquitur applies here. It does not. While this common household appliance was owned and used by and may be said to have been controlled and managed by respondents, it cannot be said that this accident was such as in the ordinary course of things does not happen if those who have the management and control of such an appliance use proper care. We use a great many household appliances and nearly all of them have automatic controls built in. These appliances operate so well that knowledge of how they operate is not required of the user. We use them until they stop working and then call in the serviceman. The proven conduct of respondents was within the norm, and from the circumstances proven the inference of negligence could not be drawn.

[5] Appellant noticed an appeal from the judgment entered upon the order of nonsuit against defendants Hale and Simondet. However, appellant's briefs deal entirely with his attack upon the judgment against the company and its employee and having nothing to say by way of attack upon the nonsuit judgment. We, therefore, deem the appeal from that judgment abandoned.

All judgments appealed from are affirmed.

SCHOTTKY and PEEK, JJ., concur.

Hearing denied; CARTER, J., dissenting.

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133 Cal.App.2d 601

Mary Jessie POWELL, Plaintiff and Appellant,

v.

A. Q. JONES and Mrs. A. Q. Jones, Defendants and Respondents.

Civ. 20878.

District Court of Appeal, Second District, Division 2, California.

June 14, 1955.

Rehearing Denied July 11, 1955.

Action by plaintiff, hired as a baby sitter, to recover for personal injuries sustained when sitter fell while on employers' premises. The Superior Court of Los Angeles County, Henry M. Willis, J., entered judgment after granting defendants' motion for nonsuit and plaintiff appealed. The District Court of Appeal, Fox, J., held that evidence on issue of whether plaintiff was a mere licensee when injuries were sustained did not present question for jury as to whether defendants had breached their duty to plaintiff to keep premises in reasonably safe condition.

Affirmed.

1. Trial 🔑139(1)

Nonsuits should be granted sparingly and only in those cases where there is rightly no factual issue to be tried by jury.

2. Trial 🔑165

Although, in passing upon motion for nonsuit, all conflicts in evidence must be resolved in favor of plaintiff and every legitimate inference favorable to plaintiff must be drawn therefrom, a nonsuit must be granted where no other reasonable conclusion is deductible from evidence, if evidence is legally insufficient to support judgment in plaintiff's favor.

3. Negligence ⚷32(1), 48, 52

Possessor of land owes to invitee the duty of exercising ordinary care to keep premises in reasonably safe condition; and possessor will be liable for bodily harm, in absence of adequate warning, caused an invitee by a dangerous condition in premises if possessor knows or should know of danger which he has no basis for believing that invitee will discover.

4. Master and Servant ⚷101(8)

An employer is required to use reasonable care to protect his employee by furnishing him with a suitable and safe place in which to work, such obligation being limited to premises where employee is required to be for purposes of his employment and to portions of premises allotted to satisfaction of incidental personal need, conveniences or amenities of employee which he may be expected to minister to while engaged in his employer's work.

5. Negligence ⚷32(3)

An inviter is liable only for injuries caused an invitee by dangerous condition existing in that part of premises which invitee may be reasonably expected to use in proper exercise of his invitation.

6. Negligence ⚷32(3), 33(1)

An invitee may, during his stay, enter upon other portions of premises where his status is merely that of a licensee or even a trespasser, and in each change of status, correlative rights and obligations of inviter and invitee vary as orbit of invitation is either adhered to or exceeded.

7. Negligence ⚷32(3)

Where an invitee enters upon portions of premises where he has no right to be and becomes, under particular facts, a licensee, duty then owed him by land occupier is to refrain from wilful or wanton injury and to exercise due care towards the licensee in conduct of his activities at the situs.

8. Negligence ⚷136(15)

Question as to extent of invitation is normally one of fact rather than law, encompassing such considerations as circumstances of invitation, relation between parties, character of premises or other locus covered by invitation, nature of use which invitee may be expected to make in accomplishing objectives of invitation, and conditions or circumstances under which such use is to be made.

9. Negligence ⚷32(3)

Where invitee was either in a part of premises neither expressly nor impliedly covered by invitation or had left that portion of premises where his duties reasonably required him to be in pursuit of private purpose dissociated from his master's business, area of invitation has been overstepped.

10. Master and Servant ⚷89(1)

The law will not impose liability on an employer where injured employee was at place where he was neither invited nor expected to go as an outgrowth of his employment.

11. Workmen's Compensation ⚷6, 606

Under Workmen's Compensation Act, an employee's injuries are compensable regardless of employer's negligence so long as injury arises out of employment and employee was at time in course of his employment, and in this regard, any reasonable doubt as to whether an act is contemplated by employment is resolved in favor of employee. Labor Code, §§ 3201 et seq., 3600.

12. Master and Servant ⚷302(6)

In cases arising under doctrine of respondeat superior where innocent third party has been injured by wrongful act of employee and question arises as to whether liability may be fastened on employer, if employee was combining his own business with that of employer or attending to both at substantially the same time, no inquiry will be made as to which business he was actually engaged in at time of injury, unless it clearly appears that neither directly nor indirectly could employee have been serving his employer.

13. Master and Servant 🔑284(2)

In action by plaintiff, who was hired as baby sitter, to recover for personal injuries sustained when sitter fell while returning to defendants' premises after a visit with her son, evidence on issue whether plaintiff was a mere licensee when injuries were sustained did not present question for jury as to whether defendants had breached their duty to plaintiff to keep premises in reasonably safe condition.

Herlihy & Herlihy, Los Angeles, for appellant.

Moss, Lyon & Dunn, Robert C. Nye, and Henry F. Walker, Los Angeles, for respondents.

FOX, Justice.

Plaintiff appeals from a judgment of nonsuit in an action in which she sought to recover damages for personal injuries allegedly caused by defendants' negligence.

The facts developed at the trial have been embodied in a Settled Statement. We have extracted therefrom those portions pertinent to the determination of the propriety of the nonsuit. As thus edited, and with emphasis supplied in all cases, the facts recited are as follows:

"Mary Jessie Powell, the plaintiff * * herein, was taken to the house of Mr. and Mrs. A. Q. Jones on August 21, 1952, in the afternoon, by Mrs. Jones to act as a 'baby sitter.' She was to be paid for these services. The premises * * * were two houses which had been joined sometime in the year 1950 by Mr. and Mrs. Jones and constituted their residence.

"Mrs. Powell's son lived in a house about fifty feet up the street, and it was plaintiff's custom after remaining at the Jones home for the night to go up and have breakfast with her son, who in turn would drive her to her own home in the morning. On the day in question, her son was ill, and she made arrangements with Mrs. Jones to obtain a ride to her home in the morning.

"About 6:30 or 7:00 p. m. on the day in question, Mr. and Mrs. Jones went out for the evening and left plaintiff in charge of the house. Around 8:00 p. m. plaintiff left the Jones' son, Michael, and her own grandson, both of about the age of seven years, in the living room of the Jones home on the second floor, watching television, while she went down the two flights of stairs from that room and up the path to the house of her son. *She had never on previous occasions left the premises while engaged as a baby sitter for Michael.* She stated that it was her purpose to advise her son of her other arrangements for transportation to her home in view of his illness, and also ascertain the extent of that illness.

"She explained that she did not call her son by telephone because three previous telephone calls had so upset the children watching television in the same room that she did not wish to disturb them again. *She stated that she knew the telephone had a long cord which reached into the adjacent kitchen.*

"It was dusk at the time she left the premises and she went down the two flights of front steps which were lighted to the path below and proceeded to her son's house, where she remained about five minutes. Upon her return, she came down the road which sloped toward the Jones house, and which consisted of decomposed granite. As she came down the road, she noticed a light shining in the bedroom window on the floor below the living room where the children were watching television, and decided that she would go directly to the bedroom to make preparations for putting the children to bed rather than to go to the top floor first.

"There was another stairway leading directly to the bedroom floor on the outside of the house. She faced this flight of stairs as she came down the slope toward the Jones home. There was no sidewalk, but merely the decomposed granite road which ran from her son's house parallel to these stairs and past the Jones house. She had passed these stairs earlier when walking to her son's house and on many previous occasions. At the foot of the stairs there was a concrete slab forming the landing about two and one-half feet by two and one-half feet, along the edge of that slab on the side farthest removed from the stairs, there was a five and one-half inch cement retaining ledge, intended to hold back the dirt and water from washing down the hill on to the concrete slab.

"The decomposed granite material of which the roadway was constructed extended in a smooth fashion from the road continuously up to the side of the house, and along the side of the house up to and including the ledge. There was nothing present to block a person's path from the approach used by Mrs. Powell. There was no railing or marking of any kind to indicate the necessity for a step down before stepping up to the stairway. Mrs. Powell testified that in the dusk of evening the approach to the stairway appeared to be of one color and to extend smoothly and continuously to the first step. She stated further that no one had ever warned her about the cement ledge, nor had anyone told her not to use the stairway, and she had in fact used it with Mrs. Jones when approaching from a different direction as indicated below.

"As Mrs. Powell approached the stairs, she angled off to the left from the roadway itself directly toward the first step, and her path would have carried her over the cement ledge to the cement slab base and then up the stairs. However, when she got to the stairs she did not notice the necessity for stepping down from the retaining ledge to the landing and then up to the first step, and when she stepped off the ledge into apparent space, she lost her balance and fell, resulting in a compound fracture of the left arm.

"Mrs. Powell had been to the Jones residence on many occasions and stayed with the child. She had passed up and down the roadway between the two houses on many occasions. On a very few occasions she had used the stairway upon which she fell, but on each of these occasions she had approached it from the opposite direction after arriving in the Jones car, and leaving the Jones garage. This garage was located between the two stairways mentioned above, and it was not necessary to pass over the concrete ledge in approaching the stairway from said garage. On the garage side, the decomposed granite ran smoothly up to the edge of the concrete slab base. For this reason, Mrs. Powell stated that she had never noticed the ledge holding back the dirt from the other direction.

"The stairway upon which she fell was not lighted by any direct light. However, there was light coming from street lights on the street below and from a window on the second floor porch, which outlines the stairway clearly, and Mrs. Powell stated that she was looking directly toward the stairs as she approached them. In order to reach the stairway leading to the second floor and the living room from which she had come, her route would have taken her past the stairs upon which she fell, past the garage, and then to the lighted stairway at the front. To reach the bedroom by that route she would have climbed two flights of stairs, walked through the living room, and descended one flight to the bedroom floor."

After the above facts had been adduced, the trial judge granted defendants' motion for a nonsuit. This appeal followed the ensuing judgment in defendants' favor.

[1, 2] The multitudinous authorities in which the propriety of granting a motion for nonsuit has been considered emphasize that nonsuits should be granted sparingly and only in those cases where there is rightfully no factual issue to be decided by the jury. Although it is the established rule that in passing upon a motion for a nonsuit all conflicts in the evidence must be resolved in favor of the plaintiff and every legitimate inference favorable to the plaintiff must be drawn therefrom, nevertheless a nonsuit must be granted where no other reasonable conclusion is deducible from the evidence, if, in short, the evidence is legally insufficient to support a judgment in plaintiff's favor. Nicholas v. Jacobson, 113 Cal.App. 382, 389, 298 P. 505; Zito v. Weitz, 62 Cal.App.2d 161, 164, 144 P.2d 409. Such is the character of the case before us.

In presenting her case, plaintiff takes the position that not only was her status that of a business invitee but she was also an employee. Conceding her dual status at the home of defendants when she assumed her duties as a baby sitter on the day in question, our inquiry will be directed to whether there is any evidence from which it may be inferred that defendants failed in the discharge of the particular duty of care owed her at the time and place of her injury.

[3–5] A possessor of land owes to an invitee the duty of exercising ordinary care to keep his premises in a reasonably safe condition; and he will be liable for bodily harm, in the absence of an adequate warning, caused an invitee by a dangerous condition in the premises "if he knows or should know of the danger which he has no basis for believing that the invitee will discover." Popejoy v. Hannon, 37 Cal.2d 159, 170, 231 P.2d 484, 491; Crane v. Smith, 23 Cal.2d 288, 296, 144 P.2d 356; Jones v. Bridges, 38 Cal.App.2d 341, 346, 101 P.2d 91; Rest., Torts, sec. 343; 38 Am.Jur., Negligence, sec. 96. Similarly, an employer is required to use reasonable care to protect his employee by furnishing him with a suitable and safe place in which to work. Brown v. Sharp-Hauser Contracting Co., 159 Cal. 89, 112 P. 874; Miller v. Pacific Constructors, Inc., 68 Cal.App.2d 529, 545, 157 P.2d 57. However, it is the law that the invitor is liable only for injuries caused an invitee by a dangerous condition existing in that part of the premises which the invitee may be reasonably expected to use in the proper exercise of his invitation. Powers v. Raymond, 197 Cal. 126, 130, 239 P. 1069; Bush v. Weed Lumber Co., 63 Cal.App. 426, 433, 218 P. 618. Likewise, the obligation of an employer to provide a safe place to work is limited to the premises "'where the employe is required, for the purposes of his employment, to be.'" Albert v. McKay & Co., 174 Cal. 451, 454, 163 P. 666, 667; Kennedy v. Chase, 119 Cal. 637, 640, 52 P. 33. This area of invitation may, of course, include portions of the premises allotted to the satisfaction of those incidental personal needs, conveniences or amenities of the employee which it may reasonably be expected he will minister to while engaged in his employer's work. See DeMirjian v. Ideal Heating Co., 129 Cal.App.2d 758, 278 P.2d 114.

[6–9] It is well settled that a person coming upon a particular part of the premises as an invitee may, during his stay, enter upon other portions of the premises where his status is merely that of a licensee or even a trespasser. Goldberger v. Market St. Ry. Co., 130 Cal.App. 597, 604, 20 P.2d 351; Biondini v. Amship Corp., 81 Cal.App.2d 751, 760, 185 P.2d 94; Gastine v. Ewing, 65 Cal.App.2d 131, 150 P.2d 266. In each change of status, the correlative rights and obligations of the invitor and invitee vary as the orbit of the invitation is either adhered to or exceeded. Koppelman v. Ambassador Hotel Co., 35 Cal. App.2d 537, 541, 96 P.2d 196. Where an invitee enters upon portions of the premises where he has no right to be and becomes, under the particular facts, a licensee, the duty then owed him by the land occupier is to refrain from wilful or wanton injury and to exercise due care towards the licensee in the conduct of his activities at the situs. Oettinger v. Stewart, 24 Cal.2d 133, 138, 148 P.2d 19, 156 A.L.R. 1221; Fisher v. General Petroleum Corp., 123 Cal.App.2d 770, 777, 267 P.2d 841. The question as to the extent of the invitation is normally one of fact rather than law, encompassing such considerations as the circumstances of the invitation, the relation between the parties, the character of the premises or other locus covered by the invitation, the nature of the use which the invitee may be expected to make in accomplishing the objectives of the invitation, and the conditions or circumstances under which such use is to be made. Gastine v. Ewing, supra; Bush v. Reed Lumber Co., 63 Cal.App. 426, 433, 218 P. 618. However, when there is neither dispute nor conflict as to the essential facts, and the evidence and the only reasonable inferences therefrom inescapably establish that at the time the injury occurred plaintiff was either in a part of the premises neither expressly nor impliedly covered by the invitation or had left that portion of the premises where his duties reasonably required him to be in pursuit of a private purpose dissociated from his master's business, the courts have decided, as a matter of law, that the area of invitation has been overstepped. Medcraft v. Merchants Exchange, 211 Cal. 404, 407, 295 P. 822; Powers v. Raymond, 197 Cal. 126, 130, 239 P. 1069; Jacobson v. Northwestern Pac. R. R. Co., 175 Cal. 468, 472, 166 P. 3; Kennedy v. Chase, 119 Cal. 637, 641, 52 P. 33.

Applying the above principles to the facts of the instant case, which are reasonably susceptible only to the inference that plaintiff had exceeded the scope of her invitation and was going about on an errand for her own personal convenience, the court was clearly justified in determining that at the time and place of the injury plaintiff was a mere licensee. Plaintiff was hired as a baby sitter and there can be no doubt that she was entitled to all the facilities and accommodations of defendants' home while discharging the duties she had undertaken. These accommodations included an invitation to make such use of the premises as was reasonably necessary for her comfort and convenience while attending to her duties as a baby sitter. If, during her vigil, it became necessary for her to go outside for any reason, real or fancied, connected with the complete or proper discharge of her duties, or if she traversed the grounds in a period of respite or relaxation from her duties which may be said to have been a reasonably contemplated incident of her employment, and injury befell her due to a dangerous condition of the premises, a jury question would have arisen as to the extent of her invitation and whether she was within its scope at the time and place of her injuries. Further, if the record showed that plaintiff had previously made arrangements with her son for transportation home following the completion of her job, which she desired to cancel because defendants had offered her such transportation, a question might arise as to whether plaintiff's visit to her son, despite the fact that she could have telephoned, was reasonably connected with the incidents of her employment. But none of these hypotheses beneficial to plaintiff, nor any other inferences favorable to her, are here present. Instead, the facts have a diametrically opposite cast.

[10] Inasmuch as the record reveals that no transportation arrangements whatsoever had been made between plaintiff and her son, or that the latter even knew she was working that night, thus belying any business reason for the visit to his house, it is unmistakably clear that in leaving her place of employment for such visit plaintiff was not merely deviating slightly from her duties nor adopting an irregular method of performing them, nor moving from place to place on her employers' premises during an interval of leisure, as might be her privilege. Instead, she was engaged in an independent act of her own, entirely outside the service for which she had been engaged and removed from the area which bounded her invitation. It cannot logically be assumed that having been hired to safeguard a child in the absence of its parents plaintiff was either authorized or empowered to leave that child to go to another house on a mission of interest to herself alone. On the contrary, by so doing, she severed the nexus between her employer and herself, temporarily interrupting her service while in her son's house. Her return to defendants' house in the darkness was just as much a part of her personal errand as was her going to his residence. At the time and place of her injury, in the eyes of the law, plaintiff was a mere licensee, attempting to make her way back to the arena of her activities to resume her duties after a departure therefrom not related to her work and not reasonably to be expected by defendants. Under such circumstances, the law will not impose liability on an employer where the injured employee was at a place where he was neither invited nor expected to go as an outgrowth of his employment.

[11, 12] Plaintiff has cited various cases arising under the Workmen's Compensation Act, and others involving the vicarious liability of the employer for the negligent or tortious conduct of his employee towards a third person. While such cases are help-

ful in arriving at a proper analysis and provide valuable orientation regarding the direction in which the law has progressed, they are not controlling here because of the difference in underlying principles. Under the Workmen's Compensation Act, an employee's injuries are compensable regardless of the employer's negligence so long as the injury arises out of the employment and the employee was at the time in the course of his employment. Labor Code, § 3600. Because of California's policy of liberal construction of the Act in favor of the employee, any reasonable doubt as to whether an act is contemplated by the employment is resolved in favor of the employee. Liberty Mut. Ins. Co. v. Industrial Acc. Comm., 39 Cal.2d 512, 515, 247 P.2d 697. Likewise, in the category of cases arising under the doctrine of *respondeat superior,* an innocent third party has ordinarily been injured by some wrongful act of the employee, and a question arises as to whether liability may be fastened on the employer. In such cases, the policy of the law is that "where the employee is combining his own business with that of his employer, or attending to both at substantially the same time, no nice inquiry will be made as to which business he was actually engaged in at the time of injury, unless it clearly appears that neither directly nor indirectly could he have been serving his employer." Lockheed Aircraft Corp. v. Industrial Accident Commission, 28 Cal.2d 756, 758, 759, 172 P.2d 1, 3.

[13] In the matter at bar, however, plaintiff baby-sitter's case against the defendant householders rests on conventional principles of negligence, based simply on their duty to provide a safe condition in that part of the premises she was invited to use. Plaintiff's injury occurred when she had departed from the ambit of her invitation to engage in a mission or excursion of personal convenience. The court properly found her to be a licensee when injured, as to whom defendants had breached no duty of reasonable care. The question of law on the undisputed facts was therefore properly decided by the order of nonsuit. Medcraft v. Merchants Exchange, 211 Cal. 404, 407, 295 P. 822; Jacobson v. Northwestern Pac. R. R. Co., 175 Cal. 468, 472, 166 P. 3; Powers v. Raymond, 197 Cal. 126, 130, 239 P. 1069; Kennedy v. Chase, 119 Cal. 637, 641, 52 P. 33. A finding that plaintiff was acting in the service of her employers and within the orbit of her business invitation would have been contrary to the undisputed evidence that she was upon an errand that was exclusively and purely personal.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

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133 Cal.App.2d 679

Robert C. EASON, Plaintiff and Respondent,

v.

Ronald A. BRYAN, Defendant and Appellant.

Civ. 16317.

District Court of Appeal, First District, Division 2, California.

June 20, 1955.

Pedestrian's action for personal injuries received when struck by defendant motorist. The Superior Court, Santa Clara County, M. G. Del Mutolo, J., entered order granting pedestrian new trial and motorist appealed. The District Court of Appeal, Nourse, P. J., held that where darkly dressed pedestrian, who had just alighted from a bus, was struck by defendant motorist within cross walk during nighttime, pedestrian was not contributorily negligent as a matter of law.

Affirmed.

1. Automobiles ⚷245(72)

Where nighttime pedestrian, wearing dark clothing, had just alighted from a bus and was struck by motorist while walking within unmarked crosswalk, pedestrian was not contributorily negligent as a matter of law.

2. New Trial ⚿69, 72

In passing upon a motion for new trial based on insufficiency of evidence, trial court is the exclusive judge of the credibility of the witnesses, the probative force of testimony and weight of the evidence.

3. Appeal and Error ⚿1015(1)

If trial court grants motion for new trial, appellate court will reverse such order only if, as a matter of law, the evidence would not support a verdict or judgment contrary to that given in the original trial.

◆

Campbell, Custer, Warburton & Britton, Frank L. Custer, San Jose, W. R. Dunn, Burlingame, for appellant.

James F. Boccardo, San Jose, Edward J. Niland, San Jose, of counsel, for respondent.

NOURSE, Presiding Justice.

This is an appeal from an order granting a new trial in a negligence action after a verdict for defendant. The order specifies that it was granted, among other grounds, on the ground of insufficiency of the evidence to justify the verdict. Appellant's only contention is that plaintiff was contributarily negligent as a matter of law, so that the order should be reversed on the ground that no verdict for plaintiff could be upheld. Compare Henningsen v. Howard, 117 Cal.App.2d 352, 355, 255 P.2d 837.

It has been stated in some way or other in too many cases to require citation, that contributory negligence as a matter of law may only be accepted when on the evidence no reasonable man could reach another conclusion and that such cases are rare. The evidence in this case is far removed from showing such a situation.

The accident happened at the intersection of 10th and Martha Streets in San Jose on November 8, 1951, at 6:45 p. m. Plaintiff stepped from a southbound bus at the northwest corner of the intersection. He was wearing a dark suit and hat. He waited until the bus had pulled away so that its rear was in the middle of the intersection before crossing 10th Street. He looked to the north where there was no oncoming traffic and then south where his view was somewhat obstructed by the bus. He then started to cross in the unmarked northerly crosswalk walking at his normal, rather fast pace. Before he came to the middle of 10th Street he again looked south; he could now see along the left side of the bus, which had gone further south, and he saw south on 10th Street the lights of an oncoming car, approximately 150 feet from the intersection. He did not see an indication of great speed, which would make crossing unsafe for him, and he accordingly continued a few steps in the crosswalk past the middle of 10th Street. When then again he looked south he saw the car at the southerly edge of the intersection, 40 to 50 feet away, bearing rapidly down on him. He ran for the sidewalk but was hit when he was still eight or nine feet from the easterly curb of 10th Street.

[1–3] In passing upon a motion for a new trial, based upon the insufficiency of the evidence, the trial court, like a trier of facts, judges the credibility of witnesses determines the probative force of testimony and weighs the evidence. Such is its exclusive province, and if it grants the motion the appellate court will reverse such order only if as a matter of law the evidence would not support a verdict or judgment contrary to that given in the original trial. Brooks v. Metropolitan Life Ins. Co., 27 Cal.2d 305, 307, 163 P.2d 689. As this is clearly not the case here the order may not be disturbed.

Order affirmed.

DOOLING and KAUFMAN, JJ., concur.

In the Matter of the ESTATE of Mae McMILLIN, Deceased.

E. A. WINSTANLEY, Public Administrator, Petitioner and Appellant,

v.

Morton J. ROBINSON, Contestant and Respondent (thirty five cases).

In the Matter of the ESTATE of Maude Evelyn ARNOLD, Deceased.

In the Matter of the ESTATE of May L. BARRETT, Deceased.

In the Matter of the ESTATE of Joseph W. BIELL, Deceased.

In the Matter of the ESTATE of Anna L. BRANDON, Deceased.

In the Matter of the ESTATE of Gilbert M. CRUZ, Deceased.

In the Matter of the ESTATE of John EFFLAND, Deceased.

In the Matter of the ESTATE of Margaret FREEDMAN, Deceased.

In the Matter of the ESTATE of Idah Martino GREY, Deceased.

In the Matter of the ESTATE of Albert HAYDUK, Deceased.

In the Matter of the ESTATE of Philip F. HAVEY, Deceased.

In the Matter of the ESTATE of John Michael HEFFERNAN, Deceased.

In the Matter of the ESTATE of SHIH CHING LO, Deceased.

In the Matter of the ESTATE of Emily F. McCARTIN, Deceased.

In the Matter of the ESTATE of David C. MENDOZA, Deceased.

In the Matter of the ESTATE of Ramon MENDOZA, Deceased.

In the Matter of the ESTATE of Sam MILLER, Deceased.

In the Matter of the ESTATE of Emma MOHR, Deceased.

In the Matter of the ESTATE of Harry F. MOORE, Deceased.

In the Matter of the ESTATE of Charles W. MORRISON, Deceased.

In the Matter of the ESTATE of Sidney PITT, Deceased.

In the Matter of the ESTATE of Byron H. RIESS, Deceased.

In the Matter of the ESTATE of Bessie B. RICHARDSON, Deceased.

In the Matter of the ESTATE of Bridget ROSENBERG, Deceased.

In the Matter of the ESTATE of James Robert RYALL, Deceased.

In the Matter of the ESTATE of Jerry STENO, Deceased.

In the Matter of the ESTATE of Arthur Roland VAN PAEMEL, Deceased.

In the Matter of the ESTATE of Joseph Francis WALSH, Deceased.

In the Matter of the ESTATE of Clarence Charles WEAVER, Deceased.

In the Matter of the ESTATE of Edna L. WELLS, Deceased.

In the Matter of the ESTATE of Charles Le Roy WHITE, Deceased.

In the Matter of the ESTATE of Harry WRIGHT, Deceased.

In the Matter of the ESTATE of Heinrich MANN, Deceased.

In the Matter of the ESTATE of Lillian M. GRIMES, Deceased.

In the Matter of the ESTATE of Louis Michael BUETTNER, Deceased.

Civ. 20807–20841.

District Court of Appeal, Second District,
Division 3, California.
June 10, 1955.
Hearing Granted Aug. 3, 1955.*

Probate proceedings consolidated for trial. The Superior Court, Los Angeles County, Wilbur C. Curtis, J., sitting in Probate, sustained objections of tax expert, hired by previous Public Administrator, to subsequent Public Administrator's final account in each of 35 cases and ordered Public Administrator to pay expert a specified sum from funds of the estate, and Public Administrator appealed. The District Court of Appeal, Vallée, J., held that, where expert, who was not in the unclassified service, during eleven year period, had examined about 15,000 estates and had done tax work in four or five thousand cases, but such work was not of a confidential nature and did not require such expert technical knowledge, experience, or ability that it could not have been done by one selected under civil service, previous Public Administrator was without authority to enter into independent contract with such expert for such work, and the contract was void.

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* Opinion vacated 292 P.2d 881.

Judgment in each estate reversed.

1. Officers 🔑11.1

Public Administrator and all positions in his office, except persons serving county without compensation, are in the classified service. St.1913, p. 1493, § 33.

2. Officers 🔑11.4

Generally, positions in the classified service must be filled by appointment from an eligible civil service list after open, competitive examination. St.1913, p. 1494, § 34.

3. Officers 🔑11.1

Each county officer is required to appoint, from eligible civil service list, all assistants, deputies, clerks, attachés, and other persons in the office or department of such officer in number fixed by Board of Supervisors. St.1913, p. 1500, § 51.

4. Counties 🔑24

Charter provisions concerning hours and duties of county officers and fixing of such officers' compensation supersede general laws upon such subjects. Probate Code, § 902; St.1913, pp. 1487, 1488, 1493–1495, §§ 11(1, 3), 14, 33, 34, 35; West's Ann.Const. art. 11, § 7½.

5. Officers 🔑11.1

Tax services, which were performed by licensed public accountant as employee of Public Administrator in course of administration of certain estates, were of such nature that they could have been performed by one selected under civil service. Probate Code, § 902; St.1913, pp. 1487, 1488, 1493–1495, 1500, §§ 11(1, 3), 14, 33, 34, 35, 51; West's Ann.Const. art. 11, § 7½.

6. Officers 🔑11.1

Even if Probate Code provision pertaining to extra allowances for extraordinary services authorizes Public Administrator of Los Angeles county to employ tax consultant for performance of any action which consultant might lawfully perform in computation, reporting, or making of tax returns without authorization from Board of Supervisors, power to employ tax consultant is circumscribed by the Civil Service provisions of the county charter. Probate Code, § 902; West's Ann.Const. art. 11, § 7½.

7. Executors and Administrators 🔑97

Probate Code provision authorizing executor or administrator to employ or retain tax counsel, auditors, accountants or other tax experts for performance of any action which such persons may lawfully perform in computation, reporting, or making of tax returns is merely grant of power and does not prescribe mode by which power should be exercised by Los Angeles County Public Administrator, and, where county charter prescribes only mode by which the power to contract shall be exercised, such mode is the measure of the power. Probate Code, § 902; West's Ann. Const. art. 11, § 7½.

8. Executors and Administrators 🔑24

Public Administrator is primarily a public officer performing essentially a governmental function in administering estates and performing his other duties and his authority is not derived wholly from his appointment by issuance of letters to him, and his official character is not affected by imposition of duties devolved on him by the letters. St.1913, pp. 1487, 1488, 1493–1495, 1500, §§ 11(1, 3), 14, 33, 34, 35, 51; West's Ann.Const. art. 11, § 7½.

9. Executors and Administrators 🔑24

Purpose of law creating office of Public Administrator is to provide a public officer who, acting under his oath of office and official bond, should be in a position at all times to administer estates where there is a failure of heirs or the persons competent to act. St.1913, pp. 1487, 1488, 1493–1495, 1500, §§ 11(1, 3), 14, 33, 34, 35, 51; West's Ann.Const. art. 11, § 7½.

10. Executors and Administrators 🔑24

In performing services for Public Administrator, tax expert is not acting for a private individual but is performing an official duty for the benefit of the county officer. St.1913, pp. 1487, 1488, 1493–1495, 1500, §§ 11(1, 3), 14, 33, 34, 35, 51; West's Ann.Const. art. 11, § 7½; Probate Code, § 902.

11. Executors and Administrators ⚷24, 488

The court must allow Public Administrator commissions prescribed by the Probate Code for his services in a particular estate from assets of such estate, but Public Administrator must pay such commissions into the county treasury. Probate Code, §§ 900, 901.

12. Executors and Administrators ⚷24, 216(1)

County Counsel is a salaried officer of county and is the attorney for the Public Administrator, nevertheless the court must allow him fees prescribed by Probate Code for services rendered Public Administrator in a particular estate from assets of such estate, but such fees must be paid into the county treasury. Probate Code, §§ 910, 911.

13. Executors and Administrators ⚷24, 109(3)

Public Administrator is not prohibited from employing a tax consultant whose salary is paid by county nor from collecting from particular estate whatever allowance court may make for services of a tax consultant, but such allowance must be paid into the county treasury. Probate Code, §§ 900–902, 910, 911, 1142; Government Code, § 27441.

14. Executors and Administrators ⚷109(3)

Under Probate Code provision that executor or administrator may employ certain tax experts and "pay from the funds of the estate" for such services, quoted phrase means only that expense of tax expert is a proper expenditure to be made from funds of the estate. Probate Code, § 902.

15. Executors and Administrators ⚷109(3)

If expenditure made by Public Administrator to tax expert is made in good faith and is proper, administrator may be credited therewith in settlement of his account. Probate Code, § 902.

16. Executors and Administrators ⚷24, 275

Where Public Administrator employs tax expert who is civil service employee paid by county, whatever allowance is made in each estate for tax expert's services must be paid direct to Public Administrator and by him paid into the county treasury. Probate Code, §§ 900–902, 910, 911, 1142; Government Code, § 27441.

17. Courts ⚷198

Sole question for court in probate is amount which shall be allowed Public Administrator from estate funds for services of tax expert employed by Public Administrator, and question as to how tax expert shall be paid and amount he shall receive is one over which the probate court, in absence of enabling statute, does not have jurisdiction or concern and is to be determined only in compliance with county charter. Probate Code, §§ 900–902, 910, 911, 1142; Government Code, § 27441.

18. Executors and Administrators ⚷236

In absence of enabling legislation, allowance from estate for attorney's fees and expenses must run in favor of party legally liable therefor and not to person to whom the party may have become legally liable for services rendered.

19. Officers ⚷11.1

Where Public Administrator had employed tax expert, who was not in the unclassified service, for eleven years in which he examined about 15,000 estates and did tax work in four or five thousand, but whose work was not of a confidential nature and did not require such expert technical knowledge, experience, or ability that it could not have been done by one selected under civil service, the employment contract was void. Probate Code, §§ 760, 900–902, 910, 911, 1142, 1556.1; West's Ann.Code Civ.Proc. § 796; West's Ann.Civ.Code, § 137.5; Government Code, § 27441; St.1913, pp. 1487, 1488, 1493–1495, 1500, §§ 11(1, 3), 14, 33, 34, 35, 51; West's Ann.Const. art. 11, § 7½.

20. Executors and Administrators ⚷216(1)

Implied liability to pay on quantum meruit for benefits received by Public Administrator for work done by tax expert hired by him could not exist where prohibition of charter against contracting in any other manner than as prescribed therein was disregarded, and, therefore, expert could not recover.

21. Executors and Administrators ⚷24, 97

Where Los Angeles County Charter prescribed mode by which Public Administrator could employ or appoint a tax consultant, compliance with charter was mandatory and adoption of mode prescribed in charter was a jurisdictional prerequisite to exercise of the power to contract at all, and disregard of prescribed mode would make contract void.

22. Executors and Administrators ⚷216(1)

Where, in hiring tax expert, Public Administrator had disregarded mode prescribed by the county charter, liability of the estates involved for such services could not arise by estoppel or ratification.

23. Officers ⚷11.1

Power of Los Angeles Public Administrator was limited by Civil Service Provisions of charter, and, therefore, contract made by him, to employ tax consultant, was not binding or obligatory in absence of compliance with charter civil service provisions.

24. Officers ⚷11.1

A person dealing with public officer of Los Angeles County is chargeable with knowledge of limitation of his authority and is presumed to know the law concerning employment of persons under civil service and, in taking employment from such officer, acts at his peril, and, when he deals in matters expressly provided in charter, is bound to see that charter is complied with.

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Harold W. Kennedy, County Counsel, and Baldo M. Kristovich, Deputy County Counsel, Los Angeles, for appellant.

S. V. O. Prichard, Beverly Hills, for respondent.

VALLÉE, Justice.

The appeals are by the Public Administrator of the County of Los Angeles from judgments of the superior court sitting in probate entered in 35 estates sustaining the objections of Morton J. Robinson to the final account of the Public Administrator in each estate and ordering him to pay Robinson a specified sum from the funds of the estate. The proceedings were consolidated for trial and tried together. The 35 appeals have been submitted on one set of briefs. The questions involved are identical. They will be decided in one opinion.

The questions arise out of the employment of Robinson as a tax consultant by a former Public Administrator. Robinson performed tax work in the course of administration of each estate. In his final account in each estate the Public Administrator did not mention the fact that Robinson had done the tax work, nor did he request the court for an allowance for the work done. Robinson filed what he denominated "Objections to Final Account and Petition that Allowance be Made to Objector" in each estate in which he alleged: he was employed by the predecessor of the present Public Administrator, as the administrator of the estate, pursuant to the provisions of section 902 of the Probate Code to perform certain extraordinary services in connection with the estate, i. e., necessary tax work in connection therewith; the services he performed; the reasonable worth of the services. He prayed that there be included in the charges against each estate and directed to be paid to him the sum specified.

The court found: 1. Robinson is a licensed public accountant. 2. From 1943 to October 6, 1953 the former Public Administrator employed Robinson to prepare and file individual and fiduciary income tax returns required by law in all estates represented by the Public Administrator. 3. It was agreed between Robinson and the Public Administrator that Robinson should be paid only from the funds of the respective estates in which such services were performed and in such amounts as might be allowed by the probate court as expenses of administration therein. 4. Robinson performed such services for the benefit of the estate, the reasonable value of which is a specified sum which he has not been paid. 5. The income tax services performed by Robinson and his employees for the Public Administrator "could at all times have been adequately and satisfactorily performed by persons selected under the provisions of the Civil Service System as established by the Charter of the County of Los Angeles."

The court concluded: 1. Since "September, 1951, said Public Administrator has had the authority, by virtue of Section 902 of the Probate Code, to employ tax accountants to perform income tax services of the nature of those performed by said Objector in estates wherein said Public Administrator is the fiduciary." 2. The "provisions of the Charter of the County of Los Angeles establishing a comprehensive Civil Service System did not and do not apply to said Public Administrator in the employment of Objector as a tax accountant for said estates." 3. Robinson's objections to the final account should be sustained. The judgment in each estate sustained Robinson's objections and ordered the Public Administrator to pay to him a specified sum from the funds of the estate.

The facts are not in dispute. In 1942 the predecessor of the present Public Administrator orally employed Robinson to do all income tax work in half of the estates handled by the Public Administrator. Later he orally employed him to do all income tax work in all the estates in the Public Administrator's office. It was agreed that on the completion of the work in each estate Robinson would be paid from the funds of that estate on submitting a bill to the Public Administrator for his approval and subject to the approval of the court. In 1945 the former Public Administrator orally employed Robinson to do all California inheritance tax work in all the estates in the Public Administrator's office, which he did until 1951. Robinson examined every estate in the Public Administrator's office and did the tax work in those which required such work. When Robinson's work in a particular estate was completed he submitted a statement to the Public Administrator showing the extent of the work done and his fee. The former Public Administrator approved the amount and it was included in the final account and paid after approval of the account by the probate court.

Robinson and a personally hired and paid employee spent full time in the Public Administrator's office. They had free space, free office furniture and stationery, free use of a county telephone, and access to the entire office, all at the expense of the county.

In 1951 the Board of Supervisors created the civil service position of "Estate Tax Analyst," and a civil service employee of the county took over and from that time did all necessary inheritance tax work. Robinson continued to do all the income tax work. In the salary ordinance for the fiscal year 1952–53 the Board of Supervisors created a civil service position in the office of the Public Administrator also described as "Estate Tax Analyst," a person was appointed to the position, and since September 14, 1953 he has done the same work as Robinson did prior thereto. In 1951 there was created the civil service position of "Estate Tax Assistant." In September 1953 the County Counsel advised the Public Administrator that all tax work in his office should be done by a civil service employee. The present Public Administrator was appointed on November 7, 1953. Since November 7, 1953 the Public Administrator has had a tax division composed entirely of civil service employees who have done all tax work, except in a few estates in which the court had previously appointed Robinson or private attorneys. Robinson has done no tax work for the Public Administrator since October 1953.

The Public Administrators of the City and County of San Francisco, the County of Alameda, and the County of San Diego for many years have had all income tax work necessary in all estates in which they were acting done by civil service employees. The California State Franchise Board in its Los Angeles office has more than 65 civil service employees, all qualified to do all kinds of income tax work. The Director of Internal Revenue at Los Angeles has more than 82 civil service employees who are qualified to do all kinds of income tax work.

The predecessor of the present Public Administrator was appointed administrator of one of the 35 estates here involved in 1950, of 4 in 1951, and of 30 in 1952 and 1953. Robinson performed tax work in each of the 35 estates. It is conceded that Robinson was not employed under civil service.

The primary question is whether the Public Administrator had the authority to employ a tax consultant on contract independently of the civil service requirements of the Charter of the County of Los Angeles. The present Public Administrator asserts that his predecessor could only employ a tax consultant selected under the civil service provisions of the charter. Robinson claims the Public Administrator could employ a tax consultant without complying with the civil service requirements. There is no dispute as to the reasonableness of the amounts allowed.

The Charter of the County of Los Angeles was adopted pursuant to the authority derived from the Constitution.[1] The Constitution says that the charter "shall provide" for "public administrators"; "[f]or the *powers* and *duties* of boards of supervisors and *all other county officers,*" and "[f]or the fixing and regulation by boards of supervisors, by ordinance, of the appointment and number of assistants, deputies, clerks, attachés and other persons to be employed, from time to time, in the several offices of the county, and for the prescribing and regulating by such boards of the powers, duties, qualifications and compensation of such persons, the times at which, and terms for which they shall be appointed, and the manner of their appointment and removal." [2] "[S]uch charter shall become the charter of such county and shall become the organic law thereof relative to the matters therein provided * * * and shall supersede all laws inconsistent with such charter relative to the matters provided in such charter." [3]

[1-3] The Charter of the County of Los Angeles [4] provides that it is the duty of the Board of Supervisors to appoint all county officers [5] and "[t]o provide, by ordinance, for the number of assistants, deputies, clerks, attachés, and other persons to be employed from time to time in the several offices and institutions of the county, and for their compensation and the times at which they shall be appointed." [6] "The appointive county officers shall be: * * * Public administrator * * *." [7] The civil service of the county is divided into the unclassified and the classified services. No claim is made that Robinson was in the unclassified service. The Public Administrator and all positions in his office, except persons serving the county without compensation, are in the classified service.[8] Positions in the classified service must be filled by appointment from an eligible civil service list after open, competitive examination, with exceptions not pertinent here.[9] Each county officer is required to appoint, from the eligible civil service list, all assistants, deputies, clerks, attachés, and other persons in the office or department of such officer as the number thereof is fixed and from time to time changed by the Board of Supervisors.[10] There may be "temporary employment of persons on the eligible list until list of the class covering the temporary employment is exhausted; and in cases of emergency, for temporary employment without examination, with the consent of the [civil service] commission, after the eligible list has been exhausted. But no

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[1] Const. art. XI, § 7½.

[2] Const. art. XI, § 7½, subds. 2, 4, 5.

[3] Const. art. XI, § 7½.

[4] Stats.1913, p. 1484; Amended by Stats. 1923, p. 1659; Stats. 1929, p. 1985; Stats.1935, p. 2440; Stats.1939, p. 3145; Stats.1941, p. 3235; Stats.1943, p. 3211; Stats.1945, p. 2921; Stats.1947, p. 3361; Stats.1949, p. 2880; Stats.1953, p. 3781.

[5] Sec. 11(1).

[6] Sec. 11(3).

[7] Sec. 14.

[8] Sec. 33.

[9] Sec. 34.

[10] Sec. 51.

such temporary employment shall continue longer than sixty days, nor shall successive temporary appointments be allowed."[11] Section 35 reads:

> "In case of a vacancy in a position requiring peculiar and exceptional qualifications of a scientific, professional or expert character, upon satisfactory evidence that competition is impracticable and that the position can best be filled by the selection of some designated person of recognized attainments, the [civil service] commission may, after public hearing and by the affirmative vote of all three members of the commission, suspend competition, but no such suspension shall be general in its application to such positions, and all such cases of suspension shall be reported, together with the reason therefor, in the annual reports of the commission."

No claim is made that the procedure prescribed by section 35 was followed with respect to the employment of Robinson.

[4] The provisions of the charter with respect to the powers and duties of county officers and the fixing of their compensation supersede the general laws on the subjects.[12]

Two lines of cases bear on the question whether the failure to comply with the civil service provisions of the Charter of the County of Los Angeles in the employment of Robinson renders his employment void.[13]

State Compensation Ins. Fund v. Riley, 9 Cal.2d 126, 69 P.2d 985, 111 A.L.R. 1503, was mandate to compel the state controller to approve a claim and issue a warrant in favor of a lawyer with whom the Fund had entered into a contract for legal services. It was alleged that because of a policy of the United States with respect to the imposition of an income tax on the Fund, its officers, and employees, the integrity of the Fund was imperiled and its disruption threatened; that to protect its rights and interests, the Industrial Accident Commission had determined it was necessary to employ special counsel and had directed the manager of the Fund to enter into a contract with the lawyer, which had been done. The Fund had an attorney, assistant attorney, and various deputy attorneys, all civil service employees. The court first held that the Fund had the power to employ special counsel to protect its rights in pending litigation. It then held that the Fund could not employ such counsel independently of the state personnel board, empowered by law to enforce the state Civil Service Act. The state Civil Service Act is similar to the civil service provisions of the Charter of the County of Los Angeles. Each provides that appointments to all positions, with exceptions not pertinent here, shall be made by the appointing power in the manner provided, i. e., from eligible civil service lists. The court said, 9 Cal.2d at page 134, 69 P.2d at page 989:

> "Petitioner urges that the services to be rendered by Mr. McNab are urgent, temporary, and require expert knowledge, experience, and ability. However, it is not alleged that the services here involved could not be rendered by one selected under the provisions of the

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[11] Sec. 34(9).

[12] Mapes v. Williams, 2 Cal.2d 177, 39 P.2d 421; In re Estate of Miller, 5 Cal.2d 588, 592, 55 P.2d 491; Anderson v. Lewis, 29 Cal.App. 24, 26, 154 P. 287; County of Los Angeles v. Cline, 37 Cal.App. 607, 609, 174 P. 73; Pullen v. Garrison, 85 Cal.App. 706, 714, 259 P. 1021; Cornell v. Harris, 15 Cal.App.2d 144, 148–149, 59 P.2d 570; Lesem v. Getty, 23 Cal.App.2d 57, 60–61, 72 P.2d 183.

[13] The Public Administrator relies on State Compensation Ins. Fund v. Riley, 9 Cal.2d 126, 69 P.2d 985, 111 A.L.R. 1503; Stockburger v. Riley, 21 Cal.App.2d 165, 68 P.2d 741; and Allen v. State Board of Equalization, 43 Cal.App.2d 90, 110 P.2d 73.

Robinson relies on City and County of San Francisco v. Boyd, 17 Cal.2d 606, 110 P.2d 1036; Kennedy v. Ross, 28 Cal.2d 569, 170 P.2d 904; Burum v. State Compensation Ins. Fund, 30 Cal.2d 575, 184 P.2d 505; In re Estate of Schnell, 82 Cal.App.2d 170, 185 P.2d 854; and County of Los Angeles v. Ford, 121 Cal.App.2d 407, 263 P.2d 638.

> Civil Service Act, and it is admitted that no application was ever made to the personnel board for a temporary appointment as required by the statute. Petitioner does not refer us to any provision of the Constitution or statute which distinguishes between urgent temporary employment and permanent employment or between skilled and nonskilled employees, or between professional and nonprofessional services. When civil service was adopted in 1934 by vote of the people, it was unequivocally declared to be the policy of this state that every employee and officer of the state should be included therein with certain enumerated exceptions not here involved. All types of service were included therein—no distinction between professional and nonprofessional, or between temporary and permanent employment was made either in the constitutional provision or in the act. There can be no doubt that both the constitutional provision and the statute embrace within their terms professional as well as nonprofessional service."

In the present case Robinson did not allege that the services he performed could not have been rendered by one selected under the civil service provisions of the county charter, and the court specifically found they could have been rendered by one so selected.

Stockburger v. Riley, 21 Cal.App.2d 165, 68 P.2d 741, was mandate to compel the state controller to draw a warrant in payment of a claim for services rendered pursuant to an agreement entered into by the state and American Building Maintenance Company. By the agreement the company agreed to furnish all labor and materials necessary to clean the windows in certain state buildings in Sacramento. The employment was to be continuous throughout the year. It was held that the Constitution required the services to be rendered by persons employed pursuant to the Civil Service Act. The court stated, 21 Cal.App.2d at page 167, 68 P.2d at page 742:

> "In the particular service provided in the agreement we are now considering, there is nothing urgent, temporary, or occasional in the work to be done. It requires no expert knowledge, experience, or ability that cannot be obtained from those either now in the employ or service of the state, or who cannot be brought into such service under the procedure provided by the Civil Service Act * * *.
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> "When civil service was adopted, the people determined as a matter of policy that the provisions thereof applied to every officer and employee of the state except certain excepted classes, under no one of which the present character of services falls. All classes of service to the state are recognized wherein the work or labor to be performed is of that character with respect to which fitness thereof may be had by competitive examination, or as to which merit or efficiency may be developed or increased by continuous service or by promotion and recognition of demonstrated ability. * * *
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> "[21 Cal.App.2d at page 170, 68 P.2d at page 744.] Having in mind therefore, that the work was continuous, rather than intermittent, permanent rather than temporary, general rather than special, not confidential in its nature, unskilled rather than highly technical, a type of service already performed by employees under civil service in other departments of the state, and having in mind the intent and purpose of the people in adopting the particular amendment under consideration, and that the sanctioning of such contract as here before us would have the result of weakening or destroying the effect of the civil service, we are constrained to hold that the writ should be denied."

City and County of San Francisco v. Boyd, 17 Cal.2d 606, 110 P.2d 1036, 1043, was mandate to compel the city controller to certify that there was a sufficient unencumbered balance in a fund that could legally be used for the proposed expenditure of $100,000 for the services of one Purcell, a civil engineer. San Francisco sought by a contract to procure the services of Purcell for a period of 5 years to aid in the solution of traffic and transit problems. One contention was that the contract violated the civil service provisions of the Charter of San Francisco which provided that all positions in all departments and offices of the city and county were in the classified civil service and should be filled from lists of eligibles "'excepting * * * (4) *persons employed in positions in any department for expert professional temporary services,* and when such positions are exempted from said classified civil service for a specified period of said temporary service, by order of the civil service commission.'" The court assumed that subdivision (4) would be complied with. The court said that a reading of the entire text of the civil service provisions of the charter indicated clearly "that it was the intention of the framers of the charter that civil service should apply only to persons *employed in permanent positions* in municipal departments to the end that public service should be free from political shifting and control resulting from changes in administration."

Allen v. State Board of Equalization, 43 Cal.App.2d 90, 110 P.2d 73, was mandate to require the respondents to reclassify and reinstate the petitioners in the positions of investigators and pay them the salary of an investigator for periods during which they were classified as collectors. The petitioners had performed the duties of investigator over a period of almost two years without examination, certification, or appointment as such. The question was whether a civil service employee who had performed the duties of one of a higher class than the class in which his position was rated could require the personnel board to classify him in such higher position for the period during which he served in that position, and could compel the controller to pay the differential between the salary of the lower class and that of the higher class of civil service. Denying the writ, the court stated, 43 Cal. App.2d at page 93, 110 P.2d at page 74:

> "The acts of the head of a department of the state do not have the sanctity of even a legislative enactment. Far short do they fall of the force of a provision of the organic law. Of this effective constitutional provision, petitioners, as well as the members of the respective boards, had knowledge and by it they are all bound. The primary purpose of a Constitution is to place limitations upon the legislative authority as well as upon the powers of its co-ordinate branches of government. When, instead of forbidding an act, it contains a provision prescribing a course to be pursued by a department, board, commission, or an official, all statutes must be consonant therewith and any resolution, order or decree contrary to such provision by whatsoever body ordained is void. In view of the quoted language of Article XXIV, no official or board could by order made, or by services performed, promote an employee in the classified service to a position in a higher class.
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> "* * * If the appointing power could, by assigning duties of a higher nature to an employee, and the state personnel board could, by classifying those duties to a higher class than that of the employee's original position, give to an employee a permanent civil service status, the entire fabric of the civil service system would fail. Promotion and appointments in civil service would then no longer be made 'exclusive under a general system based upon merit, efficiency and fitness as ascertained by competitive examination.'"

Kennedy v. Ross, 28 Cal.2d 569, 170 P.2d 904, 905, was mandate to compel the controller of San Francisco to issue a warrant. The Director of Public Works of San Francisco had entered into a contract with the petitioner, a consulting engineer, "whereby the latter, employing and maintaining a staff of professional engineers and operating a chemical and biological testing laboratory in San Francisco, agreed to prepare and furnish engineering and architectural plans, specifications, estimates of cost, and contract documents required for a proposed North Point Sewage and Sludge Treatment and Disposal Plant, and appurtenant works and buildings, to be located in the Islais Creek district." It was contended the contract was invalid for failure to comply with the civil service provisions of the charter. On the basis of the exemption referred to in City and County of San Francisco v. Boyd, supra, 17 Cal.2d 606, 110 P.2d 1036, it was held that the contract was valid. The civil service commission had certified that petitioner was an independent contractor, that he and his employees were not subject to the civil service provisions of the charter, and that an order of exemption was unnecessary. The court said that "the petitioner was not appointed to nor does he hold a position in any department or office of the city"; his contract called for his expert professional services on other than a permanent basis; he was engaged to do a specific, expert, professional task for a stated consideration; the services for which he was engaged were not such as could adequately be rendered by an existing department of the city; his services could not be duplicated; and they were not within the scope of any existing civic department.

Burum v. State Compensation Ins. Fund, 30 Cal.2d 575, 184 P.2d 505, 506, was an action by a firm of attorneys to recover from State Compensation Insurance Fund attorneys' fees pursuant to a written contract entered into by the parties. The plaintiffs, as attorneys for the widow and minor children of one Davis who was killed in an industrial accident, brought an action for damages against the alleged negligent third parties. The Fund, which was the insurance carrier for Davis' employer, paid the widow $6,300 for herself and the children pursuant to an award of the Industrial Accident Commission. The Fund claimed the right to recover that amount "'as special damages against [the responsible] third parties, either in a separate suit brought in its own name, or by lien imposed on the judgment in any action brought by the widow on behalf of herself and the minor children.'" It elected to follow the latter course and entered into a written contract with the plaintiffs for them to represent it in the death action and to recover the amount of its lien for a contingent fee of 25 per cent. The trial court sustained a demurrer to the complaint without leave to amend. The complaint alleged that an action in the name of the Fund as an insurer claiming subrogation would be likely to encounter prejudice and hostility on the part of a jury, while an action in the name of the widow would be likely to excite sympathetic consideration; the parties did not know of any insurance or property from which a judgment in excess of $5,000 could be satisfied; the Fund was entitled to $6,300 before any damages were payable to the widow; in view of this priority, no incentive existed for the widow to continue prosecution of her action; an incentive existed for her attorneys "to obtain a judgment and 'explore the posssibility of discovering additional assets subject to execution, if (they) could look to the Fund as well as to (the) widow for a fee'; and that through the services of her attorneys, 'performed simultaneously and incidentally in the interest of the Fund,' there would be 'a better prospect of obtaining damages on behalf of the Fund' than would be the case if the Fund relied on 'the services of attorneys in the civil service employ of (the) Fund'"; *the services "were of such a nature that they could not be performed adequately or competently or satisfactorily by an attorney or attorneys selected under" civil service.* (Italics added.) The complaint also alleged that the services were performed, $5,800 collected and paid to the Fund, and the plaintiffs were entitled to receive $1,450 from the Fund. It was held that the complaint stated a cause of action. Referring to the allegation that the services could not be performed adequately or competently or satisfactorily by an attorney selected under civil service, the court observed, 30 Cal.2d at page 580, 184 P.2d at page 507:

> "The force of such allegation stems from the fact that in the conduct of its insurance business the Fund operates on a 'fairly competitive' basis with private insurance carriers and has the power to 'enter into any contracts or obligations relating to the State Com-

pensation Insurance Fund which are authorized or permitted by law.' "

The opinion continues, 30 Cal.2d at page 581, 184 P.2d at page 508:

> "[I]n line with the allegation that the reimbursement claim of the Fund exceeded the amount of known assets from which a judgment against the responsible 'third parties' could be satisfied and the consequent priority right of the Fund in the damage recovery, the widow manifestly would have had no incentive to employ attorneys to prosecute the action for the sole benefit of the Fund and at the same time the Fund was without legal right to substitute in such litigation its attorneys or any other attorney selected by civil service examination in the place of the attorneys selected by the widow. But the Fund had a recognized *interest* in the death action by virtue of its claim of a lien upon any judgment that might be obtained therein and, *a fortiori,* it was to the Fund's advantage to have that action continued in pursuance of an approved means of effecting its reimbursement for 'expenditures for compensation.' Labor Code, sec. 3856. Such claim of lien undoubtedly constituted an interest in the death action as would warrant the Fund's employment of special counsel for its protection, consistent with its broad powers to conduct its insurance business on a 'fairly competitive' basis and to take such steps as it should deem proper to keep its losses at a minimum. * * * [30 Cal.2d at page 582, 184 P.2d at page 508]. By reason of the unique set of facts alleged by plaintiffs, the services which they were required to, and did, perform in accordance with their contractual arrangements with the Fund involved considerably more than 'the collection of a lien.' Allegedly, as a matter of tactics and in recognition of certain practical considerations affecting its status with reference to the death action (cf. Jacobsen v. Industrial Accident Commission, supra, 212 Cal. 440, 446, 447, 299 P. 66), the Fund negotiated its contract with plaintiffs in pursuance of one of the approved methods designed to keep its losses at a minimum by reason of compensation paid as part of its insurance business. Labor Code, sec. 3856. Accordingly, the facts pleaded support plaintiffs' allegation that the particular services here in question 'could not be performed adequately or competently or satisfactorily' by attorneys selected under civil service; and such pleading is sufficient, on demurrer, to bring plaintiffs' case within the exception above noted in State Compensation Insurance Fund v. Riley, supra, 9 Cal.2d 126, 135, 69 P.2d 985."

In re Estate of Schnell, 82 Cal.App.2d 170, 185 P.2d 854, 856, was an appeal from a judgment fixing a fee of $10,000 for extraordinary legal services rendered in the estate of Anna Schnell. Orders were made in the estate proceeding authorizing the Public Administrator of the County of Los Angeles to retain the appellants, attorneys at law, for the purpose of endeavoring to recover and establish title to property claimed by the executor of the will of August Schnell and directing him to pay the attorneys for their services a contingent fee based on the value of the property recovered, the amount to be fixed by the court. The Public Administrator's petition for the orders alleged he had information there was property of the estate which the executor of the will of August Schnell asserted belonged to that estate; that the outcome of the litigation was uncertain; that he did not wish " 'to put the estate of Anna Schnell to the expense of employing counsel at a fixed fee, *or to use the services of the County Counsel* in the prosecution of an action to determine title to the securities which would also involve the estate in the necessity of paying large attorney's fees for the services of counsel regardless of the outcome' "; that the appellants were willing to accept the employment on a contingent basis. Over a period of three years the attorneys, by various actions and proceedings, succeeded in recovering property of the value of $45,219.02. The trial court found that the orders authorizing the employment were void, that the attorneys had rendered extraordinary services, and that a reasonable fee was $10,000. The attorneys appealed, claiming the contract of employment was valid and should have been considered in fixing the fee, and that the court abused its discretion in not fixing the fee at a sum larger than $10,000. Without analysis or discussion of article XI, section 7½, of the Constitution or of the civil service provisions of the Charter of the County of Los Angeles, the court commented, 82 Cal.App.2d at page 174, 185 P.2d at page 856:

> "In the circumstances presented, the public administrator used sound judgment and practical common sense when he engaged the services of appellants, who, through persistent effort over a period of three years, succeeded in recovering for the within estate the sum of $44,756.27 in cash from the Estate of August Schnell, deceased",

said it was not necessary to decide the question of the validity of the orders and the employment thereunder, and held that the trial court had not abused its discretion in fixing the amount.

County of Los Angeles v. Ford, 121 Cal. App.2d 407, 263 P.2d 638 639, was mandate to compel the chairman of the board of supervisors to execute contracts pursuant to which the medical schools of the University of Southern California and of the College of Medical Evangelists would render medical and teaching services in the county hospital. By the contracts the schools were to provide medical specialists from their teaching staffs who would "provide effective on-the-job training and teaching facilities to those employees holding permanent civil service classifications." The schools had been rendering the services gratuitously but had notified the board of supervisors they could not continue to do so and would be forced to restrict or terminate the services unless paid. In order to adequately care for the indigent sick it was necessary to continue operating the county hospital as a teaching hospital. It could only be maintained as a teaching hospital as long as it remained associated with qualified medical schools. The contracts also provided that the university and the college, through their medical schools, would conduct at the hospital medical research projects authorized by the superintendent and furnish clinical and scientific equipment. On the authority of City and County of San Francisco v. Boyd, supra, 17 Cal.2d 606, 110 P.2d 1036, and Kennedy v. Ross, supra, 28 Cal.2d 569, 170 P.2d 904, the court held the contracts valid, saying, 121 Cal.App.2d at page 412, 263 P.2d at page 641:

> "Likewise here, the faculty members of the medical schools, who are to render the teaching and medical services required by the contracts, are not employees in the usual or ordinary sense. As hereinabove mentioned, the contracts provide that the University and the College medical faculties, the doctors and the students are independent contractors, and shall be responsible for the manner in which they perform the required services 'after they have been advised by the Superintendent what activities they shall perform.'"

The test laid down in these cases for determining whether a contract of employment made by a public body or officer is valid, when there is a failure to comply with civil service requirements, is: Are the services, whether temporary or permanent, of such a nature that they could be performed by one selected under the provisions of civil service? If the services could be so performed, then it is mandatory on the appointing power to proceed in accordance with the civil service provisions of the county charter.[14] The test is not limited in its application to services or contracts for services which the governmental agency does or contracts to do directly to be paid for with its own funds out of its treasury.[15]

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[14] State Compensation Ins. Fund v. Riley, 9 Cal.2d 126, 135, 69 P.2d 985, 111 A.L.R. 1503. See also 11 Op.Atty.Gen. 214; 12 Op.Atty.Gen. 308; 16 Op.Atty. Gen. 194; 17 Op.Atty.Gen. 152; 22 Op. Atty.Gen. 192; 24 Op.Atty.Gen. 173.

The authorities relied on by Robinson, all of which we have analyzed, do not negative this conclusion. In City and County of San Francisco v. Boyd[16] and Kennedy v. Ross[17] the professional services in question were specifically exempted from civil service. Burum v. State Compensation Ins. Fund[18] and County of Los Angeles v. Ford[19] held that the services in question in those cases were of such a nature that they could not be performed by one selected under civil service. In re Estate of Schnell[20] is of no value because of the failure to consider the effect of article XI, section 7½, of the Constitution and the civil service requirements of the Charter of the County of Los Angeles. Further, the court may well have held that the services there involved could not have been done by one selected under civil service.

[5] Applying the test to the facts in the case at bar, we think it patent that the services performed by Robinson were of such a nature that they could have been performed by one selected under civil service. In fact, as we have stated, the trial court expressly found that the services performed by Robinson "could at all times have been adequately and satisfactorily performed by persons selected" under civil service. The evidence does not permit any other conclusion. The constitutional provision and the charter leave no room for interpretation. All positions in the office of the Public Administrator other than those in the unclassified service are positions in the classified service. Robinson occupied a position in the office of the Public Administrator. He was not in the unclassified service. The county can and does employ persons to assist the Public Administrator in the performance of his duties, including the performance of extraordinary services.[21] The doing of the tax work in the office of the Public Administrator was not of an intermittent, temporary, or special nature. Robinson was not employed temporarily to do the tax work in each particular estate. His work was continuous, permanent, and general. It went on for all of 11 years, during which time he examined about 15,000 estates and did tax work in 4,000 or 5,000. During all of that time he required the services of a full-time employee. The work was not of a confidential nature. It did not require such expert technical knowledge, experience or ability as could not have been done by one selected under civil service. The consequence is that the contract of employment of Robinson was void unless the Public Administrator, by virtue of section 902 of the Probate Code, is free to employ any one he may select as a tax expert.

Section 900 of the Probate Code provides that the administrator shall be allowed all necessary expenses in the care, management, and settlement of the estate. Probate Code, section 902, as amended in 1951, provides that the administrator may "employ or retain tax counsel, tax auditors, accountants, or other tax experts for the performance of any action which such persons, respectively, may lawfully perform in the computation, reporting, or making of tax returns, or in negotiations or litigation which may be necessary for the final determination and payment of taxes, and pay from the funds of the estate for such services." It also provides that allowances may be made as the court may deem just and reasonable for the preparation of estate, income, or other tax returns, or the adjustment or litigation or payment of said taxes.

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[15] In State Compensation Ins. Fund v. Riley, 9 Cal.2d 126, 69 P.2d. 985, the funds involved were not public funds. See Ins.Code, §§ 11770–11800. Cf. City of Pasadena v. Estrin, 212 Cal. 231, 234–235, 298 P. 14.

[16] 17 Cal.2d 606, 110 P.2d 1036.

[17] 28 Cal.2d 569, 170 P.2d 904.

[18] 30 Cal.2d 575, 184 P.2d 505.

[19] 121 Cal.App.2d 407, 263 P.2d 638.

[20] 82 Cal.App.2d 170, 185 P.2d 854.

[21] From 1946 through 1953 the Public Administrator of the County of Los Angeles had a staff of full-time employees which varied from 30 to 60, all employed under civil service. From 1951 to November 1953 part of the tax work was done by a county-employed civil service employee. Since November 6, 1953 all tax work has been done exclusively by county-employed civil service employees, except in a few estates in which the court had previously appointed Robinson or private attorneys.

[6, 7] Assuming that section 902 of the Probate Code authorizes the Public Administrator of the County of Los Angeles to employ a tax consultant for the performance of any action which the latter "may lawfully perform in the computation, reporting, or making of tax returns" without authorization from the board of supervisors, a question we need not decide,[22] the power to employ a tax consultant does not authorize the Public Administrator to employ any one he may select. The power thus given is circumscribed by the civil service provisions of the county charter in the same manner as his power to employ assistants, deputies, clerks, attachés, stenographers, etc., is limited. Section 902 is merely a grant of power. It does not and perhaps could not prescribe the mode by which the power shall be exercised by the Public Administrator of the County of Los Angeles. It does not say how a tax expert is to be employed; the charter does. Where the charter prescribes the only mode by which the power to contract shall be exercised, the *mode* is the *measure* of the power.[23]

[8–10] The Public Administrator is primarily a public officer performing essentially a governmental function in administering estates and performing his other duties. He obtains letters of administration, not as an individual but as Public Administrator, by virtue of his office. His authority is not derived wholly from his appointment by the issuance of letters to him. His official character is not affected by the imposition of the duties devolved on him by the letters. The purpose of the law creating the office of Public Administrator was to provide a public officer, acting under his oath of office and official bond, who should be in a position at all times to administer estates where there is a failure of heirs or other persons competent to act. He represents the government and acts in a governmental capacity. The county has a material financial interest in estates handled by the Public Administrator. In performing services for the Public Administrator a tax expert is not acting for a private individual but is performing an official duty for the benefit of a county officer.[24]

[11–18] The fact that the Public Administrator may pay a tax expert employed by him "from the funds of the estate for such services"[25] does not militate against our conclusion. The court may make an allowance out of the estate to the Public Administrator for "the preparation of estate, inheritance, income, sales or other tax returns."[26] The Public Administrator is a salaried officer of the county. He "shall charge and collect such fees as are allowed by law."[27] The court must allow him the commissions prescribed by the Probate Code for his services in a particular estate out of that estate,[28] which he may not retain but must pay into the county treasury.[29] The County Counsel is a salaried officer of the county and is the attorney for the Public Administrator; nevertheless the court must allow him the fees prescribed by the Probate Code for services rendered the Public Administrator in a particular estate out of that estate,[30] which he may not retain but must pay into the county treasury.[31] There is nothing in the law which prohibits the Public Administrator from employing a tax consultant whose salary is paid by the county, nor is there anything in the law which prohibits the Public Administrator from collecting from a particular estate whatever allowance the court may make for the services of a tax consultant and paying the same into the county treasury. As said in Estate of Miller, 5 Cal.2d 588, at page 595, 55 P.2d 491, at page 494:

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[22] The question we need not decide is whether the Public Administrator of the County of Los Angeles may employ a tax consultant without prior authorization of the board of supervisors, in view of article XI, section 7½, of the Constitution and the civil service provisions of the Charter of the County of Los Angeles.

[23] Miller v. McKinnon, 20 Cal.2d 83, 91, 124 P.2d 34, 140 A.L.R. 570.

[24] County of Los Angeles v. Kellogg, 146 Cal. 590, 593–594, 80 P. 861; In re Estate of Miller, 5 Cal.2d 588, 592, 594–596, 55 P.2d 491. Cf. Brown v. Overshiner, 38 Cal.2d 432, 240 P.2d 617; People v. McAtee, 35 Cal.App.2d 329, 332, 95 P.2d 471.

[25] Prob.Code, § 902.

[26] Prob.Code, §§ 902, 1142.

[27] Govt.Code, § 27441.

[28] Prob.Code, §§ 900, 901.

[29] County of Los Angeles v. Kellogg, 146 Cal. 590, 596, 80 P. 861.

> "In the first place, as already pointed out, the public administrator is a public officer, performing essentially a governmental function in administering estates and performing his other duties. It, therefore, follows that when the county counsel acts as his attorney, the county counsel is not representing a private individual or carrying on a private law practice for the benefit of the county, but is performing an official duty for the benefit of a county officer. The question of fees is purely secondary. The state Legislature has seen fit to provide that the public administrator and his attorney shall receive the same fees provided for private administrators and attorneys. In the case of estates administered by the public administrator, the state Legislature has seen fit to require those benefiting from the estate to defray part of the cost of administering it by paying these fees. These fees then go to the county treasurer. * * *
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> "[5 Cal.2d at page 596, 55 P.2d at page 495.] In addition to the foregoing, it must be remembered that the county has a material financial interest in estates handled by the public administrator. As already pointed out, under section 4300i of the Political Code, when the public administrator receives a salary in lieu of fees, all charges incurred by him in the administration of estates, except as limited in the section, are made county charges. * * *
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> "[5 Cal.2d at page 597, 55 P.2d at page 495.] The matter of depositing in the county treasury the fees collected does not in any way affect the administration of estates. When the fees are paid to the public administrator and by him to the county counsel, the probate of the estate has been completed. After the fees are paid, they are not part of the assets of the estate. The fees are no different from those paid to a private attorney for the same purpose. Obviously, what happens to those fees after they are paid does not affect the estate being probated."

"[P]ay from the funds of the estate"[32] means no more than that the expense of a tax expert is a proper expenditure to be made from the funds of the estate. If the expenditure is made in good faith and is proper the administrator may be credited therewith in the settlement of his accounts. And in the case of a tax expert employed by the Public Administrator, who must be a civil service employee paid by the county, whatever allowance is made in each estate must be made direct to the Public Administrator and by him paid into the county treasury. The sole question for the court in probate is the amount that shall be allowed the Public Administrator for the services of the tax expert from the funds of the estate. The question as to how the tax expert shall be paid and what amount he shall receive is an entirely different question, one over which the probate court, in the absence of an enabling statute, has no jurisdiction or concern; and dependent altogether for its determination in the County of Los Angeles on compliance with the charter.[33]

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[30] Prob.Code, §§ 910, 911.

[31] See In re Estate of Miller, 5 Cal.2d 588, 55 P.2d 491.

[32] Prob.Code, § 902.

[33] In the absence of enabling legislation, it is the rule that allowances for attorney's fees and expenses must run in favor of the party legally liable therefor and not to the person to whom the par-

[19] We hold that the former Public Administrator was without authority to enter into an independent contract with Robinson for the work to be performed, and that the contract he entered into was void.

[20–24] Robinson contends that in any event he is entitled to recover in *quantum meruit*. The contention cannot be sustained. The contract was one of a public officer. It was beyond the scope of the power of the officer. It was expressly prohibited. The Charter of the County of Los Angeles prescribes the mode by which the Public Administrator may employ—appoint—a tax consultant. Compliance with the charter is mandatory. The mode prescribes the measure of the power. The adoption of the prescribed mode is a jurisdictional prerequisite to the exercise of the power to contract at all, and the power can be exercised in no other manner. If the prescribed mode is disregarded, the contract is void. Liability cannot arise by estoppel or ratification. The power of the Public Administrator of the County of Los Angeles is limited by the civil service provisions of the charter. A contract employing a tax consultant, made otherwise than as prescribed by the civil service provisions of the charter, is not binding or obligatory. No implied liability to pay on a *quantum meruit* for benefits received can exist where the prohibition of the charter against contracting in any other manner than as prescribed is disregarded.[34]

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ty may have become legally liable for services rendered.

Prior to an enabling statute of 1905 an attorney's fee was paid from the funds of the estate but the allowance had to be made to the administrator and not to the attorney. Code Amdts.1880, ch. 85, § 97, p. 99; Stats.1905, ch. 577, p. 776; Prob.Code, § 911; Briggs v. Breen, 123 Cal. 657, 659, 56 P. 633, 886; In re Estate of Kruger, 143 Cal. 141, 143–146, 76 P. 891; In re Estate of Hite, 155 Cal. 448, 451, 101 P. 448; In re Estate of Pailhe, 114 Cal.App.2d 658, 659, 251 P.2d 76.

Prior to an enabling statute of 1909 the court was without authority to order payment to a real estate broker for his services. Allowance, if any, was made to the administrator. Stats.1909, ch. 150, p. 251; Prob.Code, § 760; In re Estate of Willard, 139 Cal. 501, 73 P. 240, 64 L.R.A. 554.

The probate court may not order payment direct to a reporter of his fee for a transcript on appeal in an action in which an administrator is a party. If allowed at all, it must be to the administrator. In re Estate of Pailhe, 114 Cal. App.2d 658, 665, 251 P.2d 76.

Prior to an enabling statute of 1951 the court was without authority to order attorney's fees for services rendered a guardian of a minor or incompetent paid direct to the attorney. The allowance was to the guardian. Stats.1951, ch. 128, § 2, p. 385; Prob.Code, § 1556.1; McKee v. Hunt, 142 Cal. 526, 77 P. 1103; Stafford v. Superior Court, 1 Cal.2d 321, 324, 34 P.2d 998; Garra v. Superior Court, 58 Cal.App.2d 588, 137 P.2d 31.

Attorney's fees allowed in a partition proceeding must be awarded the party, not the attorney. Code Civ.Proc. § 796; Chavez v. Scully, 62 Cal.App. 6, 216 P. 46.

An allowance for the services of an attorney for a receiver must be made to the receiver, not to the attorney. Sullivan v. Gage, 145 Cal. 759, 79 P. 537.

Prior to an enabling statute of 1937 the court was without authority to order attorney's fees in a divorce action paid direct to the attorney. The award was to the party employing the attorney. Stats.1937, ch. 183, p. 479; Civ.Code, § 137.5; Keck v. Keck, 219 Cal. 316, 322, 26 P.2d 300.

[34] Miller v. McKinnon, 20 Cal.2d 83, 124 P.2d 34, 140 A.L.R. 570; City of Pasadena v. Estrin, 212 Cal. 231, 298 P. 14; Reams v. Cooley, 171 Cal. 150, 152 P. 293; Daly v. San Francisco, 72 Cal. 154, 13 P. 321; Zottman v. City and County of San Francisco, 20 Cal. 96; Bear River etc. Corp. v. County of Placer County, 118 Cal.App.2d 684, 258 P.2d 543; Williams Bros. & Haas, Inc., v. City & County of San Francisco, 53 Cal.App.2d 415, 128 P.2d 56; Tax Factors, Inc., v. County of Marin, 20 Cal.App.2d 79, 66 P.2d 666; Los Angeles Warehouse Co. v. County of Los Angeles, 139 Cal.App. 368, 33 P.2d 1058; Nash v. City of Los Angeles, 78 Cal.App. 516, 248 P. 689; Gamewell Fire Alarm Tel Co. v. City of Los Angeles, 45 Cal.App. 149, 187 P. 163; Shaw v. City and County of San Francisco, 13 Cal.App. 547, 110 P. 149; Fountain v. City of Sacramento, 1 Cal. App. 461, 82 P. 637; 18 Cal.Jur. 1002, p. 273; annotations, 84 A.L.R. 936; 93 A.L.R. 258; comment 4 Cal.L.Rev. 255.

A person dealing with a public officer of the County of Los Angeles is chargeable with knowledge of the limitation of his authority. He is presumed to know the law with respect to the employment of persons under civil service, and acts at his peril. He, no less than the public officer, when he deals in a matter expressly provided for in the charter, is bound to see that the charter is complied with.[35]

Shaw v. City and County of San Francisco, 13 Cal.App. 547, 110 P. 149, is directly in point. The plaintiff in that case, in his own right and as assignee of 46 other persons, brought the action to recover the reasonable value of services rendered by the plaintiff and his several assignors as deputy registrars of voters of San Francisco under appointment made by resolution adopted by the board of election commissioners. The positions to which the plaintiff and his assignors were appointed had been duly included by the civil service commissioners within the civil service system, and appointments to such positions could be made only from the list of civil service eligibles for the class or grade to which the positions belonged. The plaintiff and his assignors were appointed in entire disregard of the civil service provisions of the charter. Judgment was for the plaintiff in the trial court. On review the plaintiff argued that since the services were performed and San Francisco had received the benefit thereof, he was entitled to recover the reasonable value of the services from San Francisco. Reversing, the court said, 13 Cal.App. at page 549, 110 P. at page 150:

> "To this doctrine we cannot subscribe. * * *
>
> "To permit a liability to be imposed upon the municipality to pay for services rendered under appointments made, as in this case, contrary to the explicit provisions of the law, and by the law declared to be void, would be to fritter away the entire scheme for civil service appointments contained in the charter. This we may not do. * *
>
> "So, too, in the case at bar, the plaintiffs as well as the board of election commissioners, when the appointments were made, knew or ought to have known that they were made in contravention of the provisions of the charter, and were under the law void. Plaintiffs were bound to see that their appointments were made according to the requirements of the charter. If they neglected this, or chose to take the hazard of accepting a void appointment, they were mere volunteers, and suffer only what they should have anticipated.[36]"

There may be apparent hardship in some cases by adhering strictly to charter provisions. An individual may suffer, but it is far better so than that an infraction of the law which the people have adopted be condoned. Courts, in giving effect to a statute such as the Charter of the County of Los Angeles, should avoid meeting hard cases by adopting rules which defeat the purpose and object of the people. We cannot let our feelings swerve us into bending the law to meet a hard case.

The judgment in each estate is reversed.

SHINN, P. J., and PARKER WOOD, J., concur.

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[35] Miller v. McKinnon, 20 Cal.2d 83, 89, 124 P.2d 34, 140 A.L.R. 570; Bear River etc. Corp. v. County of Placer, 118 Cal.App.2d 684, 690, 258 P.2d 543; Fountain v. City of Sacramento, 1 Cal.App. 461, 463, 82 P. 637.

[36] To the same effect, Nash v. City of Los Angeles, 78 Cal.App. 516, 248 P. 689.

In the Matter of the ESTATE of Arthur Alfred CHRISTOF, also known as Arthur A. Christof, A. A. Christof, Art Christof and as Arthur A. Christoff, Deceased.

E. A. WINSTANLEY, Public Administrator, Petitioner and Appellant,
v.
Morton J. ROBINSON, Contestant and Respondent (forty-eight cases).

In the Matter of the ESTATE of Sadye M. BERG, also known as Sadye Marde Berg, Sadie M. Berg, Sadye Mard Berg and as Sadie Maud Berg, Deceased.

In the Matter of the ESTATE of Stefan BISSER, also known as Stefi Bisser, Deceased.

In the Matter of the ESTATE of William Dante BOSSI, also known as William D. Bossi, and as William Bossi, Deceased.

In the Matter of the ESTATE of Rollie Fred BRAZIEL, also known as Rollie Fred Brazil, Deceased.

In the Matter of the ESTATE of Harold Guinn BURGESS, also known as Harold Burgess and as H. G. Burgess, Deceased.

In the Matter of the ESTATE of Helen Rutherford DICK, also known as Helen R. Dick, Deceased.

In the Matter of the ESTATE of Albert Henry FELSKE, also known as Albert H. Felske and as A. H. Felske, Deceased.

In the Matter of the ESTATE of Anthony Jones FERDINAND, also known as A. J. Ferdinand, Deceased.

In the Matter of the ESTATE of Agnes I. FONTAINE, also known as Agnes Fontaine and as Mrs. F. E. Fontaine, Deceased.

In the Matter of the ESTATE of Sam FOROI, Deceased.

In the Matter of the ESTATE of Mildred A. GELLER, also known as Mildred Ann Geller and as Mildred A. Goetz Geller, Deceased.

In the Matter of the ESTATE of Rose J. GOOD, Deceased.

In the Matter of the ESTATE of James J. GRADY, Deceased.

In the Matter of the ESTATE of Frederick L. HOGAN, Deceased.

In the Matter of the ESTATE of Charles Roland HOWARTH, also known as Charles Howarth and as Charles R. Howarth, Deceased.

In the Matter of the ESTATE of Carl Herbert IMAN, also known as Carl H. Iman, Carl Iman, and as Carl Inman, Deceased.

In the Matter of the ESTATE of Charles B. JAMIESON, also known as Charles B. Jameson, Charles Jamieson and as C. B. Jamieson, Deceased.

In the Matter of the ESTATE of John Thomas JENKINS, Deceased.

In the Matter of the ESTATE of John Peter JONES, also known as John Jones and as John P. Jones, Deceased.

In the Matter of the ESTATE of Edna L. KASDORF, also known as Edna Kasdorf, Deceased.

In the Matter of the ESTATE of George Dalzalmo KUMAGAI, also known as George Dal Kumagai, Deceased.

In the Matter of the ESTATE of Fred Emil KUNTZ, Deceased.

In the Matter of the ESTATE of Aldon Victor LANDRY, also known as Alden V. Landry, Deceased.

In the Matter of the ESTATE of Eulalia LANDRY, also known as Eulalia Aragon, Deceased.

In the Matter of the ESTATE of Gust Peter LERCH, also known as August Peter Lerch, August P. Lerch and as A. P. Lerch, Deceased.

In the Matter of the ESTATE of Willis G. LONG, Deceased.

In the Matter of the ESTATE of Robert G. LOOMIS, also known as Robert Gene Loomis, Deceased.

In the Matter of the ESTATE of Ralph L. LOVELAND, also known as Ralph La Verne Loveland, Deceased.

In the Matter of the ESTATE of TADOYOSHI MATSUBARA, also known as Tadoyoshi Matsuhara, Deceased.

In the Matter of the ESTATE of Fred Milton McKEE, also known as Fred M. McKee and E. M. McKee, Deceased.

In the Matter of the ESTATE of John Joseph McHUGH, also known as John J. McHugh, Deceased.

In the Matter of the ESTATE of Edna Clark Sawyer MOFFATT, also known as Edna Sawyer Moffatt, Edna Clark Moffatt, Edna C. Moffatt, Edna C. Moffut, Edna Clark Sawyer, Mrs. Arthur C. Moffatt, and as Mrs. A. C. Moffatt, Deceased.

In the Matter of the ESTATE of Mary L. MOORE, also known as Mary Lulu Moore, Deceased.

In the Matter of the ESTATE of Laura PETLANSKY, Deceased.

In the Matter of the ESTATE of Edward James PHILLIPS, also known as Edward J. Phillips, Deceased.

In the Matter of the ESTATE of James RAY, also known as J. L. Ray, Deceased.

In the Matter of the ESTATE of Carlin W. ROWE, also known as Harland Edward Rowe, Harlin W. Rowe and as Harlan E. Rowe, Deceased.

In the Matter of the ESTATE of Hugo SCHELLINGER, also known as H. Schellinger and as Hugo Schlessinger, Deceased.

In the Matter of the ESTATE of Max SCHEIGE, Deceased.

In the Matter of the ESTATE of Claude C. SMITH, also known as Claude Carlos Smith and as C. C. Smith, Deceased.

In the Matter of the ESTATE of Edward May SNOWDEN, also known as Theresa M. Snowden and as Theresa M. Snowdan, Deceased.

In the Matter of the ESTATE of Edward Francis SPEAR, also known as Edward F. Spear, Deceased.

In the Matter of the ESTATE of Martin M. SULLIVAN, also known as Martin Sullivan, Deceased.

In the Matter of the ESTATE of Ann SYMINGTON, also known as Alice Symington and as Anne Symington, Deceased.

In the Matter of the ESTATE of Ethel Lawson TRITES, also known as Ethel Lawson, Ethel Trites and as Ethel Clark, Deceased.

In the Matter of the ESTATE of Mary YOUNG, also known as Mary B. Young, Deceased.

In the Matter of the ESTATE of Jacob ZIMMERMAN, also known as J. Zimmerman, Deceased.

Civ. 21035–21082.

District Court of Appeal, Second District,
Division 3, California.
June 10, 1955.
Hearing Granted Aug. 3, 1955.*

Appeals from judgments of the Superior Court of Los Angeles County; Newcomb Condee, Judge.

Harold W. Kennedy, County Counsel, and Baldo M. Kristovich, Deputy County Counsel, Los Angeles, for appellant.

S. V. O. Prichard, Beverly Hills, for respondent.

VALLEE, Justice.

The appeals are by the Public Administrator of the County of Los Angeles from judgments of the superior court sitting in probate entered in 48 estates sustaining the objections of Morton J. Robinson to the final account of the Public Administrator in each estate and ordering the latter to pay Robinson a specified sum from the funds of the estate. The proceedings were consolidated for trial and tried together.

The facts in these proceedings are stated in Estate of McMillin, Cal.App., 284 P.2d 864, and need not be repeated. The parties agree that the issues involved in these appeals are identical with the issues involved in the McMillin case, and that the records are substantially identical with the record in that case. They have stipulated that the decisions in these appeals be in accordance with the decision in that case. On the authority of Estate of McMillin, the judgments must be reversed.

The judgment in each estate is reversed.

SHINN, P. J., and PARKER WOOD, J., concur.

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* Opinion vacated 292 P.2d 881.

134 Cal.App.2d 11

Earle C. ANDERSON, Plaintiff and Appellant,

v.

NO-DOZ, a corporation; Roe Company, a corporation; Doe I, Doe II, Doe III, Doe IV and Doe V, Defendants.

Harrison Products, Inc., Respondent.

Civ. 20636.

District Court of Appeal, Second District, Division 3, California.

June 23, 1955.

Action arising out of automobile accident. The Superior Court, Los Angeles County, Beach Vasey, J., granted defendant's motion for change of venue, and plaintiff appealed. The District Court of Appeal, Vallée, J., held that affidavit of merits filed with notice of motion for order transferring action to another court was insufficient for failure to state that defendant had fully and fairly stated case and all facts thereof to his attorneys, or that attorneys' statement that they had a valid defense to action was based on consideration of facts stated to them by anyone.

Reversed.

1. Venue 🔑**66**

There must be filed with a notice of motion for order transferring action to another court an affidavit of merits deposing that defendant has fairly and fully stated case and all facts thereof to his attorney, and that after such statement he was advised by attorney and verily believes that he has a good and substantial defense on the merits, and averments that affiant has stated "my," "his," or "defendant's" case and "defense" to his attorney are insufficient. West's Ann.Code Civ.Proc. § 396b.

2. Venue 🔑**66**

Affidavit of merits filed with notice of motion for order transferring action to another court was insufficient for failure to state that defendant had fully and fairly stated case and all facts thereof to his attorneys, or that attorneys' statement that they had a valid defense to action was based on consideration of facts stated to them by anyone. West's Ann.Code Civ. Proc. § 396b.

3. Venue 🔑**66**

An affidavit of merits accompanying a notice of motion for order transferring action to another court must show that defendant, upon stating facts of case to his attorney, was advised by latter that he had a defense that will address itself to merits of controversy and not merely to matters of form. West's Ann.Code Civ.Proc. § 396b.

4. Venue 🔑**65**

Object of affidavit of merits required to be filed with notice of motion for order to transfer action to another court is to show that defense is on merits and not a technical one.

5. Venue 🔑**66**

Affidavit of merits which was filed with motion for order transferring action to another court and which stated that defendant's attorneys had stated they had a valid defense to this action was insufficient for failure to allege that defense was one on merits.

6. Venue 🔑**66**

A "defense on the merits" such as must be shown by affidavit filed with motion for order transferring action to another court is one which depends upon inherent justice of defendant's contention as shown by facts of case, as distinguished from one which rests upon technical objections or some collateral matter, and a good defense growing out of error in pleading is not a defense on merits. West's Ann.Code Civ. Proc. § 396b.

See publication Words and Phrases, for other judicial constructions and definitions of "Defense on the Merits".

James C. Webb, Long Beach, for appellant.

Reed & Kirtland and Robert C. Packard, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by plaintiff from an order granting defendant's motion for a change of venue from the County of Los Angeles to the City and County of San Francisco. He contends the order should be reversed because the affidavit in support of the motion was not sufficient as an affidavit of merits as required by section 396b of the Code of Civil Procedure.

The action is one for damages for personal injuries sustained in an accident which occurred in the County of Monterey. The motion was made on the ground that at the time of the commencement of the action defendant was a resident of the City and County of San Francisco.

The motion was based on the complaint, the notice of motion, and an affidavit of Warren E. Merrill which reads:

> "That he is the Secy-Treas. of the defendant, Harrison Products Inc., a corporation, organized and existing under the laws of the State of California. That defendant's attorneys, Reed and Kirtland, have stated to him that they have a valid defense to this action. That at the time of the commencement of this action, and at the present time, the Harrison Products, Inc., manufactures a product known as 'No-Doz Awakeners', in the City of San Francisco, County of San Francisco, State of California. That the principal place of business of the Harrison Products, Inc., was at the time of the event giving rise to this action and at the time of commencement of said action 45 Second Street, San Francisco, California, and now is 610 Folsom Street, San Francisco, California, and at all times herein mentioned has been at either of these locations in San Francisco, California. Affiant further states the Harrison Products, Inc., does not have an office in Los Angeles County."

Plaintiff opposed the motion on the grounds the affidavit was not sufficient as an affidavit of merits as required by section 396b of the Code of Civil Procedure and that no affidavit of merits sufficient as such had been filed. The motion was granted.

[1] Section 396b of the Code of Civil Procedure requires the filing of an affidavit of merits with a notice of motion for an order transferring the action to another court. Fernandez v. Fernandez, 11 Cal.2d 568, 569, 81 P.2d 913; Eistrat v. Humiston, 129 Cal.App.2d 463, 277 P.2d 463; Nanny v. Ruby Lighting Corp., 108 Cal.App.2d 856, 859, 239 P.2d 885. An affidavit of merits must depose that the defendant has fully and fairly stated the case and all the facts thereof to his attorney, and that after such statement he was advised by his attorney and verily believes that he has a good and substantial defense on the merits. Fernandez v. Fernandez, supra, 11 Cal.2d at page 569, 81 P.2d 913; Nickerson v. California Raisin Co., 61 Cal. 268; Noland v. Noland, 52 Cal.App.2d 58, 59, 125 P.2d 847; Roberts v. Roberts, 81 Cal.App. 499, 253 P. 1112; Carter v. Broder, 50 Cal.App. 63, 194 P. 527.

Averments that the affiant has stated "my," "his," or "defendant's" case and "defense" to his attorney are insufficient. Nickerson v. California Raisin Co., 61 Cal. 268; People v. Larue, 66 Cal. 235, 5 P. 157; Palmer & Rey v. Barclay, 92 Cal. 199, 28 P. 226; Westover v. Bridgford, 25 Cal. App. 548, 144 P. 313; Roberts v. Roberts, 81 Cal.App. 499, 253 P. 1112; Wells v. Wells, 74 Cal.App.2d 158, 168 P.2d 73. In Nickerson v. California Raisin Co., supra, the court said, at page 268:

> "[An affidavit of merits] must show that the defendant has fully and fairly stated the facts of the case to his counsel, before the advice of the latter could amount to a *prima facie* showing of merits on defendant's behalf. It is obvious that a statement, such as is found in the affidavit in the present case, that defendant 'has fully and fairly stated the said defendant's defense in this action' to his counsel, does not answer the requirement. It might be that the defense relied on was a purely technical one, that did not touch the merits of the controversy. The expression used in the affidavit is not the equivalent of a statement that the defendant had fully and fairly stated to his counsel all the facts in the case."

[2] In Merrill's affidavit there is no statement to the effect that defendant fully and fairly stated the case and all the facts thereof to defendant's attorneys. The affidavit is devoid of any such averment. The affiant merely deposes that "defendant's attorneys * * * have stated to him that they have a valid defense to this action." He does not assert that the attorneys were acquainted with the facts of the case; nor does he even say that their statement was based on a consideration of the facts stated to them by anyone. Their opinion is presented as a conclusion. Defendant contends it could be inferred that the statement made by counsel was based on an investigation. This is pure conjecture. The purported affidavit of merits is clearly insufficient.

[3–6] An affidavit of merits must also show that the defendant, upon stating the facts of the case to his attorney, was advised by the latter that he has a defense that will address itself to the merits of the controversy and not merely to matters of form. Carter v. Broder, 50 Cal.App. 63, 69, 194 P. 527. The object of the affidavit is to show that the defense is on the merits and not a technical one. Averill v. Lincoln, 52 Cal.App.2d 398, 402, 126 P.2d 398. The statement that defendant's counsel said to affiant that defendant has "a valid *defense to this action*" may envision something quite different from a defense on the merits. An action is the judicial means or procedure of enforcing a right. The merits are the subject or grounds of the action. A "defense on the merits" is one which depends upon the inherent justice of the defendant's contention as shown by the facts of the case, as distinguished from one which rests upon technical objections or some collateral matter. There may be a good defense growing out of an error in the plaintiff's pleadings, but that is not a defense on the merits unless the real nature of the transaction in controversy shows the defendant to be in the right. Black's Law Dictionary, 2d Ed., p. 775.

The failure of the affiant to allege that defendant's counsel advised him defendant has a "defense on the merits" is an additional reason why the affidavit is insufficient. The motion should have been denied.

Reversed.

SHINN, P. J., and PARKER WOOD, J., concur.

134 Cal.App.2d 1

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
Joseph Jack CUNHA and Carl Lee Pritchard, Defendants,

Joseph Jack Cunha, Defendant and Appellant.
Cr. 5325.

District Court of Appeal, Second District, Division 3, California.
June 22, 1955.

Prosecution for grand theft. The Superior Court, Los Angeles County, Charles W. Fricke, J., entered judgments of convictions. One defendant appealed. The District Court of Appeal, Shinn, P. J., held that evidence was sufficient for conviction.

Judgment and order affirmed.

1. Criminal Law 🔑742(1)
Witnesses 🔑48(2)

In prosecution for grand theft, fact that one witness had been previously convicted of grand larceny did not render him incompetent as a witness, and his credibility was to be appraised by jury.

2. Criminal Law 🔑511(1)

In prosecution for grand theft, evidence furnished substantial corroboration for testimony of alleged accomplice.

3. Criminal Law 🔑1159(2)

On appeal, a claim of insufficiency of the evidence for conviction must fail if, when given full effect, evidence logically and reasonably leads to a conclusion of guilt.

4. Larceny 🔑65

Evidence was sufficient for conviction of grand theft.

William J. F. Brown, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Marvin Gross, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Joseph Jack Cunha and Carl Lee Pritchard were jointly accused by information of grand theft in that they took from Antone J. Grassel property consisting of a wrist watch, a television set and $150 cash of the total value of $327. Pritchard pleaded guilty and turned State's evidence. Cunha was tried to a jury and convicted. Probation was denied and Cunha was sentenced to state prison. He appeals from the judgment and an order denying his motion for new trial.

There was evidence of the following facts. Grassel returned from the race track one evening and met Cunha and Pritchard in a bar on West Pico Street in Los Angeles. The parties had several drinks and Grassel stated aloud that he was reluctant to drive his car home, whereupon Cunha drove Grassel home in the latter's car, Pritchard following in Cunha's car. At Grassel's home he offered Cunha $5 which was refused. Upon invitation Cunha and Pritchard spent the night there, sleeping in a front room which contained a 21-inch television set encased in a heavy steel cabinet. Grassel was wakened during the night, saw a person whom he believed to be Pritchard and was told that the intruder was looking for a glass of water. Grassel wakened again about 4:30 a. m.; Cunha and Pritchard had already left and Grassel discovered that there was missing $165 in cash consisting of two $50 bills and other bills, also the T-V set valued at about $164 and a $12 wrist watch. Pritchard testified that he and Cunha carried away the T-V set early in the morning and put it into Cunha's car and that Cunha later handed him $65; fearful of discovery they left the set at the side of the road and abandoned it. In the evening following the theft Cunha got change for a $50 bill in another bar on Pico Street. Cunha on the stand denied any knowledge of the theft, testified that he did not see the T-V set, the money or the watch; that he drove Pritchard to work and just as Pritchard was leaving the car he handed Cunha a folded bill which was accepted and placed in his pocket without examination.

[1–4] Appellant's first contention on appeal is "the evidence was insufficient to overcome the presumption of innocence beyond a reasonable doubt." "The evidence was insufficient to establish a corpus delicti" etc. It is argued that the testimony of Pritchard was unworthy of belief because he had previously been convicted of a felony, grand larceny. This, of course, did not render him incompetent as a witness and his credibility was something to be appraised by the jury. Appellant's presence at the scene of the theft, the fact that a heavy steel encased T-V set was carried from the house and placed in the car, and the fact that upon the following evening appellant exhibited a $50 bill, furnished substantial corroboration for the testimony of Pritchard. On appeal a claim of insufficiency of the evidence must fail if when given full effect it logically and reasonably leads to a conclusion of guilt. Such is the present case.

The judgment and order denying motion for new trial are affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

133 Cal.App.2d 631

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Willie L. McCLURE, Defendant and Appellant.

Cr. 5272.

District Court of Appeal, Second District, Division 3, California.

June 14, 1955.

Hearing Denied July 13, 1955.

Prosecution for burglary of a railroad boxcar. From an adverse judgment of the Superior Court, Los Angeles County, Burdette J. Daniels, J., the defendant appealed. The District Court of Appeal, Shinn, P. J., held that possession of the stolen property, coupled with evidence that the accused aided another in removing the stolen goods from freight car after entry, and removed the goods from the scene of the crime, attempting to conceal them, was sufficient evidence to sustain the verdict.

Affirmed.

1. Burglary ⚿42(3)

In prosecution for burglary of railroad boxcar, possession of the stolen property, coupled with evidence that the accused aided another in removing the stolen goods from freight car after entry and then removed goods from the scene, was sufficient evidence to sustain jury verdict of burglary in the second degree.

2. Burglary ⚿16

In order to support a conviction of burglary, it is unnecessary to show that defendant actually entered the premises burglarized, if the evidence establishes that the accused acted as an accessory who aided in the commission of the crime. Pen.Code, §§ 31, 971.

3. Burglary ⚿42(3)

Where goods have been feloniously taken by means of a burglary and they are immediately or soon thereafter found in the possession of a person who gives false account of the manner in which he came into possession, proof of such possession and guilty conduct is presumptive evidence not only that he stole the goods but that he made use of the means by which access to them was obtained.

4. Burglary ⚿42(3)

Possession of stolen property, coupled with conflicting and inconsistent accounts of the manner in which it came into possession of the defendant is sufficient to sustain conviction of burglary.

5. Witnesses ⚿337(5)

In prosecution for burglary, examination of accused on the stand as to prior convictions of felonies and the nature of those crimes was properly permitted.

6. Criminal Law ⚿1122(5)

Failure by defendant to include instructions in the record on appeal, precluded him from questioning their correctness.

7. Criminal Law ⚿1166(1)

In prosecution for burglary, fact that over 60 days elapsed between the filing of the information and the commencement of the trial was not shown to be prejudicial to the defendant.

William Bronsten, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., James D. Loebl, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Appellant Willie McClure was convicted by a jury of burglary in the second degree. He was charged with the burglary of a railroad boxcar and with one prior conviction of theft from an interstate shipment, a felony, for which he had suffered imprisonment. This appeal is from the judgment.

The evidence was that a switchman for the Union Pacific Railroad coming to work at 3:00 p. m., on March 22, 1954, observed that the seals on three boxcars on a siding near the Soto Street Sears Roebuck building were in place, and the doors of the cars were closed. At 7:30 p. m. when he returned to move the cars he noticed that the seals on each of the three cars had been broken, and the doors of two of the boxcars had been forced open. An agent of Union Pacific testified that no one had been given permission to enter the boxcars. From one consigned to Sears, Roebuck Company, shoes, and shirts bearing the Sears' trademark "Pilgrim," and sportswear were missing. Defendant was arrested at 12:45 a. m. on March 23, 1954 while seated in his automobile. The arresting officer found a large number of shoes, men's trousers and shirts bearing the "Pilgrim" trademark in the back seat. Some of these were placed in evidence and were identified as those found in defendant's car.

Defendant gave conflicting explanations of where he had obtained the merchandise. The arresting officer testified that defendant told him at first that he knew nothing about the merchandise in the back seat; that later he said the goods belonged to his wife. Officer Edwards testified defendant told him that he bought the merchandise from an unidentified man at "23rd and Compton" and that the next day appellant told him that the "other man" had entered the freight cars, and had thrown the cartons out to him, but that he, defendant, had not entered the freight cars himself; that they went to 23rd and Compton where he paid the other man $30 for the items. On the witness stand, defendant testified he had seen a man removing the cartons from the freight cars and "stashing" them, and that he, defendant, had gathered the merchandise up to take to the police station, in the course of which he was arrested.

[1-4] Appellant's main contention is that there was insufficient evidence to sustain the conviction; that the evidence merely showed he was in possession of stolen property. There was evidence, however, that not only was defendant in possession of the stolen property when arrested, but that by his own admission he had been present and had aided and abetted another unidentified person in the burglarizing of the boxcars and the removing of at least part of the contents. Possession of the stolen property, coupled with evidence that the accused aided another in removing the stolen goods from the freight car after the entry, and removed the goods from the scene of the crime, attempting to conceal them, was sufficient evidence to sustain the verdict. People v. Kellner, 67 Cal.App.2d 477, 154 P.2d 425. In order to support a conviction of burglary, it is unnecessary to show that defendant actually entered the premises burglarized, if the evidence establishes that the accused acted as an accessory who aided in the commission of the crime. Pen.Code §§ 31, 971; People v. Bonilla, 124 Cal.App. 212, 214, 12 P.2d 64; People v. Russell, 120 Cal.App. 622, 625, 8 P.2d 209 and cases cited therein. The authorities hold that where goods have been feloniously taken by means of a burglary and they are immediately or soon thereafter found in the possession of a person who gives a false account of the manner in which he came into the possession, proof of such possession and guilty conduct is presumptive evidence not only that he stole the goods, but that he made use of the means by which access to them was obtained. People v. Lang, 142 Cal. 482, 485, 76 P. 232; People v. Murphy, 91 Cal.App. 53, 54, 266 P. 374; People v. Corral, 60 Cal.App.2d 66, 72, 140 P.2d 172. Possession of stolen property, coupled with conflicting and inconsistent accounts of the manner in which it came into possession of the defendant is sufficient to sustain conviction of burglary. People v. McCann, 34 Cal.App.2d 376, 377, 93 P.2d 643; 10 West's California Digest, Burglary, ⚷42(3), pages 760-762.

[5] Appellant next claims error in permitting the district attorney to examine him as to the nature of his prior conviction. But the rule is that when the defendant takes the stand he may be examined as to convictions of felonies and the nature of crimes of which he has been convicted. People v. Williams, 27 Cal.2d 220, 228, 163 P.2d 692.

[6] The next point as to improper instructions given to the jury is without merit, since the instructions have not been included in the record on appeal, and de-

fendant is thereby precluded from questioning their correctness. People v. Rivera, 123 Cal.App.2d 358, 360, 266 P.2d 810; People v. Brickman, 119 Cal.App.2d 253, 264, 259 P.2d 917; People v. Frye, 117 Cal.App.2d 101, 108, 255 P.2d 105; 4 Cal. Jur.2d p. 441.

[7] Appellant's contention that he was prejudiced by lack of a speedy trial, in that over 60 days elapsed between the filing of the information and the commencement of the trial, is unsubstantiated by the record.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

133 Cal.App.2d 681

Adoption of Deborah RICHARDS, a Minor.

Giuseppi BIAGI and Isabel L. Biagi, Petitioners and Appellants,

v.

STATE DEPARTMENT OF SOCIAL WELFARE et al., Respondents.

Civ. 16469.

District Court of Appeal, First District, Division 2, California.

June 20, 1955.

Adoption proceeding. The Superior Court, San Mateo County, A. R. Cotton, J., entered judgment dismissing petition and petitioners appealed. The District Court of Appeal, Dooling, J., held that where adoption petition was dismissed because of prior decree of adoption, which was valid on its face on appeal from order dismissing petition, petitioners could not attack validity of prior adoption decree.

Affirmed.

1. Adoption 🔑14

Where adoption petition was dismissed because of prior decree of adoption which was valid on its face, petitioners could have attacked prior decree by moving to set aside the order of adoption and if their motion was denied, they could have appealed from that order, but prior decree was not subject to collateral attack.

2. Adoption 🔑15

Where petition for adoption was dismissed because of a prior decree of adoption which was valid on its face, on appeal from dismissal of petition, petitioners could not attack validity of prior decree.

E. C. Mahoney, Burlingame, for appellants.

Keith C. Sorenson, Dist. Atty. of San Mateo County, Elinor Louise Falvey, Deputy Dist. Atty., Redwood City, for respondents.

DOOLING, Justice.

The decision of one question is conclusive of this appeal. The petitioners, husband and wife, sought to adopt a minor child, the granddaughter of the wife. When their petition came on for hearing a decree of the superior court was introduced approving and ordering the adoption of the child by other parties. The trial court found that because of the prior decree of adoption "the child is not legally free for adoption by the petitioners herein", and accordingly dismissed their petition.

This presents the question: On an appeal from the order dismissing their petition can appellants attack a decree of adoption valid on its face, from which they have not appealed? The question must be answered in the negative.

[1, 2] The decree of adoption being valid on its face is not subject to collateral attack. In re Estate of Smith, 86 Cal.App. 2d 456, 195 P.2d 842; In re Estate of Grazzini, 31 Cal.App.2d 168, 87 P.2d 713. Appellants might have moved to set the order of adoption aside, thus making themselves parties to the proceeding, in which event if their motion was denied, they could have appealed from the order of denial. In re Adoption of Shook, 129 Cal.App.2d

287, 276 P.2d 839. In the absence of a direct attack on the order of adoption in this or some other manner appellants are bound by it. They cannot, as they seek to do here, urge errors in its procurement which would only be open to them on a direct appeal.

Order dismissing petition for adoption affirmed.

NOURSE, P. J., and KAUFMAN, J., concur.

133 Cal.App.2d 622

J. George GOLD and James J. Needleman, Plaintiffs and Respondents,

v.

Virginia VELKOV, formerly known as Virginia Sherry Guiberson, and Samuel A. Guiberson, Jr., Defendants.

Virginia Velkov, Appellant.

Civ. 20633.

District Court of Appeal, Second District, Division 3, California.

June 14, 1955.

Rehearing Denied July 6, 1955.

Hearing Denied Aug. 11, 1955.

Action by attorneys for declaratory relief with respect to fees for legal services rendered defendant. From adverse judgment of the Superior Court, Los Angeles County, Clarence M. Hanson, J., the defendant appealed. The District Court of Appeal, Shinn, P. J., held that it was incumbent upon the attorneys to establish the entire fairness of their transactions with the defendant.

Judgment reversed.

1. Attorney and Client 🔑124

In action by attorneys for declaratory relief with respect to fees for legal services rendered defendant, it was incumbent upon attorneys to establish the entire fairness of their transactions with defendant involving receipt of sums for legal services and sums received by attorneys for benefit of defendant.

2. Attorney and Client 🔑124

Attorneys, who brought action for declaratory relief with respect to fees for legal services rendered defendant, had the burden of establishing that agreements between them for payment of legal fees were fair and equitable and that no advantage was taken of the defendant.

C. E. Spencer, Los Angeles, William A. Freeman, Santa Paula, for appellant.

Leonard Horwin, Harry M. Fain, Richard Kelton, Beverly Hills, for respondents.

SHINN, Presiding Justice.

Defendant Virginia Velkov instituted an action for separate maintenance against her then husband, Samuel A. Guiberson, Jr., in Los Angeles County. Her husband, who spent much of his time in Texas, made an offer through defendant's attorney, Mr. Geisler, of a settlement of her claims to property and to support. The offer was not accepted. Defendant consulted plaintiffs who are also attorneys and after discussing her problems with them she discharged Mr. Geisler and employed the plaintiffs, thereby involving herself in financial transactions with them which led to the present litigation. As a result of conferences between plaintiffs and Mr. Guiberson's attorneys in Dallas, a property settlement was arranged and was carried to completion. In this settlement Mr. Guiberson paid $6,000 to cover present obligations of defendant, $20,000 as attorneys' fees of plaintiffs and $3,000 as costs, having previously paid to the attorneys $1,000 with which to defray their expenses of a trip to Dallas. Previous to that time plaintiffs had received from Guiberson under court order $2,500 as attorneys' fees and $250 as costs and defendant had paid plaintiffs $500 as an advance on costs and $5,000, either as an advance upon their fees or, as she claimed, as a loan which was to be repaid to her, or an advance for expenses which was to be accounted for. In the settlement with Mr. Guiberson defendant also received assignments of certain overriding oil royalties, which assignments were invalid because issued without permit of the Division of Corporations. Other assignments were issued to her after a permit had been procured. In the meantime Mr. Guiberson had obtained a decree of divorce from defendant in Texas which made a division of property rights and had forwarded to her a check for $500 as a payment on account of $35,000 awarded her by the Texas decree. This check was returned by defendant. Defendant questioned the validity of the Texas decree.

It was agreed between plaintiffs and defendant that plaintiffs would obtain as much as possible from Mr. Guiberson to apply on their fees, and that if their services were worth more, defendant would pay the difference. Eventually it was agreed that the amount payable by defendant should be approximately 25 per cent of the excess of value of what she received in the settlement above what had been offered through Mr. Geisler, the value thereof being approximately $55,000. In accordance with this understanding it was agreed that plaintiffs would be entitled to receive 25 per cent of the royalty interests which defendant received in the settlement. The total of the above sums is $32,500. Plaintiffs also deposited to their account the $6,000 received from Guiberson from which they paid $3,500 to Mr. Geisler for defendant's account and to defendant $2,500.

May 7, 1951, plaintiffs sent to defendant in New York a letter as set out in the margin[1] which was approved by defendant.

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[1] "Mrs. Virginia S. Guiberson May 7, 1951
"595 Fifth Avenue
"New York, N.Y. Re: Guiberson v. Guiberson

"Dear Virginia:

"We are enclosing herewith a copy of our May 5, 1951 letter to Mr. Glen Turner, Mr. Guiberson's Dallas attorney, which is more or less self-explanatory.

"As you will note, the principal features of this settlement are:

"(1) Outright transfer to you of the De Winter lease;
"(2) Transfer to you of a one-twenty-fourth overriding royalty interest in the Placerita leases;
"(3) $6,000.00 in cash payable to you;
"(4) $20,000.00 in cash payable to us on account of attorneys' fees;
"(5) $3,000.00 in cash payable to us on account of costs and expenses.

"In order to arrive at terms of settlement with the Dallas attorneys, we had to substantially reduce our original demand for attorneys' fees which we sought to have Guiberson pay to apply on account of our services to you. However, we readily did so with a minimum of reluctance because of our arrangement for additional fee from you to be measured by the yardstick which you suggested, namely, approximately 25% of the difference between the settlement which Mr. Giesler recommended and that which we were able to achieve.

"As I promised you during our telephone conversations of last week, I am outlining below the formula for taking care of the fee arrangement between us which we feel is very advantageous to you and of which you expressed tentative approval.

"The Giesler arrangement was to pay you $16,500.00 in cash and $35,000.00 at the rate of $500.00 per month, without interest, making a total, part in cash and part in about six years, of $51,500.00. To date you are out of pocket $5,500.00 which you paid to us, and $3,500.00 which you owe to Giesler, making a total of $9,000.00. After you receive $6,000.00 in cash contemplated by our settlement, you will still be $3,000.00 behind the position in which you would have been by virtue of the Giesler settlement. This means that you must receive back a total of $54,500.00 to place yourself in a position approximating the Giesler settlement.

"We tentatively agreed by telephone that out of the total cash which Guiberson has agreed to pay, namely, $29,000.00, you will take the sum of $20,000.00, and a 75% interest in the two sets of royalties, and we will take $9,000.00 in cash and 25% of the two sets of royalties as payment in full for our services.

"It is our suggestion to put through immediately the property settlement arrangement to which we have now secured Guiberson's consent, without changing those terms in any way, and that at the same time we prepare an agreement setting forth our own settlement and providing for transfer by you to us of a 25% interest in the royalty and/or lease rights, as the case may be, to become ef-

June 8, 1951, defendant approved a letter received from plaintiffs as set out in the margin.[2] The settlement with Guiberson was concluded and was later approved by judgment in the California action, which also established the validity of the Texas decree. Under the arrangement expressed in the writings defendant was to receive $16,500 and plaintiffs were to pay Mr. Geisler $3,500. Plaintiffs paid defendant $16,500 of which $2,500 was from the $6,000 received from Guiberson. Including the $3,500 which plaintiffs paid to Mr. Geisler defendant received $20,000; she had paid out $5,500 and had left $14,500. Plaintiffs retained $18,250, less their expenses, and were to receive 25% of the royalty interests. Defendant executed to plaintiffs assignments of one-fourth of the royalty interests. However, this was prior to the obtaining of a permit for the issuance of the assignments by Guiberson. After a permit was obtained

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fective immediately upon your receiving title to same from Guiberson.

"If this proposed formula to execute our agreement relative to full compensation for our services meets with your full approval, please sign where indicated on the carbon copy of this letter, which we are enclosing for that purpose, and return to us immediately.

"Because of Mr. Guiberson's advanced age and state of health, we feel that the settlement which we have agreed upon should be executed at the earliest possible date.

"With best personal regards,

"Very truly yours,
"Gold & Needleman
"By (s) J. George Gold
"JGG:ml "J. George Gold

"The Foregoing Provisions Meet Fully with My Understanding and Are Hereby Approved and Agreed to: With the additional provision that you obtain for me the ownership papers of the two cars now in my possession.

"(s) Virginia S. Guiberson May 10, 1951
"Date"

[2] "Mrs. Virginia Sherry Guiberson June 8, 1951

"Dear Virginia:

"The purpose of this letter is to confirm our understanding and agreement relative to the litigation with your husband in which we have been representing you, and the matter of our fees in connection therewith.

"It was our agreement that we were to receive whatever attorneys fees we could induce or compel S. A. Guiberson, Jr. to pay us, and in addition thereto, in connection with that portion of our action not connected with the matter of the divorce and wherein we sought to obtain for you property in excess of that which had been offered you in settlement of your property rights through your former attorney, Jerry Giesler, it was our understanding that in addition to any cash fee we might obtain, we were to receive 25% of whatever we were successful in securing for you in excess of that which had previously been offered to you.

"As we outlined to you in our letter of May 7, 1951, we were successful in obtaining an offer which included the outright transfer to you of the Dewenter lease, the transfer to you of a one-twenty-fourth (1/24) overriding royalty interest in the York and Schisler leases in the Newhall area, $6,000.00 in cash for you, and cash in the amount of $23,000 payable to us for our fees and expenses.

"Recently you have expressed dissatisfaction with the small amount of cash which you were scheduled to receive according to this formula of settlement.

"Accordingly, we have agreed with you to settle our rights to compensation upon the following basis: Of the total sum of $29,000 cash payable by S. A. Guiberson, Jr., you are to receive $16,500.00; we are to pay $3500 to Jerry Giesler in full satisfaction of your promissory note in that amount which he now holds, and we are to retain the remaining $9,000. You are to receive three-fourths of the Dewenter lease and we are to receive one-fourth of the rights therein. You are to receive three-fourths of the overriding royalty interests in the York and Schisler leases, and we are to receive one-fourth thereof. All other property which has been or is being transferred to you by S. A. Guiberson, Jr. is, of course, to be retained by you.

"Please indicate your approval of the foregoing as the final terms of settlement of our rights to compensation in this matter by affixing your signature to one copy of this letter.

"Gold & Needleman
"By (s) J. George Gold
"J. George Gold

"This letter and the statements contained herein is strictly in accord with our understanding and my agreement thereto.

"(s) Virginia Sherry Guiberson
"Virginia Sherry Guiberson
"Dated: June 8, 1951."

for those assignments, defendant made no further assignments to plaintiffs. Some five months after these transactions defendant gave notice of rescission of the settlement with plaintiffs, demanded reassignments of the royalties and offered to pay plaintiffs therefor $5,000, which she contended was the amount they had paid her for the same.

Plaintiffs brought this action for declaratory relief. They alleged that the assignments were valid but that defendant was claiming they were invalid and they sought a declaration of their rights thereunder. They also alleged that their services were worth more than they were to receive under their settlement with defendant. Defendant answered and filed a cross-complaint by which she sought reassignments upon payment by her of $5,000. She alleged that the services of plaintiffs were reasonably worth not more than $11,500 and that she had entered into the settlement with them without independent advice and without knowledge of the value of the royalties. In addition to the foregoing allegations it was alleged that defendant had learned since the settlement that $6,000 was paid by Guiberson for her use and benefit and that plaintiffs were paid $23,000 by Guiberson with the understanding and agreement that they would pay therefrom the sum of $3,500 owing to Mr. Geisler. It was also alleged that defendant entered into the agreement of settlement without any accounting by plaintiffs of the sum of $4,250 which they had received from Guiberson for costs and expenses. There were also allegations of defendant's ignorance of the value of plaintiffs' services and of the royalty interests that were involved. Defendant admitted that she had received $16,500 at the time the royalties were assigned but it was alleged that $2,500 was a part of the $6,000 paid by Guiberson, and that $5,500 was in repayment of the sums of $500 and $5,000 which defendant had paid plaintiffs and which she claimed were to be returned to her. She therefore substantially alleged that plaintiffs paid her from their own funds only the sum of $5,000, inasmuch as they had received $9,000 more than they had earned. During the trial she amended her cross-complaint by striking out the figure $5,000 and inserting an offer to do equity.

At the commencement of the trial plaintiffs announced their willingness to reassign the royalty interests upon the receipt of $14,000 which they claimed to have paid for the same. The question whether defendant had a right to rescind the transfer of the royalties was thereby withdrawn, but there remained a clear-cut issue as to the amount defendant had received for the transfers to plaintiffs which it would be her duty to return. Inasmuch as the amount was paid from sums received by plaintiffs for fees and expenses which they alleged they had earned, and which defendant alleged were in excess of what they had earned, and in view of the fact that the settlement was agreed to without any accounting by plaintiffs, the court had those issues to decide in order to determine the amount which defendant should restore. As we shall see, the court by its rulings eliminated these issues from the case, decided that plaintiffs had paid $14,000 for the transfers and awarded them judgment in that amount. The questions whether plaintiffs had received more than they had earned and whether their settlement with defendant was, as to her, reasonable and fair were ruled out and no evidence pertaining thereto was received. As we view the case these were the primary issues that had to be determined.

After full discussion of the matter the court stated the issues to be tried as follows:

> "(1) How much money was received by the defendant Virginia Velkov from plaintiffs in connection with said transfer from her to plaintiffs?
>
> "(2) Is Virginia Velkov entitled to offsets in the sum of $500.00 and $5,000.00 for alleged loans or advances claimed to have been made by her to the plaintiffs?
>
> "(3) Is Virginia Velkov entitled to an offset in the sum of $3,500.00 allegedly received by the plaintiffs for her use and benefit?
>
> "(4) Is Virginia Velkov entitled to any offset for costs received by plaintiffs and allegedly unaccounted for?"

[1] It is contended by plaintiffs that defendant agreed that the issues should be

thus limited. Defendant contends that she made no such agreement, that it was incumbent upon plaintiffs to establish the entire fairness of their transactions with her and that it was grievous error for the court to eliminate that issue. The record supports the contentions of the defendant. Throughout the trial her attorney insisted that under the established facts a presumption arose that the consent of the defendant in the various transactions was influenced by the trust and confidence which she reposed in plaintiffs and that plaintiffs could not have the benefit of the agreements without producing evidence which would overcome the presumption. Upon numerous occasions the point was argued, with citation of authority. The court consistently ruled against this contention. The issues were not limited by stipulation or agreement. At no time did the court rule that the issues were limited by agreement. The findings recite that they were limited by the court: there is no recital that they were limited by agreement. Plaintiffs' contention upon that point is without merit.

The issues were not limited by the pleadings. The questions of the fairness of the transactions and the reasonableness of the charges of plaintiffs were sufficiently pleaded. When plaintiffs agreed to restore the royalties the issues were altered in several respects but the pleadings were not amended. They were, therefore, to be considered according to their substance with respect to the remaining issues. It was not contended by plaintiffs that defendant had pleaded insufficient facts to put in issue the fairness of the settlement. Moreover, defendant did not have to question the fairness of the transactions in order to create an issue. The order of proof respecting enforcibility of the agreement of settlement was reversed because of the presumption that a trustee who gains an advantage in dealing with his beneficiary has made undue use of the confidential relationship.

[2] When plaintiffs brought their action seeking to hold defendant to her agreements with them they assumed the burden which every attorney must bear when he seeks to enforce an agreement with his client which is to his advantage. As said in Re Estate of Witt, 198 Cal. 407, 419, 245 P. 197, 202: "Not only must the attorney offer clear and satisfactory evidence that the transaction between himself and his client was fair and equitable, and no advantage was taken by him, but he must also offer proof that the client was fully informed of all matters relative to the transaction, and was so placed as to be able to act understandingly and to deal with the attorney at arm's length. Kisling v. Shaw, 33 Cal. 425, 91 Am.Dec. 644; Cooley v. Miller & Lux, 156 Cal. 510, 105 P. 981; Clark v. Millsap, [197 Cal. 765] 242 P. 918."

In the beginning there were two phases of the problem. Plaintiffs made their settlement with defendant on the basis of a contingent arrangement. They were to receive from defendant 25 per cent of whatever she received above the amount of some $55,000. However, they conceded that they were not entitled to retain all the money they had received and also the share of the royalties. But they did claim they were entitled to all the money they had received, and that having paid $14,000 from their own funds, they were entitled to restoration of that amount. It would seem that the turn the case took at the trial removed any question as to the fairness and validity of the contingent fee arrangement. Plaintiffs pleaded that agreement and alleged they had paid defendant $14,000 for the royalties. They thereby effectually conceded that the sums they retained above $14,000, plus the royalties, would give them the compensation to which they were entitled under the agreement. But when they consented to a rescission of the transfer of the royalties it was no longer a question whether they had a right to retain them as a part of their compensation. For all practical purposes the contingent fee agreement could no longer be considered as the basis of a settlement of the dispute; it was effectually abandoned. But there remained the question whether plaintiffs were entitled to restoration of $14,000 and this called for a decision whether they had earned the amount of cash they retained, from which they paid the $14,000. As we have seen that amount was $18,250, less plaintiffs' proper costs and expenses. If they had earned that amount and if the settlement with defendant was otherwise enforcible by them, they were entitled to have $14,000 returned to them when they restored the royalty interests. If they had earned less the difference would be deductible from the $14,000 which they claimed as restitution.

The court made no finding as to the value of plaintiffs' services, having ruled out that issue. For the same reason the court made no finding whether defendant had received independent advice respecting the settlement and no finding whether it was just and fair as to defendant. There was no evidence as to the value of the royalties received by defendant from Guiberson, which would have been a factor in evaluating the services of plaintiffs. There were findings which negatived the employment of actual fraud, menace or duress by the plaintiffs but there was no allegation or issue to which those findings were responsive.

There was a considerable amount of testimony respecting the arrangement that plaintiffs' compensation would be measured by what she received from Guiberson. Defendant testified that when fees were first discussed plaintiffs asked for the 25 per cent arrangement and that she agreed to it. Plaintiffs testified that defendant insisted upon the arrangement and that they did not agree to it until after the settlement with Guiberson had been agreed upon. All this testimony was irrelevant. Plaintiffs did not base their claim to the money upon that agreement. The only issues to be tried were those which related to the settlement as evidenced by the writings of May 7 and June 8. The primary question was whether plaintiffs had earned all or any part of the $14,000 they paid defendant. The failure of the court to try and determine the question of the fairness of the settlement was due entirely to the avoidance of that issue by the plaintiffs. It is an issue which every attorney must meet when he seeks to enforce a contract for his fees and it is one from which he should not shrink. The judgment must be reversed. The parties should be permitted to amend their pleadings if they so desire.

Any judgment hereafter rendered for restoration of money paid to defendant for an assignment of royalties should declare defendant's right to the royalties that have been impounded and should determine whether plaintiffs are chargeable with the amount of royalties which they have received. The purported appeals from the order denying defendant's motion for new trial and from the order denying her motion to vacate the judgment are dismissed.

The judgment is reversed.

PARKER WOOD and VALLÉE, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

133 Cal.App.2d 660

Velma WALSTON, Plaintiff and Appellant,

v.

FLINTRIDGE OIL COMPANY, a partnership composed of Homer F. West, R. W. Dorn, Byron M. Engle, Ben H. Gordon and C. A. West, partners; and Homer F. West, R. W. Dorn, Byron M. Engle, Ben H. Gordon and C. A. West, Individually, Defendants and Respondents.

Civ. 4964.

District Court of Appeal, Fourth District, California.

June 15, 1955.

Rehearing Denied July 7, 1955.

Hearing Denied Aug. 11, 1955.

Action by lessor to recover rent claimed to be due under an oil lease. From adverse judgment of the Superior Court, Kern County, W. L. Bradshaw, J., lessor appealed. The District Court of Appeal, Barnard, P. J., held that under oil lease providing that if lessee did not commence drilling operations within 60 days or terminate the lease, lessee was to pay a certain sum per acre per month for so much of land still held under lease, and that the lease should terminate upon lessee's election not to drill, lease was terminated by lessee's failure to commence drilling within the prescribed time and lessee was not liable for delay rental.

Judgment affirmed.

Mines and Minerals ⟹78(1)

Under oil lease providing that, if lessee did not commence drilling operations within 60 days or terminate the lease, lessee was to pay a certain sum per acre per month for so much of the land still held under the lease, and that the lease should terminate upon lessee's election not to drill, lease was terminated by lessee's failure to commence drilling within the prescribed time and lessee was not liable for delay rental.

◆

Leonard C. Hall, Jr., Bakersfield, for appellant.

Marvin A. Freeman and Jack E. Lund, Beverly Hills, for respondents.

BARNARD, Presiding Justice.

This is an action to recover rent claimed to be due under an oil lease.

On December 21, 1953, the plaintiff as owner, and the defendants as lessee, executed an oil and gas lease which provided, so far as material here, the following:

> *"Section 5.* * * * 'Commencing with the 60th day of the term hereof, if the Lessee has not theretofore commenced drilling operations on said land or terminated this lease as herein provided, the lessee shall pay or tender to the lessor in advance, as rental, the sum of Twenty five ($25.00) Dollars per acre per month for so much of said land as may then still be held under this lease, until drilling operations are commenced or this lease terminated as herein provided.'
>
> *"Section 6.* * * * 'The Lessee agrees to commence drilling operations on said land within sixty days from the date hereof (unless the lessee has sooner commenced the drilling of an offset well on said land as herein provided) and to prosecute the same with reasonable diligence until oil or gas is found in paying quantities, or to a depth at which further drilling would, in the judgment of the Lessee, be unprofitable; or it may at any time within said period terminate this lease and surrender said land as hereinafter provided. No implied covenant shall be read into this lease requiring the Lessee to drill or to continue drilling on said land, or fixing the measure of diligence therefor. The Lessee may elect not to commence or prosecute the drilling of a well on said land as above provided, and thereupon this lease shall terminate.'
>
> *"Section 26.* * * * 'On the expiration or sooner termination of this lease, Lessee shall quietly and peaceably surrender possession of the premises to Lessor and deliver to him a good and sufficient quitclaim deed, and so far as practicable cover all sump holes and excavations made by Lessee.'"

This action was brought on June 26, 1954. The complaint set forth a copy of the lease and alleged its execution; that it provided that if drilling was not commenced within sixty days the lessee would pay to the lessor $25 per acre per month in advance as and for rental of said property during the term of the lease; that "thereafter" the defendants entered into possession of the premises and such possession continued to on or about May 25, 1954; that during the term of the lease the defendants neither drilled nor attempted to drill any oil wells upon the premises; that they made no payment or tender of payment of rent in accordance with the terms of the lease; that four monthly payments of $1,000 each became due as rental; and that the defendants have refused to pay these amounts. Judgment for $4,000 was prayed for. The defendants filed a demurrer, which was sustained by the court with permission to amend within fifteen days. No amendment was filed, and the defendants moved for a dismissal of the action. The court entered an order granting this motion and dismissing the action, and the plaintiff has appealed from that order.

The sole contention raised by the appellant is that this lease is of the "drill or pay" type and that consequently the lessee is liable for delay rental. The respondents contend that the lease is of the "unless" type and that they are not liable for the payment of any such rent.

The language of the lease here in question, so far as material here, is substantially identical with the language of the leases involved in Alexander v. Oates, 100 Cal.App.2d 266, 223 P.2d 264, and Norris Oil Co. v. Von Glahn, 104 Cal.App.2d 159, 230 P.2d 885. In each of those cases it was held that the lease involved was one of the "unless" type and that the failure to commence drilling operations within the time limit or to pay the rentals provided for resulted, under the terms of the lease, in an automatic termination of the lease. See also Wilcox v. West, 45 Cal.App.2d 267, 114 P.2d 39, and Richfield Oil Corp. v. Bloomfield, 103 Cal.App.2d 589, 229 P.2d 838.

The appellant, while conceding that if this lease is of the "unless" type there is no liability on the lessee for rent, contends that the cases above cited are not controlling. It is argued that in each of those cases the action was brought by the lessor to quiet title and not for delay rental; that the lessor had the option to either declare a forfeiture or to sue for delay rental; and that the result in each of those cases did not depend upon whether the lease involved was of the "unless" or "drill or pay" type. Regardless of the form of the action, it was held in the first two of those cases that leases identical with the lease here involved, in material effect, created an automatic termination of the lease upon the failure to drill or pay the rent. The terms of this lease support the same conclusion.

The main difference between the "drill or pay" type of lease and the "unless" type, so far as material here, is that the former contains terms requiring the payment of rent when drilling operations are not commenced within the time specified, while the latter contains terms providing for a termination of the lease when the lessee fails to drill within the time limit and also fails, as an alternative, to pay delay rentals. The provision in Section 5 of this lease for the payment of rent in advance on the 60th day does not create a definite obligation to pay such rental until drilling is started, but makes such payment subject to the right to terminate the lease. Section 6 then contains two provisions whereby the lease may be terminated. The first, after providing for the start of drilling operations and a diligent prosecution of the same for a certain period, provides that the lessee may at any time during said drilling operations terminate the lease and surrender the land, and that no requirement that the lessee must drill or continue to drill shall be implied. The second, clearly applying where no drilling operations are started, provides that the lessee may elect not to drill "and thereupon this lease shall terminate". Nothing is said in that provision about surrendering the land, and no real possession would ordinarily be involved. Instead of creating an obligation to pay rent if no drilling is done within a certain time, this lease permits the lessee to elect not to drill, with no limitations on that right of election. It is not even required that he give notice of such election.

The complaint as filed was insufficient. No facts were alleged as to when or how the respondents took possession, and none to the effect that the payment terms of the lease were still in force. The lease alone was not sufficient to establish the obligation to pay rent. The respondents had a right to elect not to drill, thereby terminating the lease including all of its provisions. If any facts existed which would show that the respondents had not exercised that right, and that the lease was still in force, such facts could have been set forth in an amended complaint, which the appellant failed to do. Likewise, if the respondents had caused any damage by failing to deliver a quitclaim deed, a cause of action for such damage might have been, but was not, alleged. This lease being one of the "unless" type, the court was justified in sustaining a demurrer to the complaint as it then stood.

The order or judgment of dismissal is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

133 Cal.App.2d 664

In re Robert Erwin MORGAN for a Writ of Habeas Corpus.

Cr. 5430.

District Court of Appeal, Second District,
Division 3, California.
June 16, 1955.

Hearing Denied July 13, 1955.

Proceeding on writ of habeas corpus issued upon petition alleging prisoner was denied right and privilege of consulting, conferring and communicating with counsel under orders of chief jail inspector. The District Court of Appeal held that evidence was sufficient to show that petitioner had not been deprived of the right to consult and confer with attorneys.

Writ discharged and petitioner remanded.

Habeas Corpus 🔑85(1)

In proceeding on writ of habeas corpus, issued upon petition alleging prisoner was denied right and privilege of consulting, conferring and communicating with counsel, under orders of the chief jail inspector, evidence was sufficient to show that petitioner was not deprived of the right to consult and confer with attorney. Pen.Code, §§ 470, 476a, 487, subd. 1.

Robert Erwin Morgan, in pro. per.

S. Ernest Roll, Dist. Atty., Jere J. Sullivan, Deputy Dist. Atty., Los Angeles, for respondent.

PER CURIAM.

Writ of habeas corpus was issued upon the petition of Robert Erwin Morgan representing that while he has been confined in the Los Angeles County Jail upon commitments following judgments of conviction of violation of sections 476a, 470 and 487, subd. 1 of the Penal Code, he has been denied the right and privilege of consulting, conferring and communicating with counsel under orders of the chief jail inspector. A return and a traverse to the return have been filed and a hearing has been had pursuant to the writ. Upon the hearing it was made to appear to the satisfaction of the court by the records kept in the jail, and otherwise, that the petitioner has not at any time been deprived of the right to consult and confer with attorneys; that upon the contrary he has been visited by numerous attorneys and has conferred with them frequently during the entire time of his present incarceration.

The writ is discharged and the petitioner is remanded.

VALLÉE, J., concurs in the judgment.

133 Cal.App.2d 693

PEOPLE of the State of California, Plaintiff and Respondent,
v.
Thomas G. KENNEDY, Defendant and Appellant.

Cr. 3109.

District Court of Appeal, First District,
Division 2, California.
June 20, 1955.

Defendant was convicted of contributing to delinquency of a minor. The Superior Court, City and County of San Francisco, Milton D. Sapiro, J., rendered judgment, and defendant appealed. The District Court of Appeal, Nourse, P. J., held that offense of contributing to delinquency of a minor requires that victim be a minor and is not included within offense of violating Penal Code, § 288a, and defendant who was charged only with violation of § 288a could not be convicted of contributing to delinquency of a minor.

Judgment reversed.

1. Infants 🔑20

Evidence was sufficient to take to jury question of defendant's guilt of contributing to delinquency of a minor. Welfare and Institutions Code, § 702.

2. Indictment and Information ⟹191

Offense of contributing to delinquency of a minor requires that victim be a minor and is not included within offense of violating Penal Code, § 288a, and defendant who was charged only with violation of § 288a could not be convicted of contributing to delinquency of a minor. Pen.Code, §§ 288a, 1159; Welfare and Institutions Code, § 702.

◆

Kenneth C. Zwerin, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., William M. Bennett, Deputy Atty. Gen., for respondents.

NOURSE, Presiding Justice.

[1] Defendant was tried to a jury on an information charging a violation of Section 288a of the Penal Code. The jury, following an instruction that it was a lesser and included offense found the defendant guilty of a violation of Section 702 of the Welfare and Institutions Code (contributing to the delinquency of a minor). The evidence overwhelmingly supported the verdict. That relating to the crime charged was of doubtful sufficiency. The trial court instructed the jury that Section 702 stated a minor offense to that denounced in Section 288a of the Penal Code and that the jury could find defendant guilty of that offense. The verdict of guilty of the minor offense followed. This instruction causes the whole attack on the judgment.

[2] The error begins with the information. It charges a violation of Section 288a alone. Under this charge evidence of a violation of Section 702 was not admissible and was not proof of the crime charged. If a violation of Section 702 was to be tried it should have been charged in the information.

Hence, the instruction that the jury could find defendant guilty of the minor offense of contributing was error because a violation of Section 702 was only possible if the other party was a minor. This is so because of the provisions of Section 1159 of the Penal Code which reads "The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense." It cannot be said that the "lesser" offense was "necessarily" included in the crime charged because here the lesser offense of contributing was applicable only in the event that the victim was a minor of less than twenty-one years of age, an element not required for the crime charged.

Having acquitted the defendant on the only charge made in the information (violation of Section 288a, Penal Code), the jury was without power to convict him of a violation of Section 702 of the Welfare Code.

Support for these views is found in People v. Greer, 30 Cal.2d 589, 184 P.2d 512; People v. Krupa, 64 Cal.App.2d 592, 149 P.2d 416; People v. Whitlow, 113 Cal.App.2d 804, 249 P.2d 35.

Judgment reversed.

DOOLING and KAUFMAN, JJ., concur.

133 Cal.App.2d 741

Edythe Marrenner BARKER, Plaintiff and Appellant,

v.

Jesse T. BARKER, Defendant and Respondent.

Civ. 21096.

District Court of Appeal, Second District, Division 1, California.

June 21, 1955

Action for divorce. From an order of the Superior Court of Los Angeles County, Herbert V. Walker, J., requiring plaintiff to pay the defendant's attorney's fees on appeal, the plaintiff appealed. On motion to dismiss the appeal. The District Court of Appeal, Doran, J., held that the appeal was not dismissible on the ground that the wife attempted to appeal from a stipulated order and that the wife had accepted the benefits thereof and thereby waived her right to appeal.

Motion to dismiss the appeal denied.

1. Divorce ⚷178

In divorce action, wife's appeal from order requiring her to pay husband's attorney's fees on appeal was not dismissible on the ground that she was attempting to appeal from a stipulated order and had accepted the benefits thereof, where the order was made after execution of stipulation which itself indicated that neither party contemplated any waiver of the right to appeal but was intended to provide for the making of a joint income tax return.

2. Divorce ⚷183½

In divorce action whether husband's appeal from interlocutory divorce judgment was meritorious and whether an award for husband's attorney's fees on appeal was excessive were matters to be decided upon the merits and not arbitrarily or summarily.

◆

Gang, Kopp & Tyre, Martin Gang, Milton A. Rudin, Los Angeles, for appellant.

Hahn, Ross & Saunders, Los Angeles, for respondent.

DORAN, Justice.

The defendant husband has filed the present motion to dismiss the plaintiff wife's appeal from a minute order entered December 13, 1954, ordering the wife to pay $7,500 as the husband's attorney fees on appeal. The husband had previously appealed from an interlocutory judgment of divorce, and the wife filed a cross-appeal, which appeals are not involved in the present motion. Defendant's motion is predicated on two grounds: (1) that the appellant wife "has attempted to appeal from a stipulated order, or an order made by the consent of the parties"; and (2) that appellant "has accepted the benefits of the stipulated order, and, thus, waives her right of appeal".

The divorce action herein involved, was instituted by the wife, Edythe Marrenner Barker; the husband, Jesse T. Barker, filed an answer thereto. An order pendente lite, ordered the wife to pay $2,500, on account of the husband's attorney fees, and at the trial the wife was ordered to pay an additional sum of $3,500 to the husband's attorneys, making a total of $6,000.

After trial of the case, and appeals by both parties as hereinbefore mentioned, the defendant husband filed a motion to require the wife to pay further attorney fees in connection with appeal No. 20929, which motion was opposed by the wife on the ground, among others, that the appeal was without merit. At the first hearing of this motion, the trial court said: "I do not believe I will deny him the right (to appeal) on account of it not being a meritorious appeal", and, "All I can say is that the lady is not going to pay for it". The matter was then continued for two weeks, to "see if you gentlemen can't work something out here".

Thereafter, the parties entered into a written "Stipulation re filing joint income tax returns and payment of attorney fees and costs", signed by both parties and the respective attorneys. This stipulation was "entered into with reference to the following facts", and recites that, "C. Prior to the entry of said Interlocutory Judgment of Divorce, plaintiff requested defendant to join with her in filing joint United States and California Income Tax Returns for the calendar year 1953 and offered that the tax saving resulting from filing such joint returns be used for the payment of defendant's attorney fees and costs herein and the balance be used for the support and maintenance of the minor children of the parties; defendant refused to sign said joint income tax returns". It also recites that plaintiff had opposed defendant's motion for attorney fees "on the ground, among others, that defendant has the ability to create a fund for the payment of his attorney's fees and costs on appeal by accepting plaintiff's offer to use the tax savings resulting from the filing of joint income tax returns for the calendar years 1953 and 1954".

The stipulation then provides that joint income tax returns shall be prepared which will be executed by both parties "within 15 days after said returns are submitted to defendant". Mrs. Barker agrees to "deposit in a special bank account" an amount equal to the "difference between the amount of taxes she has paid in connection with her separate income tax returns for 1953 and the amount of the taxes on the joint income tax returns for 1953 which she has agreed to pay and be responsible for", when plaintiff receives a tax refund. In respect to joint income taxes for subsequent years, plaintiff likewise agrees to deposit this difference.

From this bank fund "Plaintiff shall be entitled to withdraw * * * or offset against any amounts she is required to deposit", among other items, "All sums plaintiff has heretofore been ordered to pay or may hereafter be ordered to pay to defendant's attorneys or to defendant for attorney's fees and costs in this action, including attorney's fees on appeal". (Paragraph 11d.) When the joint tax liability has been finally determined, "and provided further that the appeals taken herein have been finally decided, plaintiff will use the balance of the fund to purchase United States Savings Bonds in equal amounts for the two children".

It is also stipulated that "14. Upon the filing of joint income tax returns for the calendar year 1954, and upon condition that defendant complies with and performs all of the terms and provisions of this stipulation * * * plaintiff will dismiss her cross-appeal taken herein". Paragraph 15 of the stipulation provides that plaintiff will pay all costs of appeal incurred by the parties, as described in sub-paragraph (c) of paragraph 11 hereinabove, as and when said costs are incurred".

That part of the stipulation now relied upon by the defendant is Paragraph (16) which reads: "With respect to defendant's attorneys fees plaintiff has heretofore or may hereafter be ordered to pay, plaintiff will make such payments from assets in her possession as and when ordered to make such payments; it being the intent of this stipulation that the said payments of costs on appeal and defendant's attorney fees be paid by plaintiff as and when incurred or due and that when the fund referred to in paragraph 10 is established, plaintiff is entitled to withdraw from said fund, or offset against her deposits therein, the amounts she has paid for costs on appeal and defendant's attorney fees as provided in paragraph 11(c) and (d)".

The final paragraph of the stipulation, (18) specifically provides that "This stipulation and agreement is without prejudice to the respective positions of the parties in respect to the appeal which has been taken by the parties hereto, and further, this stipulation shall not be considered a waiver of any claim or any rights that the parties may have on the appeal; and further, the acceptance of any of the benefits or any of the money set forth in this stipulation shall not be deemed a waiver of any claims or rights under the appeal taken except that the plaintiff will dismiss her cross-appeal as provided in paragraph 14 hereinabove".

[1] The husband's present motion to dismiss the wife's appeal from the order to pay $7,500 as the husband's attorney fees on appeal, cannot be granted. The grounds of this motion, (1) that the wife "has attempted to appeal from a stipulated order, or an order made by consent of the parties"; and (2), that the wife "has accepted the benefits of the stipulated order, and, thus, waives her

right of appeal", are not supported by the record, and depend upon a forced and unnatural interpretation of the stipulation in question.

In the first place, the trial court's $7,500 award for defendant's attorney fees on appeal, was never consented to by the wife, and the order was made after execution of the stipulation. As said in the wife's brief: "Does defendant contend that if the trial court had awarded an attorney's fee of $1,000,000.00, plaintiff would be deemed to have consented to such an award?". To adopt such an interpretation is to deprive a litigant of the right to have an appellate tribunal review the trial court's determination. If the waiver of such an important right was intended, it is reasonable to suppose that the parties would definitely so state. But the stipulation contains no such provision; indeed, a reading of the last paragraph thereof would seem to indicate that neither party contemplated or intended any such waiver.

[2] The obvious purpose of the stipulation was to provide for the making of joint income tax returns, which procedure would result in a tax saving, thereby creating a fund which would defray both parties' legal expenses. The balance of this fund was to be used "to purchase United States Bonds in equal amounts for the two children". That this was a proper and laudable purpose cannot be doubted. Such a stipulation, however, should not be unnecessarily turned into a vehicle to deprive either party of the right to appeal.

Whether the husband's appeal from the interlocutory divorce judgment is meritorious, and whether the trial court's award for the husband's attorney fees on appeal is excessive, are matters which should be decided on the merits after due consideration. The amount of such attorney fees, whether reasonable or excessive, should not be determined arbitrarily nor summarily. The plaintiff wife is entitled to have such matter reviewed in an appellate tribunal.

The motion to dismiss the appeal is denied.

WHITE, P. J., and DRAPEAU, J., concur.

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133 Cal.App.2d 589

In the Matter of the ESTATE of E. F. LOESCHER, also known as Eduard F. Loescher, also known as Eduard Frank Loescher, also known as Edward Frank Loescher, Deceased.

Vesta F. LOESCHER, Executrix, Respondent,

v.

Burt G. LOESCHER and Jack Loescher, by and through Burt G. Loescher, the guardian of his person and estate, Appellants.

Civ. 4968.

District Court of Appeal, Fourth District, California.

June 13, 1955.

Proceeding on executrix' final account and petition for distribution. Beneficiaries of a testamentary trust filed objections. The Superior Court, Fresno County, Arthur C. Shepard, J., made order settling final account and entered decree of distribution. Beneficiaries appealed. The District Court of Appeal, Griffin, J., held that where will provided that residue of estate would be held in trust, and trust was divided in two separate funds, benefits of one fund to go to widow, and benefits of second fund to go to sons, and both funds were to bear the burden of inheritance and state taxes assessed against them, court's construction that both trusts were residuary, and that they would bear expenses of administration and family allowance in proportion of their values, was correct.

Order and decree affirmed.

1. Wills ⚿750

Classification of devises is primarily a matter of convenience of expression, and whether devise is residuary, general, specific or administrative depends upon intention of testator as shown by entire will.

2. Wills ⚿750

There is a general presumption that legacy is presumed to be general unless it clearly appears to be specific.

3. Wills ⚷750, 753

Where legacy is of a pecuniary character the intent of the testator necessarily controls in determining whether legacy is general or specific, and where it appears that his intent was to give a particular thing or a particular sum of money, not generally, but only from a specified and definitely ascertained source, the court has no choice but to give effect to that intent.

4. Wills ⚷753

Where specifically described land is devised, or where the proceeds of particularly designated land are the actual subject of a bequest, the gift is generally considered to be specific.

5. Wills ⚷750

Regardless of statutory definitions, the fundamental and controlling factor in determining whether a legacy is general or specific is the intent of the testator at the time the will is drafted as expressed in the will considered as a whole, and in light of surrounding circumstances.

6. Wills ⚷750

In determining whether testator intended that legacy be general or specific, the intention sought for is not that which may have existed in mind of testator, but is that which is expressed in language of will, giving such language, if clear, its ordinary meaning and if ambiguous, the meaning it should have, in light of context and circumstances shown to explain meaning.

7. Wills ⚷457

In construing wills, technical words are to be taken in their technical sense, unless context clearly indicates contrary intention, or unless it satisfactorily appears that will was drawn solely by testator and that he was not acquainted with such technical sense.

8. Wills ⚷457

Where a will is drawn for a testator by an attorney, a word or phrase which has recognized technical meaning must be interpreted in accordance with that meaning.

9. Wills ⚷750

In determining whether a legacy was intended to be general or specific, principles of construction should be applied to entire will to determine express intention of testator as to source of payments in dispute and nature of gifts.

10. Wills ⚷587(1)

The "residue" or "residuum" technically is the remainder or that which remains after taking away a part, and the presumption is that the testator used it in that sense unless a contrary intention clearly appears.

See publication Words and Phrases, for other judicial constructions and definitions of "Residue" and "Residuum".

11. Wills ⚷587(1)

Where will is drawn for testator by attorney, the words residue, as used in instrument will be taken technically, and no resort can be had to artificial aid in its interpretation when natural reason and the circumstances of its insertion make clear its meaning.

12. Wills ⚷587(1), 736

Where will provided that residue of estate would be held in trust, that two separate funds from the residuary legacy would be used for benefit of widow and sons of testator, and that both funds would bear burden of inheritance and estate taxes assessed against them, court's finding that burden of obligations and expenses of estate would be shared by both funds as being residue of estate was correct. Probate Code, § 750.

13. Courts ⚷89

Although construction by inheritance tax appraiser and state controller as to whether certain trust was in residue of estate was not binding on the court, it was entitled to some respect. Probate Code, § 750.

14. Courts ⚷202(5)

Where the construction placed by probate court on the terms of a will is reasonable and appears to be consistent with intent of the testator as expressed in the will, the appellate court will not substitute another interpretation even though it may seem equally tenable.

Wallace G. Quinlisk, Fresno, for appellants.

Staniford, Harris & Loomis, Fresno, for respondent.

GRIFFIN, Justice.

Appellants Burt G. Loescher and Jack Loescher through his guardian, sons of deceased E. F. Loescher by a former marriage, filed objections to the first and final account and petition for distribution of respondent Vesta F. Loescher, executrix and widow of the deceased. This appeal is from the order approving the account and rejecting appellants' objections relating to allocation of debts, expenses of administration, and payment of family allowance.

After several introductory paragraphs, deceased made a specific devise in his will in paragraph Third, of certain specified money and other property to his wife. He then, in paragraph Fourth, recommended that his wife permit her share of their community property to be disposed of under a trust later created therein, and provided that the specific bequests made in paragraph Third should not become a part of said trust. The widow elected that her share of the community property should not pass under the will. Under paragraph Fifth, it provides:

> "I give, devise and bequeath the residue and remainder of my estate, both real and personal, and wherever situate, to my said wife, Vesta Frances Loescher, as trustee, in trust for the uses and purposes hereinafter set fourth:
>
> "(1) The trust estate shall be divided into two (2) Trust Funds: namely; 'A' and 'B', which shall constitute separate trusts.
>
> "Fund 'A' Shall Consist of:
>
> "(a) My wife's share of our community property, if she shall permit such share to pass under the provisions of this Will;"
>
> (Subparagraphs b, c and d containing particularly described parcels of real property are omitted.)
>
> "(e) Leasehold interest in Lots 12 and 13, Swanson Colony, in Section 21, Township 16 South, Range 21 East, M.D.B. & M., together with all trucks and farming equipment and all other property (except that specifically devised in Paragraph Third and by Trust Fund B of this my Last Will and Testament), whether real, personal or mixed, which I may own or to which I may be entitled at the time of my death.
>
> "(2) Fund 'B' Shall Consist of:
>
> "(a) (A particularly described piece of real property). . .
>
> "Fund A and Fund B shall bear the burden of inheritance and estate taxes assessed against my estate in proportion to the value placed upon them by the California State Inheritance Tax Appraiser, appraising my said estate."

Respondent is the primary recipient of benefits from Fund 'A' and appellants, in conjunction with Eduard F. Loescher, Jr., infant son of decedent and respondent, are recipients of benefits only from Fund 'B'. The court ordered that all debts existing at the time of death, expenses of administration, and family allowance, be allocated among the surviving wife's share of the community property, the property in Fund A, and the property in Fund B, in proportion to the appraised values of each. Fund B's share thereof is approximately $54,000 (approximately 25 per cent) out of a total of obligations and expenses in excess of $213,000.

It is appellants' contention that the Probate Court erred in making this order and that the property in Fund B should not bear any part of these obligations and expenses because it was a specific bequest and not a residuary bequest under section 750 of the Probate Code, which provides that such charges are taxable against the residue. The trial court found that the debts existing at the time of death should be allocated proportionately to the appraised value of the bequests made in trust funds A and B. The questions presented are: (1) Did the testator express his intention in the will that funds A and B should be on an equal basis in respect to these debts, expenses of administration, and family allowance? (2) Without regard to testator's expressed intention as to source of payment of these charges, are funds A and B both a part of the residuary gift to be treated as part of the residue of the estate? If either of these questions may be answered in the affirmative the order of the court must be affirmed.

In general, Probate Code section 750 requires that debts, expenses of administration and family allowance shall be paid from such sources as the testator directs. If he expresses no intention in this respect such charges are to be paid from the residue of the estate. Appellants argue that Fund B is a specific devise of real estate, notwithstanding it is in the residuary clause; that this bequest meets all the tests of a specific bequest; that the wording of the testator's will, paragraph Fifth, subdivision (1) shows that Fund B is a specific bequest; that there is sufficient property in the residue of the estate to pay the debts of the testator and the expenses of administration; and that it was therefore erroneous for the court to charge any of such debts and expenses to property specifically devised, citing such cases as In re Estate of Bacigalupi, 105 Cal.App. 578, 581, 288 P. 122; In re Estate of De Bernal, 165 Cal. 223, 230, 131 P. 375; In re Estate of Sullivan, 128 Cal.App.2d 144, 274 P.2d 946; Holmes v. Hrobon, 93 Ohio App. 1, 103 N.E.2d 845.

It is appellants' main argument that although Fund B was created in a residuary clause of the will it nevertheless was a specific devise of certain described property and was intended and considered by deceased as a specific bequest, particularly in view of the deceased's reference to it in paragraph Fifth, subdivision (e) referring to the aforementioned property and "all other property (except that specifically devised in Paragraph Third and by Trust Fund B of this my Last Will and Testament)". The argument is that deceased described Fund B as being "specifically devised" property. An examination of this language might well indicate that the decedent was excepting that property admittedly specifically devised in paragraph Third, and, in addition, that property devised in Fund B. Whether the word "specifically" must be interpreted as intending to modify, be descriptive of, or apply to the devise under Trust Fund B is problematical. At least the expression used, when applied to the entire provisions of the will, was a subject for the court's interpretation as to whether deceased intended also to specifically devise Fund B to the beneficiaries named.

[1–5] Respondent points out that the first consideration of the court must necessarily be an examination of the will to determine the testator's intent with respect to the source from which these charges should be paid. Classification of devises is primarily a matter of convenience of expression. Whether a devise is residuary, general, specific or administrative depends upon the intention of the testator as shown by the entire will. Page on Wills, Lifetime Ed. Vol. 4, p. 101, sec. 1392; In re Estate of Hendrix, 77 Cal.App.2d 647, 654, 176 P.2d 398. There is a general presumption that a legacy is presumed to be general unless it clearly appears to be specific. Where it is of a pecuniary character the intent of the testator necessarily controls, and where it appears that his intent was to give a particular thing or a particular sum of money, not generally but only from a specified and definitely ascertained source, the court has no choice but to give effect to that intent. Where specifically described land is itself devised, or where the proceeds of particularly designated land are the actual subject of the bequest, the gift is generally considered to be specific. Regardless of statutory definitions, the fundamental and controlling factor is the intent of the testator at the time the will was drafted as expressed in the will when considered as a whole and in the light of the surrounding circumstances. In re Estate of Jepson, 181 Cal. 745, 747, 186 P. 352; In re Estate of Sullivan, 128 Cal.App.2d 144, 146, 274 P.2d 946.

[6] The intention sought for is not that which may have existed in the mind of the testator but is that which is expressed in the language of the will, giving such lan-

guage, if clear, its ordinary meaning, and if ambiguous, the meaning it should have, in the light of the context and the circumstances shown to explain the meaning. 26 Cal.Jur. p. 883, sec. 199; In re Estate of Sessions, 171 Cal. 346, 349, 153 P. 231.

[7–13] Technical words are to be taken in their technical sense, unless the context clearly indicates a contrary intention, or unless it satisfactorily appears that the will was drawn solely by the testator, and that he was not acquainted with such technical sense. In re Estate of Coleman, 189 Cal. 612, 209 P. 571. However, it has been said that where a will is drawn for a testator by an attorney, as in this case, a word or phrase which has a recognized technical meaning must be interpreted in accordance with that meaning. 26 Cal. Jur. p. 895, sec. 211; In re Estate of Northcutt, 16 Cal.2d 683, 107 P.2d 607. Of course these principles should be applied to the entire will to determine the expressed intention of the testator as to the source of the payments in dispute, and the nature of the gifts. With this in mind, from an examination of the entire will, it shows that after disposing of the specific gifts in paragraph Third, paragraph Fifth clearly indicates that the *residue* and *remainder* of all other property is to be left to the widow in trust "for the uses and purposes hereinafter set forth:" The "residue" or "residuum" technically, is the remainder or that which remains after taking away a part, in a will, and the presumption is that the testator used it in that sense unless a contrary intention clearly appears. Where a will is drawn for a testator by an attorney the word "residue", as used in the instrument, will be taken technically, and no resort can be had to artificial aid in its interpretation when natural reason and the circumstances of its insertion make clear its meaning. In re Estate of Scott, 1 Coff. Prob. 368. Apparently, the scrivener of the will considered all of the property going into this trust as the residue of the estate. After declaring it to be the residue, he then proceeded to set up two separate funds from the proceeds of the residuary legacy. This did not necessarily change such residuary bequest to a specific bequest. By the terms of the will Fund A, as well as Fund B were on an equal footing insofar as they should both bear the burden of inheritance and state taxes assessed against them. This provision is indicative that both funds were intended to be on a parity, and that the testator meant "residue and remainder" in a technical sense when he used those words, and intended the burdens of obligations and expenses of the estate to be shared by all of the property disposed of in the residuary clause. The construction placed upon this will in this respect by the inheritance tax appraiser and the State Controller coincides with that of the trial court, i. e., that Fund A and Fund B should bear the obligations in proportion to their value. Although such construction by an administrative agency is not binding on the court, it is entitled to some respect. In re Estate of Welsh, 89 Cal.App.2d 43, 200 P.2d 139.

[14] It is a cardinal principle of law that where the construction placed by a probate court on the terms of a will is reasonable and appears to be consistent with the intent of the testator, as expressed in the will, the appellate court will not substitute another interpretation even though it may seem equally tenable. In re Estate of Northcutt, supra.

Order and decree affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

133 Cal.App.2d 610

Jasper Ernest LAIL, as Executor of the Last Will and Testament of Jasper E. Lail, Sr., deceased, Plaintiff and Respondent,

v.

Robert L. LAIL, also known as R. L. Lail and Pearl A. Lail, also known as Perle A. Lail, Defendants and Appellants.

Civ. 20583.

District Court of Appeal, Second District, Division 3, California.

June 14, 1955.

Rehearing Denied July 6, 1955.

Hearing Denied Aug. 11, 1955.

Action by executor against testator's son for alleged breach of trust and for money had and received. The Superior Court, Los Angeles County, William J. Palmer, J., entered judgment for plaintiff and denied defendant's motion for new trial, and defendant appealed. The District Court of Appeal, Vallée, J., entered judgment of reversal. On rehearing, the same court held that evidence was sufficient to rebut presumption that it was intention of testator and defendant at time of opening of joint account to vest title in survivor.

Judgment affirmed.

Opinion, 281 P.2d 885, vacated.

1. Appeal and Error ⚿994(3)

Where, in action by executor against testator's son for alleged breach of trust and for money had and received, only evidence that money in joint tenancy account of defendant and testator, was testimony of defendant himself, and where trial court did not believe such testimony, reviewing court would not assume its veracity.

2. Joint Tenancy ⚿3

Statute governing joint tenancy bank deposit sets up rebuttable presumption that deposit in names of depositor and another person to be paid to either survivor becomes property of such persons as joint tenants, and also conclusive presumption that in absence of fraud or undue influence, it was intention of depositors to vest title in survivor, and conclusive presumption applies only in favor of survivor to moneys still remaining in account at time of death and does not apply to moneys withdrawn by either of depositors during life, even if one of them has subsequently died. Stats.1929, p. 444, § 3.

3. Joint Tenancy ⚿3

Presumption of equality of interest arising from form of joint account is rebuttable by competent evidence showing true character and ownership of moneys deposited. Stats.1929, p. 444, § 3.

4. Joint Tenancy ⚿3

In action by executor against testator's son for alleged breach of trust and for money had and received, evidence was sufficient to rebut presumption that it was intention of testator and defendant at time of opening of joint account to vest title in survivor. Stats.1929, p. 444, § 3.

5. Trusts ⚿262

When fiduciary enters into transaction with beneficiary whereby fiduciary's position is improved, or he obtains favorable opportunity, or where he otherwise gains, benefits, or profits, it may be said that advantage has been obtained, and to declare that advantage obtained must be shown to be unfair, unjust, or inequitable before presumptions arise would result in imposition of condition not required by statute declaring all transactions between trustee and beneficiary by which trustee obtains any advantage from his beneficiary, are presumed to be entered into without sufficient consideration under undue influence. West's Ann.Civ.Code, §§ 2219, 2235.

6. Trusts ⚿262

In action by executor against testator's son for alleged breach of trust and for money had and received, presumption that transaction between trustee and beneficiary by which trustee obtained advantage from his beneficiary was entered into under undue influence, was evidence and was sufficient to sustain judgment even though there was direct evidence to contrary of presumption. West's Ann.Civ.Code, §§ 2219, 2235.

7. Appeal and Error ⚿837(10)

In action by executor against testator's son for alleged breach of trust and for money had and received, copy of will of decedent which allegedly established that decedent held half interest in certain land in trust for defendant, which was not offered or received in evidence, could not be considered by reviewing court for that purpose.

8. Trial ⚷54(1)

Where will was offered and received for sole purpose of showing state of mind of decedent, it could not be considered for any other purpose.

9. Trusts ⚷44(1)

In action by executor against testator's son for alleged breach of trust and for money had and received, evidence was insufficient to establish that testator had held half interest in certain land in trust for defendant.

10. Appeal and Error ⚷1051(1)
Evidence ⚷317(2)

In action by executor against testator's son for alleged breach of trust and for money had and received, testimony of witness as to what her mother-in-law and father-in-law said to her out of presence of defendant, was hearsay and inadmissible, but its admission was not prejudicial, where substance of what such parties said to witness had been recited in another document which had been admitted in evidence without objection.

11. Trial ⚷105(1, 2)

In action by executor against testator's son for alleged breach of trust and for money had and received, even though record was replete with incompetent, irrelevant, and hearsay evidence admitted without objection of defendant, where such had been received without objection, it was sufficient to support findings of court.

◆

J. Robert Maddox, Beverly Hills, and Wm. J. Clark, Los Angeles, for appellants.

W. Floyd Cobb, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by defendants from a judgment for plaintiff as executor of the will of Jasper E. Lail, Sr., deceased, in an action for alleged breach of trust and for money had and received. Defendants also appeal from the order denying their motion for a new trial. That order is not appealable, and the appeal therefrom will be dismissed. Defendant Pearl A. Lail is the wife of defendant Robert L. Lail. Defendant Robert L. Lail will be referred to as defendant.

Jasper E. Lail, Sr., died in Beverly Hills on April 17, 1950. He was about 90 years of age. At the time of his death, his wife was 80 years of age. The decedent and his wife had 5 children living at the time of his death—4 sons and 1 daughter. Defendant is the eldest. Plaintiff is his brother.

Decedent lived on a ranch in Texas until 1930. The ranch consisted of 2,960 acres. Included in the 2,960 acres is a section known as section 151. Section 151 was purchased during the years 1910 to 1913 under a contract of sale. Defendant was not living at his father's home at the time. Defendant testified that sometime in 1909 he received a letter from his mother stating his father had an opportunity to buy a section of land which he had theretofore leased, his father did not have the money to pay for it and asked if defendant would pay half, if he would make the first payment his father would make the next, and they would buy it together; he wrote back and "told them to go ahead and make the deal and let me know how much the amount was to be paid and I would have the money to pay it"; he sent the money to make the first payment which was about $400 (it was $416); the other payments were "somewhere in the neighborhood of $400 or a little better" (they were four payments of $416 each with 6% interest); he paid half the purchase price by sending checks and money to his father in Texas; he does not remember the exact amount of the purchase price—it was somewhere around $1,800 or $1,900; part of the money was sent in cash and part by check; he does not remember exactly how much money he sent; his "mother kept track of all I sent." Title to section 151 was taken in the name of decedent.

In 1930 defendant induced decedent to sell his cattle and horses, lease the Texas ranch, and move to California. Since 1930 the 2,960 acres have been subject to a lease for grazing. The first grazing lease was negotiated by decedent. Thereafter all grazing leases were made by decedent with the advice of defendant. From 1930 until the death of decedent, defendant helped and advised decedent in every transaction in which decedent engaged. In caring for his business and affairs, decedent gave defendant checks signed in blank and defendant filled them in and paid the bills. Decedent obtained cash by giving defendant checks signed in blank which defendant filled in, cashed, and gave the cash to decedent. Defendant never demanded or received any compensation for the services so rendered. For many years prior to and up to the time of his death, decedent had a commercial account in Winters State Bank in Winters, Texas.

On June 6, 1936 decedent executed a witnessed last will and testament which contained this provision:

> "To my oldest son, R. L. Lail, [defendant] I give, devise, and bequeath the North One-Half of Section No. 151, Block No. 64, of the H & T. C. Ry. Co. surveys of Taylor County, Texas, in fee simple, because in reality he owns the property and the title of same merely in my name in trust for my use during my life."

In February 1948 defendant negotiated an oil and gas lease on 649.1 acres of land described as section 160 belonging to decedent, from which a bonus check of $2,921.58 was received. On receipt of the check, decedent endorsed it, and a joint tenancy savings account, Number 1154, was opened in Bank of America, Wilshire and La Brea Branch, Los Angeles. Decedent, defendant, and sometime later defendant's wife, signed the signature card. The signature card provided that any one of them could withdraw funds from the account. Defendant's wife did not withdraw any of the funds.

In November 1949 defendant negotiated another oil and gas lease which covered section 151 and other parts of the Texas ranch. Prior to December 18th defendant received a bank draft of $10,560 payable to decedent as a bonus for the lease. Decedent endorsed the draft and it was deposited in the Bank of America joint tenancy savings account. The bonus was at the rate of $9 an acre. There was testimony that decedent told defendant to deposit the draft in the Winters State Bank account.

On December 18, 1949, in the afternoon, a meeting was had at decedent's home at which decedent, his wife, all of the children, and some of the sons' wives were present. There was evidence that the purpose of the meeting was to have the children sign something stating the parents did not "owe anybody any money whatever." Conversation was had about the oil bonus money. Defendant said he had received the oil bonus check and that it was for $10,560. Defendant stated he felt he was entitled to part of the revenue from section 151, to which one of the brothers replied, "That's a deal between you and my father, and whatever my father agrees to is perfectly all right with me." Defendant was shown a typewritten document which read that decedent and his wife were not indebted to any of the children in any amount. Decedent and his wife signed the original; defendant's brothers and sister signed the original and 4 copies of the instrument; defendant did not sign. The document was received in evidence without objection.[1] The wife of one of the brothers testified that at the request of her mother-in-law she took a typewriter to decedent's home in the morning of December 18th and typed the statement.

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[1] The document reads:

"This agreement, entered into this 18th day of December, 1949, by and between J. E. Lail and Sara Frances Lail, his wife, party of the first part, and their children, named as following:

R. L. Lail
Jessie S. Hankla
P. F. Lail
Ernest Lail
John O. Lail

known hereafter in this agreement, as parties of the second part.

"Witnesseth: That whereas under this agreement J. E. Lail and Sara Frances Lail, his wife, as first parties, do not owe any debts or obigations [sic], in any way, shape, form or fashion to the said R. L. Lail, Jessie S. Hankla, P. F. Lail, Enrest [sic] Lail and John O. Lail, second parties, hereto as second party. The first partyies [sic] are free from all obligations, to the parties of the second party, Any and all expenditures, by either member of the second party, have been reimbursed, in cash, or by check, by J. E. Lail and Sara Frances Lail, his wife, party of the first part.

"In witness whereof the parties have executed this indenture the day and year hereinafter mentioned."

On January 6, 1950 decedent signed two checks and gave them to defendant. The first check reads:

16–146 Wilshire-LaBrea Branch 16–146
Bank of America No. 2
National Trust and Savings Association
Los Angeles, Calif., Jan 6 19 50
Pay to the
Order of R. L. Lail $ 3380/00
Three Thousand Three Hundred Eighty and 00/100 Dollars
account #1154
J. E. Lail

On the reverse side, there appears the following:

Grazing lease on 320 acres of Section 151 Taylor Co., Texas 20 yrs @ 65¢ Per acre	$4160/00
Dec 1–1949 To June 1–1950 @ 75¢ Per acre	120.00
	$4280.00
Less Taxes (20 yrs)	— 400.00
" 1 Mile fence	— 500.00
Balance	$3380.00

R. L. Lail [Signed]

The check is perforated "Paid 1–21–50." The second check reads:

16–146 Wilshire-LaBrea Branch 16–146
Bank of America No. 3
National Trust and Savings Association
Los Angeles, Calif., Jan 6 19 50
Pay to the
Order of R. L. Lail $ 2880/00
Two Thousand Eight Hundred Eighty and 00/100 Dollars
account #1154
J. E. Lail

On the reverse side, there appears the following:

Oil Bonus on 320 acres of
Section 151 Taylor Co., Texas
320 acres @ $9.00 Per acre $2880/00
R. L. Lail [Signed]

This check is also perforated "Paid 1–21–50." All of the handwriting on the two checks, except the signatures, is that of defendant. It will be noted that the checks are drawn on a commercial account. Decedent did not have a commercial account in Bank of America. The checks total $6,260. This amount was debited to the savings account by Bank of America on January 21, 1950 and paid to defendant.

Defendant testified with respect to the receipt of the two checks that he dropped in to see his parents, and at the suggestion of his mother that his Dad "settle up with me" his father and he figured out how much was coming to him from section 151; he wrote out the two checks so they would have a definite record between the oil lease and the grass lease; his father signed them after they had been filled out; when he made the first deposit in the joint tenancy savings account he "just picked up a little check book and I brought the deposit slip back and the book and I handed them all to my father"; that is how the checks happened to be written on a commercial account; his father said "he wanted it all paid before he passed away or anything happened to him"; the grazing lease "ranged from $1 down to 52 cents an acre"; and they agreed on 65 cents an acre less taxes and cost of erecting a fence.

Plaintiff brought the action to recover the $6,260 on the theory that defendant was trustee thereof and that it is a part of the estate of decedent. The court found that defendant R. L. Lail appropriated the $6,260 to the use of defendants. Judgment was for plaintiff, as prayed.

[1] Defendant first asserts that the money in the joint tenancy account from which the $6,260 was withdrawn belonged to his father and himself jointly. The argument is that defendant contributed half the purchase price of section 151, that title was taken in the name of his father, and that the money in the joint tenancy account was income from section 151. The difficulty with the argument is that it assumes that defendant contributed half the purchase price. The only evidence in that regard was the testimony of defendant. Obviously the court did not believe the testimony and we cannot assume its veracity. See Holcomb Estate Co. v. Burke, 4 Cal.2d 289, 299, 48 P.2d 669; McQuinn v. Rice, 88 Cal.App.2d 914, 917–918, 199 P.2d 742.

It is next asserted that in the absence of fraud or undue influence, the signature cards are conclusive evidence of a joint tenancy. Defendant testified that neither he nor his wife deposited any money in the account and that he never did and does not now claim any interest in the funds in the account. He relies on section 15a of the Banking Code, as it in part read at the time in question:

> "The making of the deposit in such form [joint tenancy] shall, in the absence of fraud or undue influence, be conclusive evidence, in any action or proceeding to which either such bank or the surviving depositor or depositors may be a party, of the intention of such depositors to vest title to such deposit and the additions thereto in such survivor or survivors." Stats. 1929, p. 444, § 3.[2]

The court found that all moneys deposited in the joint tenancy account and all moneys withdrawn therefrom belonged to the decedent, and that all the moneys therein were not property belonging jointly to the decedent and defendants; that the account was opened only for the purpose of facilitating the payment of bills incurred by the decedent and for his convenience in paying such bills. Defendant does not challenge the finding. The moneys plaintiff seeks to recover are not moneys on deposit in the joint tenancy account. They are moneys which were withdrawn by defendant during the lifetime of the decedent.

[2–4] Section 15a set up two presumptions: First, a rebuttable presumption that a deposit in the names of the depositor and another person "in form to be paid to" either or the survivor of them becomes the property of such persons as joint tenants. Second, a conclusive presumption that in the absence of fraud or undue influence, it was the intention of the depositors to vest title in the survivor. The conclusive presumption applies only in favor of the survivor to moneys still remaining in the account at the time of death. It does not apply to moneys withdrawn by either of the depositors during life, even if one of them has subsequently died. Paterson v. Comastri, 39 Cal.2d 66, 71, 244 P.2d 902. The presumption of equality of interest arising from the form of the joint account is rebuttable by competent evidence showing the true character and ownership of the moneys deposited. (Id.) The evidence was sufficient to rebut the presumption.

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[2] The quoted provision appears to have been omitted when the Banking Code became a part of the Financial Code in 1951. (Stats.1951, ch. 364, p. 860; Fin. Code, § 852.)

[5, 6] Defendant contends the evidence was insufficient to establish that he appropriated $6,260 belonging to the decedent to his own use. He concedes that the decedent reposed great trust and confidence in him. Civil Code, section 2235, provides: "All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence." Civil Code, section 2219, provides that everyone who voluntarily assumes a relation of personal confidence with another is deemed a trustee. To bring the presumptions of insufficient consideration and of undue influence into operation, it is necessary to show that a confidential relationship existed and that this relationship was used by the fiduciary to gain an advantage. "When a fiduciary enters into a transaction with a beneficiary whereby the fiduciary's position is improved, or he obtains a favorable opportunity, or where he otherwise gains, benefits, or profits, it may fairly be said that an advantage has been obtained. To declare that the advantage obtained must be shown to be unfair, unjust, or inequitable before the presumptions arise would result in the imposition of a condition which is not required by section 2235." Bradner v. Vasquez, 43 Cal.2d 147, 152, 272 P.2d 11, 14. The presumption of undue influence is evidence and it is sufficient to sustain the judgment although there may be direct evidence to the contrary of the presumption. Id., 43 Cal. 2d at page 153, 272 P.2d 11. There was evidence tending to show there was no undue influence; but we cannot say, as a matter of law, that the presumption of undue influence was overcome by such evidence.

[7-9] The claim is made that the court erred in not finding that the decedent held a half interest in section 151 in trust for defendant. It is argued that had the court so found, a different result would have been likely since at least a part of the $6,260 was oil bonus from section 151. The contention that the decedent held a half interest in section 151 in trust for defendant is predicated on the 1936 will. As a special defense defendant alleged that on January 6, 1950 he was the owner and entitled to the possession of certain property in Texas; that on that date and for a long time prior thereto the decedent was possessed of the property, and during that period had received and enjoyed the rents, issues, and profits therefrom; and that the decedent paid defendant the $6,260 as payment in full for such use and occupation to and including June 1, 1950. Defendant says he established the allegation of ownership by the will of 1936. Assuming that the will would have established that the decedent held a half interest in section 151 in trust for defendant, it was not offered or received in evidence and cannot be considered by us for that purpose. The record as to what took place at the time the will of 1936 was offered and received in evidence is set out in the margin.[3] Counsel first

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[3] "Q. [By Mr. Maddox, attorney for defendant] I hand you Defendants' Exhibit L for identification [the will of 1936] only and ask you if you have ever seen the original of that document? A. Yes, I have.

offered the document with the exception of the last line in the second paragraph, which reads: "and the title of same merely in my name in trust for use during my life." Further foundation was laid and the court stated the will would be received "for the limited purpose only of showing a state of mind." Counsel for defendant then said: "For that purpose only it is offered." Having acquiesced in the ruling, defendant cannot on review assert that the will was admitted for all purposes. (4 Cal.Jur.2d 424, § 558.) The will having been offered and received for the sole purpose of showing the state of mind of the decedent, it cannot be considered for any other purpose. The state of mind for which the court said the will was received was to show a friendly mental attitude of the decedent toward defendant. It was not for the purpose of showing the state of mind of a trustee toward the beneficiary of a trust or a state of mind in which the decedent acknowledged a trust relation with respect to a half interest in section 151. On the record it cannot be held that the will of 1936 was received in evidence for the purpose of establishing that the decedent held a half interest in section 151 in trust for defendant. There was no evidence to support the allegations of the special defense except the testimony of the defendant with respect to contributions to the purchase price of section 151, which the court did not believe.

[10] Defendant complains of various rulings of the court with respect to the reception and rejection of evidence. All are trivial with the exception of one which was pressed on us with emphasis at the oral argument. Mary Arnold Lail, the wife of P. F. Lail, a brother of plaintiff and of defendant, was called as a witness by defendant. On direct she testified she prepared the document of December 18, 1949 in which it was stated that the parents did not "owe anybody any money whatever"; she took a typewriter to her father-in-law's home; her father-in-law and mother-in-law told her "what they wanted to put in the agreement." On cross the following occurred:

> "Q. Did you see the original at that time and place in Texas? A. The first I saw that.
>
> "Q. Mr. Lail, do you understand my question? Did you see the original when you were down in Texas at the trial, the original will? A. Yes.
>
> "Q. What, if anything, happened to that original will at that time and place? A. As far as I know, it is held in Abilene court.
>
> "Q. It was read to the jury, was it not? A. Yes.
>
> "Q. It was introduced into evidence, was it not? A. Yes.
>
> "Mr. Maddox: If the Court please, at this time I would like to offer this document as Defendants' next in order with the exception of the last line on Paragraph Second. That is not offered.
>
> "Mr. Cobb: Your Honor, the plaintiff objects to that on the grounds that it purports to be a last will and testament. There is no proper foundation laid. There is nothing to show that the will was ever admitted to probate or approved as the last will, and there is no proper foundation laid as to the execution of the instrument, and on the further ground that it would be hearsay and incompetent and irrelevant and immaterial as to the issues in this case.
>
> "The Court: Let me ask the witness a question or two. Did the document to which you have referred, the original of this, bear the signature of your father?
>
> "The Witness: It does.
>
> "The Court: You knew it to be his signature, did you?
>
> "The Witness: Yes.
>
> "The Court: Would this be a correct statement, that to the best of your knowledge and belief the original of this document is not within the State of California at the present time?
>
> "The Witness: I don't think it is.
>
> "The Court: Well, so far as you know.
>
> "The Witness: As far as I know, that is right.
>
> "The Court: The document will be received for a limited purpose. However, I cannot eliminate part of it as Mr. Maddox suggested. I will either have to receive the whole document or none of it. Counsel, if you want to offer the entire document, it will be received for the limited purpose only of showing a state of mind.
>
> "Mr. Maddox: For that purpose only it is offered. Thank you.
>
> "The Court: It will be received as Exhibit L."

"Q. By Mr. Cobb [attorney for plaintiff]: And did someone call you to come there to the residence? A. They did.

"Q. Who called you? A. My mother-in-law.

"Q. What did she tell you?

"Mr. Maddox: Objected to as hearsay.

"The Court: Overruled.

"The Witness: She said that she would like me to draw up an agreement whereby they didn't owe any of the children any money.

"Q. By Mr. Cobb: And what did you tell her? A. I told her I would.

"Q. And what did you do in reference to that? A. I went over to her house and sat down by them and they told me what they wanted written in this agreement.

"Q. Was Mr. J. E. Lail present? A. He was.

"Q. And what did they say to you at that time?

"Mr. Maddox: If the court please, I would like to have a running objection on the ground it is outside the presence of either one of the defendants.

"The Court: Overruled, counsel.

"A. Dad told me, 'I want you to write a letter stateing [sic] that I do not owe any ot [sic] the children any money in any way, form or shape or fashion, any debts or obligations.' He said, 'I have reinbursed [sic] the children all the money they may have spent or any expenditures by cash or by check, and I do not owe any of them any money in any way.' I wrote that down just like he stated it to me.

"Q. And what did you do with it after you wrote it? A. I left it there with my mother in law."

Defendant says it was prejudicial error to permit the witness to testify to what her mother-in-law and father-in-law said to her out of the presence of defendant. The rulings were of course erroneous. The witness had not testified on direct to any conversation out of the presence of defendant. The evidence was not admissible; it was hearsay. We think, however, it was not prejudicial. The substance of what the mother-in-law and father-in-law said to the witness was recited in the document of December 18, 1949, which was admitted in evidence without objection. That document, signed by the mother-in-law and by the father-in-law, said they were free from all obligations to the children and that "Any and all expenditures" by any of the children had been reimbursed in cash or by check by the parents.

[11] No other points require discussion. The record is replete with incompetent, irrelevant, and hearsay evidence admitted without objection of defendant. But having been received without objection, it is sufficient to support the findings. In re Estate of Pohlmann, 89 Cal.App.2d 563, 574, 201 P.2d 446. There is much evidence that would have supported contrary findings. We may not reject the findings of the trial court and substitute findings of our own, even though we might arrive at a different conclusion.

The appeal from the order is dismissed. The judgment is affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

133 Cal.App.2d 634

In the Matter of the ESTATE of Seymore McCRAE, also known as Seymour McRae, Deceased.

Joe Witt and Ethel Witt, Appellants,

H. A. Grinnell and Ruth Grinnell, Respondents.

Civ. 8544.

District Court of Appeal, Third District, California.

June 14, 1955.

Proceeding in settlement of a decedent's estate. The Superior Court, Butte County, J. F. Good, J., vacated an order confirming sale of real estate, and purchasers appealed. The District Court of Appeal, Schottky, J., held that trial court's action in vacating order on affidavits by an earlier bidder that he had been prevented by illness from appearing at sale was not abuse of discretion.

Order affirmed.

1. Appeal and Error ⚷982(1)

On appeal from an order relieving a party from effect of a judgment, attack on order must rest upon a clear case of abuse of discretion. West's Ann.Code Civ.Proc. § 473.

2. Judgment ⚷336

Statute providing for relief from a judgment, order, or other proceeding taken through mistake, inadvertence, surprise or excusable neglect is remedial in nature and must be liberally construed. West's Ann. Code Civ.Proc. § 473.

3. Executors and Administrators ⚷379

Trial court's action in vacating order confirming sale of property in decedent's estate on affidavits by an earlier bidder that he had been prevented by illness from appearing at sale was not abuse of discretion. West's Ann.Code Civ.Proc. § 473; Probate Code, § 785.

◆

Laughlin, McKalson & Crable, Chico, for appellants.

Charles H. Andrews, Chico, for petitioner Leonard.

Whitten & Fortino, Chico, for petitioners Grinnell.

SCHOTTKY, Justice.

This is an appeal from an order vacating an order confirming sale of certain real property of the estate of the above named deceased.

The record shows that on May 15, 1953, the administrator of decedent's estate filed a return of sale of real property at private sale and petitioned the court for confirmation thereof, setting forth that the property was sold on or after May 12, 1953, to H. A. Grinnell for the sum of $1,085. Thereafter, and on May 25, 1953, a hearing on said petition was duly held and a sale of said property was confirmed to "Joe Witt et ux. for $1,193.50."

On June 1, 1953, H. A. Grinnell and Ruth Grinnell, respondents herein, filed their notice of motion to vacate the order confirming sale made on May 25th. Attached thereto was the affidavit of Ruth Grinnell wherein it was stated that affiant and H. A. Grinnell as the high bidders at the private sale of the property "were desirous and anxious of attending the hearing of the Petition for confirmation of said Sale which was noticed for 9:30 o'clock A.M. on Monday, the 25th day of May, 1953; that, however, immediately prior thereto H. A. Grinnell became very ill and it was necessary for Ruth Grinnell to attend him during such illness and by reason thereof neither of said bidders were able to attend said sale, and by reason of said illness and excusable negligence failed to attend said sale and were unable to arrange for any representative to be present; that said parties were prepared to protect their bid for real property, and now make an offer to purchase the same for the sum of $1650.-00."

At the hearing on the motion to vacate respondent H. A. Grinnell testified that for many years he had been trying to acquire the property in question because he owns other properties surrounding it, one of which is subject to an easement appurtenant to the subject property. He further stated that he fully intended to attend the hearing on confirmation to protect his bid on the property, but that on the evening of May 24th he became extremely ill from a migraine headache, which illness continued through the morning of May 25th, and was in such desperate pain that he did not think of anything. On cross-examination Mr. Grinnell stated that a migraine headache attack, usually lasting from 12 to 24 hours, causes him to lose his reason, and that during this illness his wife attended to his needs. He admitted having received a notice of the hearing on confirmation, but stated that since he fully intended to attend the hearing himself he had made no arrangements for anyone else to appear in his behalf.

In addition to corroborating her husband's testimony concerning their interest in the subject property and the severity of his illness, Mrs. Grinnell testified that she did not handle any of the family property matters and that although she knew of the scheduled hearing she temporarily overlooked it, being upset and concerned with her husband's illness and being late to work because of it. She further testified that immediately upon remembering the fact of the hearing she tried in vain to contact both the administrator and his attorney, and immediately thereafter consulted an attorney and filed the petition to vacate the order. Mrs. Grinnell admitted on cross-examination that she knew the hearing was scheduled and that having worked in law offices for some 30 years she was thoroughly familiar with estate matters, but emphasized the fact that it was solely by reason of her husband's illness and the confusion caused thereby that she temporarily forgot the matter of the sale. She stated that in her opinion her husband's condition was such that it prevented him from conducting any business on the morning of May 25, 1953.

Appellant Joe Witt testified that on May 25, 1953, he was in South Dakota, but had arranged for a title company representative to appear at the hearing on confirmation. He stated that upon being notified that he was the successful bidder, he immediately cut his trip short, returned to Butte County, and had changed his position in reliance on the sale by buying material and furniture for the premises in question. However, the record indicates that it was after being informed that the respondents were "contesting" the confirmation that appellants so changed their plans.

The court made its order vacating the order confirming the sale to Joe Witt and Ethel Witt and instructed the administrator to notice and hold a new sale. The Witts have appealed from said order.

Appellants concede that under proper circumstances the court has power to vacate an order of confirmation of sale of real property under section 473 of the Code of Civil Procedure on motion of a prospective bidder, and that the granting of such motion is a matter addressed to the legal discretion of the trial court. Appellants then argue that the trial court abused its discretion and that the order appealed from "is not in conformity with the spirit of the law and defeats rather than subserves the ends of justice."

Section 473 of the Code of Civil Procedure, so far as here applicable, provides:

> "The court may, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect."

In 20 Cal.Jur.2d at page 719, it is stated:

> "The probate court has power to vacate an order of confirmation of sale under section 473 of the Code of Civil Procedure on motion of either a prospective bidder or the administrator."

In Re Estate of Moreland, 49 Cal.App.2d 484, 121 P.2d 867, hearing denied, the court held that the probate court has power to vacate an order of confirmation of sale under section 473 of the Code of Civil Procedure on motion of either the prospective bidder or the administrator. In affirming an order vacating such a sale, the court said, 49 Cal.App.2d at pages 486, 487, 121 P.2d at page 868:

> "* * * If this section of the code applies to such an order in probate the attack on appeal must rest upon a clear case of abuse of discretion. On this subject it is said in 14 Cal.Jur., page 1075, that 'The policy of the law is to have every litigated case tried upon its merits; and it looks with disfavor upon a party who, regardless of the merits of his case, attempts to take advantage of the mistake, surprise, inadvertence, or neglect of his adversary. The discretion of the court ought always to be exercised in conformity with the spirit of the law and in such manner as will subserve rather than defeat the ends of justice.'

"It is the settled law that the section is addressed to the legal discretion of the trial court 'and in the absence of a clear showing of abuse in the exercise thereof an appellate court will not disturb the order of the court below,' Waybright v. Anderson, 200 Cal. 374, 377, 253 P. 148, where numerous cases are cited. * * *

"Turning to the direct question raised—the jurisdiction of the court to grant relief from a probate order under section 473—we find the authority expressly confirmed in Levy v. Superior Court, 139 Cal. 590, 73 P. 417. In that case the superior court, sitting in probate, made an order setting aside a homestead. In due time the executors and an heir moved to set aside the order upon grounds stated in section 473. The only question raised on the appeal was whether the court had jurisdiction to proceed under that section. The Supreme Court held that both the executor and the heir were interested parties entitled to move for relief from the order under the code section. To the same effect is In re Estate of Hickey, 129 Cal. 14, 61 P. 475. Jurisdiction under the section was assumed in Lilienkamp v. Superior Court, 14 Cal.2d 293, page 301, 93 P.2d 1008, 1012, where the real question involved was what notice was required under the section, but the court said that the jurisdiction of the superior court following the order of partial distribution 'extended to the hearing and determination of a motion pursuant to section 473 of the Code of Civil Procedure, after due notice, as required by that section.'"

The trial court in its memorandum opinion stated:

"In this matter it appears that the purchaser whose bid was the subject of the confirmation hearing, by reason of his illness (and, possibly his wife's concern therewith—she was not a bidder insofar as the original petition shows and therefore does not have direct interest in the matter) failed to appear at the time and place of hearing as planned for the purpose of protecting his bid in the event of additional bidding pursuant to Probate Code Section 785. The showing made by him is such that if this were a default in a civil matter wherein his default had been entered under like circumstances, there would be compelling reason which would command the exercise of judicial discretion to vacate the default.

"As a result of his failure to appear the property was sold for a sum substantially less than could otherwise be expected and the estate deprived of the benefit of competitive bidding as contemplated by the probate code in the event of an additional bid being made."

[1–3] Whether the evidence in the instant case was sufficient to support the order vacating the order confirming the sale was a question for the determination of the trial court. The vital interest that respondents had in the property, the illness which prevented them from being present at the hearing, and the fact that respondents were thereby rendered unable to protect their prior bid at said hearing, with the further result that the estate was prevented from realizing an increased amount for the property, were all factors to be considered and weighed by the trial court. Since it is conceded by appellants that under proper circumstances the court has power to make such an order, the only question that we must determine is whether or not the trial court here abused its discretion. As stated in Re Estate of Moreland, supra, "the attack on appeal must rest upon a clear case of abuse of discretion." Section 473 is remedial in nature, and, in the interest of disposing of matters upon their merit, must be liberally construed. In re Estate of Strobeck, 111 Cal.App.2d 853, 858, 245 P.2d 317. Our conclusion is that upon the record here it cannot be held as a matter of law that the court abused its discretion in granting the motion to vacate the order.

The order is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

133 Cal.App.2d 691

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Lon CLUTTER, Defendant and Appellant.

Cr. 3089.

District Court of Appeal, First District, Division 2, California.

June 20, 1955.

Prosecution of father on information charging violation of Section 288 of the Penal Code committed upon his 10 year old daughter. From adverse judgment of the Superior Court, City and County of San Francisco, Melvyn I. Cronin, J., and from order denying a new trial, the father appealed. The District Court of Appeal, Nourse, P. J., held that the evidence was sufficient to sustain the conviction.

Judgment and order affirmed.

1. Infants ⚷20

Evidence was sufficient to sustain conviction of father, who was charged with violation of Section 288 of the Penal Code committed upon his 10 year old daughter. Pen.Code, § 288.

2. Infants ⚷20

In prosecution of father, who was charged with violation of Section 288 of the Penal Code committed upon his 10 year old daughter, it was not necessary that the girl's testimony be corroborated. Pen. Code, § 288.

◆

Robert C. Dunn, William P. Dunn, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., of the State of Cal., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., Thomas C. Lynch, Dist. Atty., of the City and County of San Francisco, John T. Rudden, Jr., Asst. Dist. Atty., Edward Walsh, Deputy Dist. Atty., San Francisco, for respondent.

NOURSE, Presiding Justice.

[1] Defendant was tried to a jury on two informations charging a violation of Section 288 of the Penal Code committed upon his two daughters—one aged 12 years the other aged 10 years. The jury found the defendant not guilty of the charge relating to the older girl, and guilty as to the younger. After the verdict defendant moved for a new trial, and for probation. Both were denied. He then asked for an examination as a sexual psychopath. The examination was negative. His appeal here is from the judgment on the verdict and from the order denying a new trial.

[2] The grounds urged are that the evidence is insufficient because it was not shown what hour, or day, the act was committed; because there was no proof of specific intent on the part of appellant; and because the little girl's testimony was not corroborated. No one of the grounds has any merit. The evidence is that the act occurred on June 28th after the father had retired for the night in the same bed with his daughter. Proof of the defendant's intent is found in the girl's testimony that he directed the girl to join him in the bed, that he fondled her private parts with his hand, and then committed a rape by inserting his private part in hers sufficient to rupture and destroy the hymen. Appellant does not suggest what intent he might have had by these acts other than the intent to commit rape as charged in the information. No one of the authorities cited which hold that intent must be proved are applicable here because the unlawful intent is manifest from the actions proved.

There is no possible theory upon which appellant can support his claim that the testimony of the prosecution should have been corroborated. The law is settled to the contrary. People v. Aleshire, 90 Cal. App.2d 506, 507, 203 P.2d 569.

Judgment and order affirmed.

KAUFMAN, Justice.

I concur. The testimony of the little girl was not as clear or direct on all points as the majority opinion would make it appear but her testimony in the essentials was sufficient in my opinion to support the verdict.

133 Cal.App.2d 733

Arthur R. WATERS, Petitioner and Respondent,

v.

CIVIL SERVICE BOARD OF CITY OF OAKLAND, County of Alameda, State of California; Raymond C. L'Heureux, Silas Cy Stulting, George Jacopetti, R. Lorentzen, and Harvey Bechtel, Respondents and Appellants.

Civ. 16313.

District Court of Appeal, First District, Division 2, California.

June 21, 1955.

Proceeding on application by city police lieutenant for writ of mandate commanding civil service board to accept his application for examination for promotion to police captain. The Superior Court, Alameda County, Richard H. Chamberlain, J., granted writ and civil service board appealed. The District Court of Appeal, Kaufman, J., held that rule adopted by city civil service board prescribing two-year period of service in rank of police lieutenant as condition of eligibility for position of police captain was reasonable and within board's power to make under city charter provisions.

Judgment reversed.

Dooling, J., dissented.

1. Municipal Corporations 🔑216(2)

Rules promulgated by city civil service board will not be interfered with as long as they are reasonable and not arbitrary or capricious.

2. Municipal Corporations 🔑58

Sections of city charter giving civil service board power to provide for probationary appointments to civil service position and to provide for promotions in police department must be construed together so as to give effect to each. St. 1911, pp. 1603, 1604, §§ 73, 77; St.1931, p. 2664, § *72*; St.1943, p. 3322, § 91c.

3. Municipal Corporations 🔑184(5)

Rule adopted by city civil service board prescribing two-year period of service in rank of police lieutenant as condition of eligibility for position of police captain was reasonable and within board's power to make under city charter provisions. St. 1911, pp. 1603, 1604, §§ *73, 77*; St.1931, p. 2664, § *72*; St.1943, p. 3322, § 91c.

4. Appeal and Error 🔑843(1)

Where question on appeal was of importance to appellant and to public employees and would probably be relitigated until final decision was given by appellate court decision on merits was proper.

◆

John W. Collier, City Atty. of City of Oakland, John W. Scanlon, Deputy City Atty., Robert E. Nisbet, Deputy City Atty., Oakland, for appellants.

Harold J. Abraham, Oakland, for respondent.

KAUFMAN, Justice.

This is an appeal from a judgment granting a peremptory writ of mandate commanding the Civil Service Board of the City of Oakland to accept the application of petitioner Waters for examination for promotion from Lieutenant to Captain of Police. The trial court found that the requirement of two years experience in the grade of Lieutenant as a prerequisite to eligibility for the promotional examination for the rank of Captain was arbitrary and without authority in the Charter of the City of Oakland.

Petitioner, Arthur R. Waters, was appointed as Patrolman in the Oakland Police Department on October 16, 1940, and has since been a member of this Department. He received an appointment to the position of Lieutenant on March 1, 1952, where he was serving at the time this case arose.

On January 8, 1954, the Civil Service Board, the appellants herein, announced that a promotional examination for the position of Captain of Police would be held on February 4, 1954. The final date for filing applications was January 26, 1954, at 4:00 p. m. The announcement stated that to be eligible to take the examination, applicants must have served in the rank of Lieutenant for two years prior to February 4, 1954. Petitioner applied to take the examination on January 19, 1954, but his application was refused because he would not have completed the required two years service as Lieutenant until March 1, 1954, about 24 days after the date on which the examination was to have been given.

The examination which had been scheduled for February 4, 1954, has been indefinitely postponed because of the issuance of the injunction herein.

The sections of the Charter of the City of Oakland, St.1911, p. 1551, which are pertinent to this case are as follows:

> "Section 72. (As last amended in 1931, St.1931, p. 2664) * * * The Board shall provide for an eligible list from which vacancies shall be filled, for a period of probation before employment is made permanent, and for promotion on the basis of merit, *experience* and record
>
> "The Council, whenever requested by the Board, may by ordinance confer upon the Board such rights, duties and privileges other than those mentioned in this Charter, as may be necessary adequately to enforce and carry out the principles of Civil Service."
>
> "Sec. 73. The board shall make rules to carry out the purposes of this article, and for examinations, appointments and promotions. All rules and all changes therein shall be forthwith printed by the board for distribution."
>
> "Sec. 77. The board shall provide for promotion in the classified service on the basis of ascertained merit, seniority in service and standing upon competitive examination, and shall provide, in all cases where practicable, that vacancies shall be filled by promotion from among such members of the next lower rank established by the board as submit themselves for such examination for promotion. The board shall certify to the appointing power the names of not more than three applicants having the highest rating for each promotion."
>
> "Sec. 91c. Promotion in the Police Department shall be based on ascertained merit, seniority in service and standing upon competitive examination. In all cases, where practicable, vacancies shall be filled by promotion from among such members of the next lower rank, without further physical examination or agility test, as present themselves for examination for promotion. Appointment to the lowest rank in the Department shall be made from those highest on the eligible list." St.1943, p. 3322.

The pertinent Civil Service Rules promulgated by the Board are as follows:

"(a) They shall have served in the class of position, which has been declared by the Board to be in the line of promotion, for a period of time, computed under the provisions of Rule 105, of not less than that set forth elsewhere in these rules as the probationary period for any such class, except as provided for promotional eligibility in the Police and Fire Departments, as set forth under paragraph (f).

"(f) Lines of promotion:

"Law Enforcement (Police) Service

"3 Years as Patrolman	To Sergeant of Police
"2 Years as Sergeant of Police	To Inspector of Police
"2 Years as Inspector of Police	To Lieutenant of Police
"2 Years as Lieutenant of Police	To Captain of Police."

"Rule 56. Probationary Period. Any person who has accepted a regular appointment from an entrance eligible list shall be on probation for a period of one year from the date of regular appointment. Any person who has accepted a regular appointment from a promotional eligible list shall be on probation for a period of six months from the date of regular appointment. In computing the amount of time served by an employee for his probationary period, credit shall be given for all the time the employee has actually worked in the class, whether continuous or not * * *."

[1] Appellants contend that it was within the rule-making power of the Civil Service Board as provided by the Charter of the City of Oakland, to prescribe a two year period of service in the rank of Lieutenant as a condition of eligibility for the position of Captain of Police. The Oakland Charter establishes a complete system of Civil Service, and under its rule-making authority the Board is possessed of broad discretionary powers. Rules promulgated by such a board will not be interfered with as long as they are reasonable and not arbitrary or capricious. Pratt v. Rosenthal, 181 Cal. 158, 163, 183 P. 542. The Charter provisions are not intended to completely cover the civil service system, but they formulate a policy or standard which is carried out in detail by the Board through its rule-making power.

[2] In Nelson v. Dean, 27 Cal.2d 873, 168 P.2d 16, 168 A.L.R. 467, it is said that the rule-making power of such a board should not be narrowly prescribed, that the legislative function is to declare policy and fix a primary standard, and to confer on executive and administrative officers the power to carry out the details of the plan through administrative rules and regulations promoting the purposes of the legislation. So here, appellants say, a complete scheme of Civil Service has been established by the Oakland Charter. In section 72, supra, the Board is given the powers to provide (a) for an eligible list from which vacancies are to be filled, (b) for a period of probation before employment is made permanent, and (c) for promotion on the basis of merit, *experience* and record. This section must be read together with section 77 which covers promotions generally in the Civil Service and section 91c providing for promotions in the Police Department. Both of these sections provide that promotions are to be made from the next lower rank on the basis of merit, seniority in the service, and standing upon competitive examination. These sections must be construed together so as to give effect to each. Haub v. Tuttle, 80 Cal.App. 561, 251 P. 925; Rumetsch v. City of Oakland, 135 Cal.App. 267, 26 P.2d 677. The rule-making power granted to the Board by section 73 extends to carrying out the purposes of the Charter and to examinations, appointments and promotions.

Appellants maintain that the promotional examination herein which prescribed two years experience in the next lower rank as a condition of eligibility was fully in accord with all the above sections of the Charter, and in no way violated any restriction contained therein. It conformed to the policy that promotion was to be from those in the next lower rank. That the people of Oakland had so declared their policy on promotion was settled in Rhodehamel v. Civil Service Board, 18 Cal.2d 709, 715, 117 P.2d 349. The promotional examinations for the position of Captain of Police were to be rated on the basis of merit, seniority and standing on the competitive examination. There was testimony that when an applicant achieved a grade of 70% on the written examination, then credit for seniority and efficiency would be tabulated into the score to secure his final grade for the promotional eligibility list.

Appellants cite Cotter v. Wolff, 88 Cal.App.2d 376, 198 P.2d 950, 951, a case involving the San Francisco Charter, in which it was held that the Civil Service Commission of San Francisco under its rule-making power, might require additional physical requirements to those set forth by the Charter for members of the classified services. However, it is to be noted that the San Francisco Charter clearly makes the standards contained therein, minimum standards only, and gives to the commission power to exercise its discretion as "'sole judge of the adequacy of the tests'" to comply with changing conditions. We find no similar provision in the Oakland Charter.

There can be no question, however, that the Civil Service Board is given the express power by section 72 of the Charter to provide for promotions on the basis of merit, *experience* and record. This power is of equal weight with the power given to the Board to prescribe a period of probation. Appellants say that the requirement that a person shall have served in a lower rank for a given length of time in order to be eligible for promotion is a common one. Field, Civil Service, Law, p. 132; Vol. III, McQuillin, Municipal Corporations, 3d Ed., Sec. 12–13. In the New York case of In re Ricketts, 111 App.Div. 669, 98 N.Y.S. 502, such an experience requirement was held valid and not violative of the constitutional provision that promotions in the civil service were to be based on merit and fitness. Respondent says that the New York case can be distinguished from the case herein by reason of the fact that the New York Civil Service Laws, 1899, p. 803, Ch. 370, Sec. 13, Subd. 6, provided that a Municipal Civil Service Commission might refuse to examine an applicant who lacked any of the established preliminary requirements, and here the Oakland Charter does not give the Board such power, but as a matter of policy requires the Board to prescribe one period of probation and nothing more.

We agree with respondent that only one period of probation may be prescribed before employment is made permanent in any rank, but it is difficult to see what connection there is between probation and promotion. The period of probation is to determine whether a person is fitted to hold the position which he has secured by entrance or promotional examination. Once he has satisfactorily completed that period, it is proof that he is competent to hold the position he then occupies. It has no bearing on whether he is competent to hold a position in the next rank above. A person may be able to serve satisfactorily as a Lieutenant of Police after 6 months experience, the probationary period in that rank, and yet have much to learn about his duties in that very rank before he would be qualified to serve as Captain in command of the ranks below.

Respondents do not dispute the reasonableness of the two years experience requirement laid down by the Commission, as they could not in view of its general acceptance, but contend that the Oakland Charter has strictly limited the power of the Commission in providing for promotions, and if it wished to make an additional requirement for promotion, it should have asked the Council to confer that right upon it by ordinance, as it may request under section 72, supra, of the Charter.

Respondents agree that the policy established by the Charter is that promotions are to be made on the basis of merit, *experience* and record, as well as seniority in service and standing upon competitive examination, citing sections 72, 77, and 91c thereof. (Emphasis ours.) That the condition prescribed for taking the examination for Captain of Police is an *experience* requirement cannot be disputed. That the Board has power under section 72 to provide for promotion on this basis, a power of equal dignity with the power to provide for probationary periods, likewise cannot be disputed.

[3] The only question then appears to be whether section 91c has so specifically provided for promotional examinations in the Police Department that the two year requirement is in conflict with that provision. We think not. That section again uses the language contained in section 77—the provision relating to the classified service generally—that promotions are to be based on "ascertained merit, seniority in service and standing upon competitive examination." It then provides that vacancies, when it is practicable, shall be filled from "such members of the next lower rank, without further physical examination or agility test, *as present themselves for examination for promotion.*" (Emphasis ours.) But this section 91c does not in any wise prevent the Board from making a rule that requires experience as a prerequisite for taking such an examination. We hold such a rule to be reasonable and within the power of the Board to make. Sections 72, 73 and 77 all contemplate that the Board may require experience before permitting an applicant to take a promotional examination. These sections must be read together with section 91c in construing the Charter.

At the time of oral argument counsel for respondent suggested that the case might be moot for the reason that appellant previously had complied with the writ of mandate issued by the lower court.

[4] However, the validity of the procedure followed by appellant under the Charter of the City of Oakland is here in

question and is of importance to appellant and to public employees and would probably be relitigated until a final decision is given by the appellate court. A decision on the merits is therefore proper. Almassy v. Los Angeles County Civil Service Commission, 34 Cal.2d 387, 390, 210 P.2d 503.

We conclude that the trial court's holding that the requirement of two years experience in the grade of Lieutenant as a prerequisite to taking the promotional examination was arbitrary and without authority, cannot stand.

Judgment granting peremptory writ of mandate reversed.

NOURSE, P. J., concurs.

DOOLING, Justice.

I dissent. The question presented is purely one of statutory construction, and I am satisfied that the plain language of the Oakland charter gives to every person in the next lower rank who submits himself for a promotional examination the right to take such examination. Section 77 is the basic section dealing with promotions. It has been unchanged since the charter was originally adopted in 1911, Stats.1911, part 2, p. 1604, and provides: "The board * * * shall provide, in all cases where practicable, that vacancies shall be filled by promotion from among *such members of the next lower rank * * * as submit themselves for such examination.*" (Emphasis mine.) Language could hardly be plainer that all members of the next lower rank who submit themselves for that purpose are entitled to take the promotional examination.

The language of section 77 applies to all promotional examinations covered by the Oakland Civil Service. In 1943 section 91c was added to the charter. Stats.1943, p. 3322. It deals exclusively with the police department and reenacts, with regard to promotional examinations in that department, the exact language above quoted from section 77, that "vacancies shall be filled by promotion from among such members of the next lower rank * * * as present themselves for such examination for promotion."

The express provisions of the charter clearly give the right to take the promotional examination to all members of the next lower rank who present themselves. This being so the rule attempting to limit the right expressly granted by the charter is void. Bruce v. Civil Service Board, 6 Cal.App.2d 633, 45 P.2d 419.

133 Cal.App.2d 71

Philip WOOD, Plaintiff and Appellant,

v.

COUNTY OF SANTA CRUZ, a political subdivision of the State of California, Defendant and Respondent.

Civ. 16418.

District Court of Appeal, First District,
Division 1, California.

June 21, 1955.

Motorcyclist's action against county for personal injuries sustained when the motorcyclist's foot had been pierced by a stick which had been left on the road by a county road crew. The Superior Court, Santa Cruz County, James L. Atteridge, J., rendered judgment in favor of the county upon a directed verdict. The motorcyclist appealed. The District Court of Appeal, Bray, J., held that evidence on the question of negligence was sufficient for the jury.

Reversed.

1. Appeal and Error 🔑927(7)

In passing upon propriety of trial court's action in directing verdict for defendant in civil negligence action, reviewing court was required to take evidence favorable to the plaintiff.

2. Automobiles 🔑264

If county negligently left branch or branches on paved portion of road where they had fallen after trimming of trees by county road crew, and if motorcyclist's foot was thereby pierced by stick or branch without fault on his part, county was liable for the injury. Government Code, §§ 53050, 53051.

3. Automobiles ⚷306(5)

Where it was shown, in motorcyclist's action against county for personal injuries, that trimming of trees along road had been done by county road crew and that branches had been permitted to lie on paved portion of road for about two weeks before accident, no further proof was necessary to charge county with knowledge of dangerous condition. Government Code, §§ 53050, 53051.

4. Municipal Corporations ⚷821(4)

Existence of dangerous or defective condition of public street for which liability may be imposed upon a municipality is primarily question of fact, and no hard and fast rule can be laid down, but each case must depend upon its own facts. Government Code, §§ 53050, 53051.

5. Automobiles ⚷308(4)

In motorcyclist's action against county for personal injuries sustained when motorcyclist's foot was pierced by small stick or branch which had been left on road by county road crew, condition of road was not, as matter of law, merely trivial defect and whether it was dangerous and menace to traveling public was one of fact. Government Code, §§ 53050, 53051.

6. Automobiles ⚷303

In motorcyclist's action against county for personal injuries, wherein complaint alleged motorcyclist drove into and over pile of branches which had been negligently left on road, proof that motorcyclist ran into one branch or stick and not pile of branches did not constitute material variance. West's Ann.Code Civ.Proc. § 469.

7. Pleading ⚷236(5)

In motorcyclist's action against county for personal injuries, trial court's refusal to permit amendment to complaint which charged plaintiff had driven into and over pile of branches on the road, so that complaint would conform to proof that plaintiff ran into one branch or stick, constituted abuse of discretion.

8. Automobiles ⚷303

In motorcyclist's action against county for personal injuries, wherein county was apprised prior to trial, by deposition of plaintiff's position, that plaintiff had run into one branch or stick on road and not into and over a pile of branches as alleged in complaint, variance between proof and complaint allegation did not mislead county and was therefore immaterial. West's Ann.Code Civ.Proc. § 469.

9. Automobiles ⚷308(11)

In motorcyclist's action against county for personal injuries, it was question for jury whether motorcyclist had been negligent in failing to see a stick which had been left on shadowed portion of highway.

◆

Lucas, Wyckoff & Miller, Santa Cruz, for appellant.

Grunsky & Pybrum, Watsonville, for respondent.

BRAY, Justice.

Plaintiff appeals from a judgment in favor of defendant upon a directed verdict. At the close of the trial the trial court stated: "the defendant's motion for a directed verdict is granted, not on the first ground stated, that is, with respect to the provisions of the Public Liability Act, but it is granted upon the ground that there is a total failure to establish or sustain the essential allegations of the complaint in respect to the claimed negligence attributed to the defendant by the plaintiff, and secondly, that there is a fatal variance between the allegations of the complaint and the testimony, and the evidence is wholly insufficient to establish the allegations of the complaint."

Questions Presented.

1. Insufficiency of evidence to show negligence of defendant. 2. Variance. 3. Was plaintiff contributively negligent?

Evidence.

About 6 p. m. September 8, 1952, plaintiff, an experienced motorcycle driver, was driving his English-type motorcycle along a Santa Cruz county road at a speed of about 30 miles an hour. The weather was clear and dry. The particular portion of the roadway was in shadows. Plaintiff had frequently made this trip before. His motorcycle was small, not equipped with foot guards, and with only pegs on which to rest his feet. Riding, the operator's feet are back at a 30 degree angle on the pegs, with the ends of the toes only about 4 inches from the ground. At a described spot, while plaintiff was riding on the paved portion of the road, about 18 to 24 inches from the edge of the highway and while looking straight ahead and seeing no obstruction, plaintiff's foot was pierced by a piece of wood or stick. The top of the wood was jagged, appearing to have been recently broken. One end of the wood appeared to have been cut by a sharp instrument. According to his doctor it was wedge shaped, ¾ inch by 1½ inch. Apparently it had bark on it. According to plaintiff, the stick was approximately ⅝ inch in diameter. The piece of wood remained in plaintiff's foot protruding several inches from the instep. Plaintiff was taken to a hospital where the wood was removed. Unfortunately the nurse discarded the piece removed.

On August 4th and 5th a county road crew had cut brush and overhanging branches along this road, including the point at which the accident occurred. The road crew picked up a portion of the brush so cut and left the balance alongside the road (off the pavement) to be picked up by the regular crew after the oiling season, which would be any time in the fall.

[1] The evidence as to whether there were branches or brush left on the paved portion of the road was conflicting. Taking the evidence favorable to the plaintiff, as we are required to do in the case of a directed verdict, the following appears:

Plaintiff testified that a few days after the accident he visited the scene; that adjacent to the road at the point of the accident was an acacia tree growing on a steep bank. The cut branches at that point were apparently from that tree. The bank was fairly littered with cut brush which evidently had been cut about a couple of weeks. There were small branches lying out on the paved portion of the road.

One Jacobson, residing about 150 feet along the road from the point of the accident, testified that in the early part of August, the crew cutting the brush just left the cuttings lay where they cut them. The cuttings were dropped down on the edge of the road. There was quite a pile there. Photographs were shown him and he identified the condition there shown as the condition at the time of the accident. These show a steep bank immediately adjacent to the paved portion of the highway, with cut brush piled against it, the ends of small branches of which are at the edge of the pavement and in two instances at least protrude onto the pavement. This brush remained there until sometime after the accident.

Mrs. McNeely, living further along the road, likewise identified the photographs as showing the condition about the time of the accident. In the latter part of July and first week in August, she saw the road crews cutting brush along the road. They dropped the cuttings where they cut them. She and her youngsters had to walk around the branches lying on the paved portion of the road.

Opposed to this evidence was the testimony, among others, of four crew members and the county road commission foreman who did the cutting, to the effect that no brush was left on the road. However, most of them testified that in piling brush it was done in places where there was considerable width between the pavement and the bank. The photographs show that at least at the point of the accident their testimony in this respect was incorrect. Another foreman admitted that he could not say for sure whether there was or was not some brush left on the paved portion of the highway. One of the crew members testified that two trucks followed the workers and picked up all of the brush so none was thrown to the side of the road. This testimony was contradicted not only by the photographs and plaintiff's witnesses but by all the other defense witnesses.

Also, in the week preceding the accident while making his daily trip plaintiff observed no branches or brush in the roadway.

Thus, there was evidence from which the jury might have found that in cutting the brush defendant negligently failed to remove it from the highway and that the piece which entered plaintiff's foot came from that brush. Did this state a

Cause of Action?

[2, 3] We think it did. Sections 53050 and 53051, Government Code, provide for tort liability of a county concerning its highways, providing, in effect, that a county "is liable for injuries to persons and property resulting from the dangerous or defective condition" of its highway if "the legislative body, board, or person authorized to remedy the condition: (a) Had knowledge or notice of the defective or dangerous condition. (b) For a reasonable time after acquiring knowledge or receiving notice, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition." Here the evidence was such that a jury might have found that a dangerous condition had been created under county supervision by the cutting of branches and allowing them to remain near and on the highway. As the work was done under the supervision of those in charge of the highway, and moreover, as the condition continued for approximately two weeks before the accident, there can be no question of knowledge.

In Fackrell v. City of San Diego, 26 Cal.2d 196, 157 P.2d 625, 158 A.L.R. 773, the plaintiff was injured when the sidewalk on which she was walking collapsed. The question was whether evidence supported the finding that a dangerous condition had been created by the city. In affirming the judgment for the plaintiff, the Supreme Court laid down these rules, 26 Cal.2d at page 203, 157 P.2d at page 629: "The rule is well established that when it is shown that a certain street and sidewalk improvement has been planned by city officers and constructed in accordance with such plan, and that by carrying out the plan a dangerous or defective condition has been created, *no further proof is needed to charge the city* with notice of that condition. [Citations.]" (Emphasis added.) "Where the authorities who have planned and constructed an improvement have knowledge of circumstances which reasonably might be expected to result in a dangerous condition as a natural and probable consequence of the work, *such authorities are put upon inquiry,* and it follows that it is incumbent upon them to make inspections commensurate in scope with the nature and character of their knowledge and the peril which should be avoided."

[4] "As to what constitutes a dangerous or defective condition no hard-and-fast rule can be laid down, but each case must depend upon its own facts. [Citations.] *Whether a given set of circumstances creates a dangerous or defective condition is primarily a question of fact.*" 26 Cal.2d at page 206, 157 P.2d at page 630; emphasis added.

[5] Under the evidence here, it cannot be said as a matter of law that the condition of the road was merely a trivial defect and not a dangerous condition. As said in Bigelow v. City of Ontario, 37 Cal.App.2d 198, 204, 99 P.2d 298, 301: "The question of whether or not a condition in a public street is actually dangerous and a menace to the safety of the traveling public is usually one of fact which is addressed to the triers of facts." See also Waldorf v. City of Alhambra, 6 Cal.App.2d 522, 526, 45 P.2d 207; George v. City of Los Angeles, 11 Cal.2d 303, 308, 79 A.2d 723. Schmidt v. City of Vallejo, 122 Cal.App. 5, 10 P.2d 107, cited by defendant, involving injury to a child on a playground slide is not in point, in that it was there held that the minor aspects in which the slide was defective in no wise contributed to the accident, but that the accident was caused by the child improperly using the slide.

Variance

[6–8] The complaint alleged that defendant in a grossly negligent manner "permitted the said branches to fall and remain upon the paved portions of said Bear Creek Road so as to constitute an extreme and dangerous hazard to pedestrians and motorists * * *. Said branches constituted a particularly dangerous hazard" in that defendant "had stacked said branches in a pile along and upon the said paved portion of said road, and in that at said point the said road is particularly narrow and makes a sharp turn to the right * * *. The above described pile of branches was permitted to remain * * *". Plaintiff "drove into and over the said pile of branches. A branch from said pile was thrown into the air by the impact of said motorcycle upon it * * *". At the close of the case plaintiff moved for permission to amend the complaint to conform to the proof, particularly to change the allegation that plaintiff drove into a pile of branches to one stating that he "collided with one of the aforesaid branches which had been negligently permitted to fall down and remain upon the paved portion of said road * *" The motion was denied. Plaintiff pointed out that not only did the proposed allegations conform to the proof but that defendant was in nowise surprised by the proof as it had taken plaintiff's deposition prior to trial and therefore knew that he claimed to have run into one branch and not a pile of branches. While the allowance of amendments is in the discretion of the trial court, not to have permitted this amendment to conform to the proofs, under the circumstances of this case, constituted an abuse of discretion. Moreover, we see no material variance between the allegations of the complaint without amendment and the proof. While a single branch is obviously not a pile of branches, there is a legal obligation not to knowingly permit a single branch to remain on the highway, if it constitutes a hazardous condition. "No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a party has been so misled, the Court may order the pleading to be amended, upon such terms as may be just." Code Civ.Proc. § 469. Being apprised prior to trial by his deposition of plaintiff's position, defendant could not possibly have been misled to his prejudice by this slight variance. Even in the days of great technicality (1867) the court said: "Immaterial variances are to be disregarded on the trial or whenever the question may be presented. This is a most beneficial provision, and should be literally construed and carried out." Began v. O'Reilly, 32 Cal. 11, 14.

Contributory Negligence

[9] Based upon the fact that although plaintiff testified he was looking ahead he failed to see the stick which injured him, defendant claims plaintiff was guilty of contributory negligence as a matter of law. Significantly, the trial court did not make contributory negligence a ground of granting the directed verdict. Going at a speed of approximately 30 miles an hour, around a turn where a portion of the highway was in shadow, we cannot say as a matter of law that plaintiff was negligent in not seeing the stick. That question was for the jury.

The judgment is reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.

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133 Cal.App.2d 596

**PEOPLE of the State of California, Plaintiff and Respondent,
v.
Harry BYCEL, Defendant and Appellant.
Cr. 5351.**

District Court of Appeal, Second District, Division 1, California.

June 14, 1955.

Hearing Denied July 13, 1955.

Prosecution on three counts of receiving stolen property. The Superior Court, Los Angeles County, Thomas L. Ambrose, J., dismissed information as to one count, entered judgments of conviction on two counts, and denied motion for new trial. Accused appealed. The District Court of Appeal, White, P. J., held that evidence was sufficient for conviction.

Judgment and order affirmed.

1. Receiving Stolen Goods ⚷8(3)

Evidence was sufficient for conviction for receiving stolen goods. Pen.Code, § 496.

2. Receiving Stolen Goods ⚷3

While guilty knowledge of the larceny is an essential fact to be proved in a prosecution for receiving stolen goods, it is not essential that such knowledge be actual and positive, and it may be circumstantial and deductive. Pen.Code, § 496.

3. Receiving Stolen Goods ⚷3

Knowledge that goods were stolen on the part of accused charged with receiving stolen goods may be inferred from surrounding conditions and circumstances. Pen.Code, § 496.

4. Criminal Law ⚷507(5)

Unless a prior conspiracy to steal is shown, the thief who steals the property is not an accomplice of the one who receives it from him, knowing it to be stolen. Pen. Code, § 496.

5. Criminal Law ⚷507(5)

In prosecution for receiving stolen goods, where there was no showing that accused charged with receiving stolen goods was in conspiracy with thief, thief was not an "accomplice" in crime of receiving stolen goods, and thief's evidence did not require corroboration. Pen.Code, §§ 496, 1111.

See publication Words and Phrases, for other judicial constructions and definitions of "Accomplice".

6. Criminal Law ⚷511(2)

In prosecution for receiving stolen goods, even if thief who stole goods was considered as an accomplice of accused in crime of receiving stolen goods, evidence apart from thief's testimony was sufficient to connect accused with offense, and to corroborate thief's testimony. Pen.Code, §§ 496, 1111.

Morris Lavine, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., James C. Maupin, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was charged with three separate violations of buying or receiving stolen property, a felony. Penal Code Section 496.

In Count I, defendant was charged with having bought and received a stolen adding machine on or about September 3, 1952. Count II charged the felonious purchase and receipt of a calculator on or about August 28, 1952, which machine had been stolen. The third count alleged that on or about June 5, 1952, defendant bought and received two adding machines knowing them to have been stolen.

Defendant moved to dismiss the information under section 995 of the Penal Code. His motion was granted as to Count II and denied as to Counts I and III. Following entry of not guilty pleas as to the last-named counts, the cause proceeded to trial before a jury which returned verdicts of guilty under both counts of the information. Defendant's motion for a new trial was granted as to Count III and denied as to Count I. Proceedings were suspended and defendant granted conditional probation on Count I. Count II was dismissed.

From the judgment of conviction (see Penal Code Section 1237, subd. 1) and from the order denying his motion for a new trial, defendant prosecutes this appeal.

We regard the following as a fair epitome of the factual background surrounding this prosecution. On the second or third day of September, 1952, one Charles Linson burglarized the premises of the Trojan Bookkeeping Service in the City of Los Angeles, removing therefrom two adding machines, a calculator, and a typewriter, which he placed in his automobile and departed. Two or three days later, Linson went to Fifty-fifth and Long Beach Boulevard to consult with the defendant, at the One Spot liquor store. Linson told defendant that he wanted to make a deal concerning the machines. He told the defendant he wanted to "deal" the machines off. The defendant asked what kind they were, and Linson told him. The former then asked where the machines were and Linson told him they were in a car, and the defendant looked in the car and saw them. The two men then came back to the store and the defendant made a telephone call. He then had Linson write on a piece of paper, "Globe Bottling Company" and the name "Cal".

Linson wanted $50 for each of the machines but defendant refused to give more than $25. At that time Linson received no money. The defendant then gave Linson an address, a bottle cap, and told him to go to a certain place, the Globe Bottling Company on Mission Road in Los Angeles. When Linson went there, he saw a man named Cal and left one adding machine with him. Cal did not give Linson anything. After leaving the adding machine with Cal, Linson went back to Fifty-fifth and Long Beach Boulevard where he saw the defendant. Linson told the latter he had made the trip, and the defendant called back, and "there was only one machine", whereupon defendant gave Linson $25.

Linson was prosecuted and convicted for the theft involved herein, and served time in the County Jail.

In the early part of September, 1952, Calvin A. Rowlette was called on the telephone by the defendant. The latter said he had an adding machine, and asked if Mr. Rowlette needed one. Mr. Rowlette said that he did and the defendant said, "I'll send it up by a man." The defendant said the price would be $50. Mr. Rowlette saw Linson at the Globe Bottling Company with the adding machine on the same afternoon that the telephone call was made.

After Linson was released from jail he went to the defendant's place of business and had a conversation. Linson told the defendant he had been "busted". "Bust" in this sense means to arrest. He further told the defendant he had sent word to him, trying to make a deal, and to try to get some money from him. The defendant told Linson he wasn't doing "too good himself, and that was about it."

After the machines had been found, the defendant came to Linson and asked him not to testify against him, and that he, the defendant, would make everything all right with him. That conversation took place in February or March of 1954, first at the defendant's store at Fifty-fifth and Long Beach Boulevard, and on the same day in Mr. Walter Gordon's office. The defendant drove Linson to Mr. Gordon's office, and when they arrived there, the defendant told Linson that the machines had been recovered and he said, "I want you to testify that you never sold me anything." Linson then signed a paper that he did not sell anything to the defendant. It was signed with the name, "John W. Lewis", which Linson was using. When the defendant returned to his store on the same day, he gave Linson twenty dollars and a pint of whiskey.

Linson talked to the defendant in court at the trial of this case and the latter said, "You heard about some guy that got a knife stuck in him, the same thing can happen to you."

Sworn as a witness on behalf of the defendant, St. Elmo P. Henderson testified that he had been employed by defendant and that "around about September, 1952" between 9 and 10 in the morning, he saw a Mr. Kanner, connected with the Globe Bottling Company, in the defendant's store and that the latter was talking with Mr. Kanner when Linson entered, that defendant went over to Linson and the witness heard the latter say "something" about an adding machine, but that defendant stated "he wasn't interested and just turned around and walked away from him". That Mr. Kanner then inquired of Linson as to whether the machine was "hot" and received a negative reply. That Linson and Kanner left the store together. That while the former was in the store defendant did not make any telephone calls.

William E. White, another employee of defendant, testified that on a morning in September, 1952, he saw Mr. Kanner and Linson engaged in conversation alongside an automobile, that the trunk of the vehicle was raised, that two machines were taken out of the automobile, one by Mr. Kanner and one by Linson, taken across the street and placed in the trunk of another automobile.

As a witness in his own behalf, defendant testified that he never called the Globe Bottling Company with reference to Linson, that he knew the latter only as a customer and for three days. He denied he ever had possession of the stolen property. He also denied ever having a conversation with Linson about the machines. He also denied he ever had received $50 in either cash or credit for the machines.

[1] As his first ground for reversal, appellant asserts that the evidence is insufficient to support the verdict in that there is no proof that he knew the machines were stolen, or intended to receive stolen property.

[2, 3] While guilty knowledge of the larceny is an essential fact to be proved in a prosecution for receiving stolen goods, it is not essential that such knowledge be actual and positive; it may be circumstantial and deductive. People v. Mercado, 59 Cal.App. 69, 72, 209 P. 1035. Among the elements the courts have found persuasive as giving rise to an inference of guilty knowledge is a disproportionately low price paid, People v. Gould, 111 Cal. App.2d 1, 7, 243 P.2d 809, or that the accused denied possession of the goods if such denial is shown to be false. People v. Levison, 16 Cal. 98, 99. In the case at bar defendant agreed to pay only $25 each for office machines that had been purchased new about one week previously for a total price of approximately $1,400. Also, the falsity of appellant's statement that he ever had possession of the property was clearly established. Since knowledge that the goods were stolen may be inferred from the surrounding conditions and circumstances the jury was entitled to give consideration to the fact that the transaction involving expensive office equipment took place between the proprietor and a customer in a liquor store. Then, there is the evidence concerning appellant's conduct after the transaction took place wherein he sought out Linson and gave him twenty dollars and a pint of whiskey for signing a paper that he (Linson) had never sold anything to the appellant. Certainly this amounted to a consciousness of guilt. Also, open for consideration by the jury was appellant's statement to Linson at the trial that the latter might "have a knife stuck in him". Finally, there is the telephone conversation between appellant and Calvin A. Rowlette, Credit Manager of Globe Bottling Company, in which appellant said, "You didn't get the machines from me". From the foregoing it is clear that the jury was justified in inferring that at the time appellant acquired the machines he knew they were stolen property. It therefore becomes plain that appellant's contention that the finding of guilty knowledge on his part lacks evidentiary support and cannot be sustained.

[4–6] Equally without merit is appellant's final contention that the corroboration of Charles Linson's testimony was insufficient. From the language of the statute, Penal Code Section 1111, it is manifest that Linson was not an accomplice for the obvious reason that he was not liable to prosecution for the *identical* offense charged against the appellant—receiving stolen property. Linson was the one who stole the property, and unless a prior conspiracy to steal is shown, the thief who steals the property is not an accomplice of the one who receives it from him, knowing it to be stolen. There is no such showing of a conspiracy present in the instant case. People v. Lima, 25 Cal.2d 573, 576–579, 154 P.2d 698; People v. Burness, 53 Cal. App.2d 214, 218, 219, 127 P.2d 623; People v. McKinney, 71 Cal.App.2d 5, 12, 161 P.2d 957; In re Morton, 179 Cal. 510, 513, 514, 177 P. 453. Furthermore, if it be assumed that Linson was an accomplice there was ample evidence aside from his testimony to connect appellant with the offense charged against him, such as his possession of the admittedly stolen property, as well as the testimony of Leo Kanner and Calvin A. Rowlette of the Globe Bottling Company concerning conversations with them regarding purchase by their company of the property in question.

For the foregoing reasons, the judgment and the order denying defendant's motion for a new trial are, and each is, affirmed.

DORAN and DRAPEAU, JJ., concur.

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133 Cal.App.2d 685

**PEOPLE of the State of California,
Plaintiff and Respondent,
v.
Joseph F. MANCHA, Defendant and
Appellant.
Cr. 3077.**

District Court of Appeal, First District,
Division 2, California.
June 20, 1955.
Hearing Denied July 20, 1955.

Prosecution for conspiracy to commit crime of theft through real estate transactions. Defendant broker pleaded guilty upon one count and was granted probation. The Superior Court, County of San Mateo, Murray Draper, J., on hearing for revocation of order of probation, revoked the probation and the defendant appealed. The District Court of Appeal, Nourse, P. J., held that where the evidence on hearing was that defendant had violated the express terms of his probation by deserting his wife and minor children to live with a dissolute woman whom he was aiding in violation of the immigration laws of the United States, the trial court had not abused its discretion in revoking the probation.

Affirmed.

1. Criminal Law 🔑982

Where evidence on hearing to revoke probation was that defendant had violated express terms of probation by deserting his wife and minor children to live with dissolute woman whom he was aiding in violation of immigration laws of United States, trial court did not abuse its discretion in revoking probation. Pen.Code, § 1203.2.

2. Criminal Law 🔑274

Where motion to withdraw guilty plea to theft count was made 17 months after plea was entered by defendant who was real estate broker, and broker with probation officer meanwhile had adjusted and settled several claims arising out of disputed transactions of broker with his former clients, and broker in moving to withdraw plea made no offer to readjust those transactions, trial court did not abuse discretion in denying motion to withdraw plea, though broker claimed he had pleaded guilty solely because he thought that his probation could not be revoked.

Joseph F. Mancha, in pro. per.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond Momboisse, Deputy Atty. Gen., Keith C. Sorenson, Dist. Atty. of San Mateo County, Vernon V. Vale, Jr., Deputy Dist. Atty., Redwood City, for respondent.

NOURSE, Presiding Justice.

Defendant was charged with two others on a grand jury indictment charging conspiracy to commit grand theft, through several real estate transactions, and charging twelve separate counts of grand theft. After various motions were heard and denied defendant pleaded not guilty on all counts. Later the defendant voluntarily pleaded guilty as charged in the first count and all other counts were dismissed. Motions for probation were made and granted as to all defendants.

As conditions of this defendant's probation he was required to make full restitution within three months, that he refrain from selling, or acting as a salesman or broker in the sale of any real or personal property, and that he retransfer all property to the rightful owners.

On May 17, 1954, appellant was charged by the probation officer with a conviction in Los Angeles County of a minor offense.

On the hearing for a revocation of the order of probation it appeared that appellant had deserted his wife and five minor children, was living in Los Angeles with another woman with whom he was carrying on real estate transactions in that city contrary to the terms of his probation.

During the period of his probation the defendant sold an automobile for another and made a down payment on the purchase of a home for the benefit of his mistress, both in violation of the terms of his probation. His appeal here is from the order revoking his probation and from the ensuing sentence to a full term in the penitentiary.

Appellant was ably defended by competent counsel in all proceedings in the superior court. He has chosen to dismiss his counsel and to appear here in pro. per. He has made a complete mess of it. His opening brief is a hodgepodge of sentimental theories which he assumes are supported by the citation of a large collection of cases, which have no bearing on the issues involved. This court has meticulously protected the rights of prisoners to have counsel to present their appeals and it is far better for them to request such an assignment than to endeavor to defend themselves in a field which is unknown to them.

There are only two issues raised on the appeal and we will confine our discussion to them.

[1] 1. Was the trial court guilty of an abuse of discretion in revoking the probation? The answer is no. The statutory law applicable is found in Section 1203.2 of the Penal Code, which provides in part that the court may "revoke and terminate such probation, if the interests of justice so require, and if the court in its judgment, shall have reason to believe from the report of the probation officer, or otherwise, that the person so placed upon probation is violating any of the conditions of his probation, or engaging in criminal practices, or has become abandoned to improper associates or a vicious life." The evidence is that appellant violated the terms of his probation by engaging in practices expressly prohibited by the terms of his probation, by the desertion of his wife and minor children to live with a dissolute woman whom he was aiding in the violation of the immigration laws of the United States.

[2] 2. Was the trial court guilty of an abuse of discretion in denying appellant's motion to withdraw his plea of guilty? The answer is no. The motion to withdraw the plea was made seventeen months after the plea was entered. During that time the probation officer, with the cooperation of the appellant, had made several adjustments and settlements of claims arising out of disputed transactions of appellant with his former clients. In seeking to withdraw the plea of guilty appellant made no offer to readjust these transactions. He admitted that he knew the difference between a guilty and a not guilty plea and claimed that he pleaded guilty solely because he thought at the time that his probation could not be revoked. Obviously there was no breach of discretion in the denial of the motion.

Judgment and order affirmed.

DOOLING and KAUFMAN, JJ., concur.

133 Cal.App.2d 655

Paul W. CARROLL and Lucille F. Carroll, and Paul W. Carroll and Lucille F. Carroll, as trustees of the trust created by the last will and testament of J. J. Carroll, deceased, Plaintiffs and Respondents,

v.

Thomas TOMASELLO, Mamie Tomasello, and Marco Clementi, Nunzio Giordano and Marie Giordano, Defendants and Appellants.

Civ. 16282.

District Court of Appeal, First District, Division 2, California.

June 15, 1955.

Rehearing Denied July 15, 1955.

Hearing Denied Aug. 11, 1955.

Action was brought by vendors against purchasers to recover balance due on note given in connection with sale of realty.

The Superior Court, Santa Clara County, Byrl R. Salsman, J., entered judgment for vendors, and purchasers appealed. The District Court of Appeal, Nourse, P. J., held that where purchasers entered into written agreement with vendors to buy realty for $625,900, $50,500 of which was to be paid on execution of contract, and, in lieu of initial payment of $50,500, purchasers were given credit of $50,500 by conveyance to vendors of three parcels of realty estimated to be of that value, and one of such parcels was encumbered by a mortgage, and, to clear the obligation, the purchasers gave vendors a note for $12,000, and purchasers transferred their rights under the contract without consent of vendors, and transferees were given full credit for down payment of $50,500, purchasers were liable for unpaid balance of the $12,000 note.

Vendor and Purchaser ⟹207

Where purchasers entered into written agreement with vendors to buy realty for $625,900, $50,500 of which was to be paid on execution of contract, and in lieu of initial payment of $50,500, purchasers were given credit of $50,500 by conveyance to vendors of three parcels of realty estimated to be of that value, and one of such parcels was encumbered by a mortgage, and to clear the obligation the purchasers gave vendors a note for $12,000, and purchasers transferred their rights under the contract without consent of vendors and transferrees were given full credit for down payment of $50,500, purchasers were liable for unpaid balance of the $12,000 note.

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James F. Boccardo, Gallagher, Ruffo & Rainville, San Jose, Edward J. Niland, San Jose, of counsel, for appellants.

Rankin, Oneal, Luckhardt, Center & Hall, San Jose, for respondents.

NOURSE, Presiding Justice.

Plaintiffs sued for the balance due on a promissory note give in connection with a sale of real property. Plaintiffs had judgment following a trial to the court.

On December 14, 1948, defendants entered into a written agreement with plaintiffs to buy a large tract of land for the sum of $625,900, payable $50,500 on execution of the contract, the balance in annual installments of $45,000 each for ten years, and a final payment of $125,400. In lieu of the initial cash payment defendants were given a credit of $50,500 by their conveyance to plaintiffs of three parcels of realty estimated to be of that value. One of these parcels was encumbered by a mortgage, and to clear the obligation defendants gave plaintiffs their promissory note for $12,000 payable eight months after date. The sum of $2,500 was paid on this note and the suit is for the balance due.

The trial court found that defendants were given full credit for the sum of $50,500 paid on the purchase price, that the promissory note was not a part of the purchase price but was a collateral agreement covering the credit of $50,500 given defendants on the purchase price. The court also found that defendants transferred all their rights under the contract without the consent of plaintiffs, did not procure an assumption of the note by the transferees, and that these transferees were given full credit for the down payment of $50,500. It was also found that plaintiffs did not claim a forfeiture under the original sale contract but reacquired the property through a quit claim deed executed by defendants' transferees; that the 1948 contract was not rescinded or terminated except as above stated, and that, accordingly plaintiffs were not seeking a deficiency judgment.

Appellant concedes that there is no real dispute or conflict as to the facts. The findings above noted are fully supported by competent evidence. Appellant's argument rests upon their theory that the promissory note was not an independent undertaking. But the evidence is to the contrary. Both parties so treated it from the beginning. Defendants assumed that they had made the full down payment of $50,500 when they transferred their interest in the land to others and gave to them full credit for the full sum of $50,500 without plaintiffs' consent. They did not seek from plaintiffs a release of their liability under the note or ask their transferees to assume such liability.

The argument that the judgment is inequitable is not persuasive. The defendants were given exclusive possession of more than ten thousand acres of land with the right to explore and occupy the same for their own profit for two and a half years. During that period plaintiffs were out of possession and derived no income from the property. The down payment does not appear to have been an unfair charge for the advantages the defendants received, hence there was no inequity.

Judgment affirmed.

DOOLING and KAUFMAN, JJ., concur.

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133 Cal.App.2d 720

Hazel SHEARER, Plaintiff and Appellant,

v.

UNITED CALIFORNIA THEATRES et al., Defendants.

Bayshore Amusement Co., Inc., doing business as State Theater, Defendant and Cross-complainant.

Paul Relei and C. White, individually and as partners, doing business as Relei Electric Co., Cross-defendants and Respondents.

Civ. 16259.

District Court of Appeal, First District, Division 2, California.

June 21, 1955.

Action for injury sustained in a fall in a theater. From judgment of the Superior Court, San Mateo County, Murray Draper, J., dismissing cross-complaint filed by defendant, the plaintiff appealed. The District Court of Appeal, Kaufman, J., held that where plaintiff was not a party to cross-action between cross-complainant and cross-defendants, plaintiff had no right of appeal from summary judgment dismissing the cross-complaint.

Appeal dismissed.

1. Appeal and Error 🔑148

Where plaintiff was not a party to cross-action between cross-complainant and cross-defendants, plaintiff had no right of appeal from summary judgment dismissing the cross-complaint. West's Ann.Code Civ. Proc. §§ 379c, 442.

2. Pleading 🔑138

Cross-actions are distinct and independent causes of action.

3. Pleading 🔑138

Issues joined upon a cross-complaint are completely severable from the issues upon the original complaint and answer. West's Ann.Code Civ.Proc. § 583.

4. Limitation of Actions 🔑124

Where cross-defendants were not referred to in any way in plaintiff's action, filing of cross-complaint could not toll running of statute of limitations simply because cross-complainants alleged that cross-defendants were solely liable for plaintiff's injury.

5. Limitation of Actions 🔑124

Denial of plaintiff's motion, made about one and one-half years after filing of cross-complaint and long after statute of limitations had run against any cause of action plaintiff might have had against cross-defendants, to add cross-defendants as a necessary party as of date of filing cross-complaint was not an abuse of discretion.

6. Judgment 🔑181(15)

Even if plaintiff had right to complain of judgment dismissing cross-complaint, where cross-complainant's claim against cross-defendants was one for indemnification for any judgment of damages that might be rendered against cross-complainant in favor of plaintiff but plaintiff had agreed that she would not prosecute action against cross-complainant to judgment, or that if judgment should be entered plaintiff would not levy execution thereon or make any demand upon cross-complainant, there was nothing on which cross-complainant could base a claim of indemnification and therefore there was no abuse of discretion in granting summary judgment dismissing the cross-complaint. West's Ann.Civ.Code, § 2778, subd. 2.

E. C. Mahoney, Burlingame, for appellant.

William Nagle, Jr., San Mateo, for respondent.

KAUFMAN, Justice.

This is an appeal by plaintiff Hazel Shearer, from a summary judgment which was entered in favor of cross-defendants Relei and White, and against cross-complainants Bayshore Amusement Co., Inc., the defendants in the main action. No appeal has been taken by cross-complainants.

Plaintiff and appellant Hazel Shearer filed a complaint on November 1, 1951, for damages for personal injuries sustained on September 2, 1951, when she fell through an open hatch in the balcony of a theatre operated by the Bayshore Amusement Company. She was a business invitee at the time. The complaint named the United California Theaters, a Corporation, First Doe and Second Doe, doing business as State Theater, as defendants, and alleged that said defendants were owners, operators and lessees of State Theater.

On May 19, 1952 defendant theatre filed a cross-complaint against Paul Relei and C. White, individually and as partners doing business as Relei Electric Company alleging that if any damage was caused to plaintiff it was the sole responsibility of cross-defendants which cross-complainants had employed as independent contractors to do certain electrical work on their premises and requested reimbursement from cross-defendants for any damages that might be assessed against cross-complainants in the main action. On September 3, 1952, cross-defendants filed an answer generally denying liability and alleging that Relei Electric Company was a corporation.

On October 7, 1952, plaintiff Shearer and defendants, Bayshore Amusement Company and United California Theaters entered into an agreement under which Hazel Shearer received $1,000 as consideration for covenanting not to prosecute the suit pending against said defendants, not to have any default entered against them, nor to execute on any judgment in the event any judgment should be rendered against them. It was recited that the agreement was a covenant not to sue, and was not a release of any cause of action which plaintiff might have against these defendants or any other persons. Appellant asserts in her brief that this agreement was negotiated with the understanding that the Theater was only secondarily liable for the damage suffered and that said defendants would aid plaintiff in carrying on her case against Relei Electric Company, and that the Theater turned over to her its files pertaining to the investigation of the accident and promised to aid in the further prosecution of the action.

The case was set for trial for December 10, 1952 and continued to February 16, 1953.

On February 9, 1953, appellant filed an amended complaint substituting Relei Electric Company as a defendant in place of First Doe. On March 5, 1953, a demurrer to the amended complaint was sustained without leave to amend on the ground that the original complaint named defendants Doe only as "owners, operators and lessees" of the theatre, whereas the amended complaint attempted to substitute an independent contractor as a defendant more than a year after the occurrence of the accident. Day v. Western Building & Loan Co., 42 Cal.App.2d 226, 235, 108 P.2d 702; McKnight v. Gilzean, 29 Cal.App.2d 218, 84 P.2d 213. The amended complaint was stricken from the files. Thereafter respondents amended their answer, and made a motion for judgment on the pleadings which was denied. They then moved for a separate trial on the special defenses to the cross-complaint which was granted. Before hearing, however, respondents filed a motion for summary judgment on the ground that the cross-action was not meritorious and that no basis for relief existed.

The notice of motion was accompanied by the affidavit of respondents' counsel which related the execution of the covenant not to sue between the parties to the main action, and incorporated a copy of that document, and alleged that in view of the execution of the covenant, no issue remained on the cross-complaint. The motion for summary judgment was granted and the cross-complaint stricken on December 21, 1953.

[1] On February 11, 1953, plaintiff and appellant filed notice of appeal, reciting that she appealed from the judgment in favor of cross-defendants and against plaintiff. It is to be noted, however, that the summary judgment is simply in favor of cross-defendants and against cross-complainants, and that plaintiff is not referred to in that judgment.

It is clear that no judgment was rendered against plaintiff and appellant herein, but simply against the cross-complainants, the defendants in the main action who are not parties to this appeal. In Stanley v. Robert S. Odell & Co., 97 Cal.App.2d 521, 218 P.2d 162, it was held that parties in the action who were not also parties to the cross-complaint had no right of appeal from the portions of the judgment disposing of the issues solely presented by the cross-complaint, and such appeals were dismissed.

The above cited decision would appear to be determinative of the appeal now before the court, for as plaintiff and appellant was not a party to the cross-action between cross-complainants and cross-defendants on which the judgment herein was rendered, she cannot be a party aggrieved by that judgment.

She contends, however, that the allegation in the cross-complaint which stated that cross-defendants were solely liable, put the cross-defendants into the action for all purposes, so that plaintiff could recover a judgment against them. She contends that the rule in New York is that a defendant may join another party who is partly or wholly liable for the claim of plaintiff and when such party is joined he automatically becomes a defendant in the action. But appellant admits that the statutes in New York and California are not identical. In this state the plaintiff may move to join a doubtful defendant. Sec. 379c, Code of Civil Procedure.

Appellant contends that she did not know that there was another party liable to her until the cross-complaint was filed. However, the cross-complaint was filed on May 19, 1952, some three and one-half months before the one-year period following the accident had expired. Nevertheless, appellant did not attempt to join respondent cross-defendants as defendants in the action until November 24, 1953, more than one and one-half years after the filing of the cross-complaint which was certainly notice to plaintiff that she might have a cause of action against respondents.

[2] Regardless of what the rule may be in other jurisdictions, it appears to be settled in this state that cross-actions are distinct and independent causes of action. In Pacific Finance Corp. v. Superior Court, 219 Cal. 179, 25 P.2d 983, 984, 90 A.L.R. 384, it was said that in such cross-action "the defendant becomes in respect to the matters pleaded by him, an actor, and there are two simultaneous actions pending between the same parties wherein each is at the same time both a plaintiff and a defendant." If they are so regarded where cross-complainants and cross-defendants are plaintiffs and defendants in the main action, they most certainly must be so regarded where cross-defendants are new parties to the proceeding who are brought in after service of summons upon them. Sec. 442, Code of Civ.Proc.

[3] In Case v. Kadota Fig Ass'n, 35 Cal.2d 596, 603, 220 P.2d 912, the language above referred to in the Pacific Finance Corporation case was cited with approval. The rule was reiterated in Douglas v. Superior Court, 94 Cal.App.2d 395, 398, 210 P.2d 853, 854, when the court pointed out that the issues joined upon a cross-complaint "are completely severable from the issues upon the original complaint and answer." This rule has been adhered to in cases involving mandatory dismissals under section 583 of the Code of Civil Procedure, the cross-action being regarded as a proceeding distinct from the main action.

[4] In view of these holdings we cannot see how appellant can contend that the filing of the cross-complaint by defendant could make the new parties, the cross-defendants, defendants in plaintiff's action which did not refer to them in any way. She cannot claim that they were one of the Does, for her complaint named Does only as "owners, operators and lessees of a certain motion picture theater." Hence, the filing of the cross-complaint could not toll the running of the statute of limitations simply because the cross-complainants alleged that cross-defendants were solely liable for the accident, for their only claim against the cross-defendants was based on an alleged right to indemnification for damages that might be assessed against cross-complainants in the main action.

[5] Appellant also asserts that error was committed in denying a motion to add cross-defendants as a necessary party as of the date of filing the cross-complaint. This motion was not filed until November 24, 1953, several days after the filing of the notice of motion for summary judgment, and as noted above, more than a year and a half after the filing of the cross-complaint. Clearly there was no abuse of discretion in denying the motion to join Relei Electric Company as a necessary party long after the statute of limitations had run against any cause of action plaintiff might have had against it.

[6] No abuse of discretion is shown in the granting of the summary judgment against cross-complainants, even if it should be assumed that appellant herein had the right to complain of this judgment. The trial judge properly concluded that the claim which cross-complainants attempted to assert against cross-defendants was one for indemnification for any judgment of damages that might be rendered against them in favor of plaintiff. Since cross-complainants' contract with plaintiff guaranteed that plaintiff would not prosecute the action to judgment, or that if in the event there should be a judgment entered, plaintiff would not levy execution thereon or make any demand upon cross-complainants, obviously there was nothing on which cross-complainants could base a claim of indemnification. See 13 Cal.Jur. 991; Civil Code, sec. 2778(2). There clearly was no triable issue of fact remaining to be tried between cross-complainants and cross-defendants and the summary judgment was properly granted. See Coyne v. Krempels, 36 Cal.2d 257, 223 P.2d 244.

In view of the foregoing, appellant's appeal must be dismissed.

Appeal dismissed.

NOURSE, P. J., concurs.

DOOLING, Justice.

I concur in the order dismissing the appeal on the stated ground that appellant is not a party to the cross-complaint. Since no proper appeal is before us we are without jurisdiction of the case. For this reason any discussion of the merits is out of place and I refrain from joining in that part of the opinion.

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133 Cal.App.2d 763

Guy N. STAFFORD, Plaintiff and Appellant,

v.

The OIL TOOL CORPORATION, a corporation, et al., Defendants.

The Oil Tool Corporation, a corporation, Respondent.

Civ. 20720.

District Court of Appeal, Second District, Division 3, California.

June 22, 1955.

Rehearing Denied July 21, 1955.

Hearing Denied Aug. 17, 1955.

Action by plaintiff to recover for alleged breach by defendant of oral contract to supply oil field goods to plaintiff at reduced rates. The Superior Court, Los Angeles County, Beach Vasey, J., sustained defendant's demurrer to all three counts of plaintiffs' complaint and plaintiff appealed. The District Court of Appeal, Vallée, J., held that where plaintiff did not make demand for performance of oral contract within period coincident with running of statute of limitations nor secure written acknowledgement or promise sufficient to take case out of operation of statute, his cause of action based on alleged breach of such oral contract was barred, but that count alleging cause of action for damages arising out of failure of defendant to replace tubing loaned to it by plaintiff, which alleged contract, breach and damages, pleaded facts sufficient to state cause of action for breach of alleged oral contract.

Affirmed in part and reversed in part.

1. Limitation of Actions ⚷66(2)

Where demand is integral part of cause of action, statute of limitations does not run until demand is made, but a plaintiff cannot indefinitely suspend running of statute by delaying to make demand. West's Ann.Code Civ.Proc. § 339, subd. 1.

2. Limitation of Actions ⚷66(15)

Where demand is necessary to perfect right of action and no time therefor is specified in contract, demand must be made within reasonable time after it can lawfully be made, and what is reasonable time depends upon circumstances of each case; but in absence of peculiar circumstances, time coincident with running of statute will be deemed reasonable, and if demand is not made within that period, action will be barred. West's Ann.Code Civ.Proc. § 339, subd. 1.

3. Limitation of Actions ⚷66(15)

Where plaintiff has it in his power at all times to fix his right of action by making demand on defendant, such demand must be made within reasonable time after it can be lawfully be made, and such demand must be made within period of statute of limitations. West's Ann.Code Civ.Proc. § 339, subd. 1.

4. Limitation of Actions ⚷146(1)

Part performance by defendant of oral contract to supply oil field goods to plaintiff at reduced rates did not operate to take case out of operation of limitations statute, in absence of acknowledgement or promise in writing and signed by party to be charged. West's Ann.Code Civ.Proc. § 360.

5. Limitation of Actions ⚷66(15)

Where plaintiff did not make demand for performance of oral contract within period coincident with running of statute of limitations nor secure written acknowledgement or promise sufficient to take case out of operation of statute, his cause of action based on alleged breach of such oral contract was barred. West's Ann. Code Civ.Proc. § 339, subd. 1.

6. Limitation of Actions ⚷21(1)

Cause of action which alleged that defendant borrowed tubing and orally agreed that it would replace it with like tubing when needed by plaintiff and that later plaintiff needed tubing and requested defendant to replace tubing loaned previously and where subsequently defendant delivered tubing as replacement, plaintiff allegedly suffering damage of failure of defendant to replace tubing at time of original request, stated cause of action for damages arising out of defendant's alleged breach of loan or exchange, which was barred by limitations, and did not state cause of action for conversion. West's Ann.Code Civ.Proc. §§ 338, 339, subd. 1; West's Ann.Civ.Code, §§ 1902, 1904.

7. Contracts ⚷332(2)

Count of cause of action for damages arising out of failure of defendant to replace tubing loaned to it by plaintiff, which alleged contract, breach, and damages, pleaded facts sufficient to state cause of action for breach of alleged oral contract.

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Guy N. Stafford, appellant, in pro. per.

James J. Baker and Joseph A. Ball, Long Beach, for respondent.

VALLÉE, Justice.

Appeal by plaintiff from a judgment entered on an order sustaining defendant Oil Tool Corporation's demurrer to the first, second, and third counts of the fourth amended complaint, and from an order denying his motion to tax costs. Three counts were pleaded. The demurrer to each count was general and special. The judgment states that defendants' general demurrers to the first and second counts were sustained without leave to amend; "and defendants' General Demurrer to plaintiff's third cause of action was sustained" with leave to amend. Plaintiff declined to amend.

Count I

The first count alleges: In January 1948 plaintiff sold 2,000 feet of casing which had a value of $4.25 a foot to defendant for $3 a foot cash and defendant's oral agreement that it would compensate plaintiff for the difference, $1.25 a foot, by selling oilfield goods to him at reduced rates on credit "at any future time." In June 1950 defendant delivered some used tubing to plaintiff pursuant to the agreement of January 1948. In July 1950 plaintiff returned that tubing to defendant at its request. On November 15, 1951 defendant delivered some other tubing to plaintiff pursuant to the agreement of January 1948. In February 1952 plaintiff returned that tubing to defendant on its demand. In March 1952 plaintiff requested tubing of defendant; defendant stated it had no tubing in stock but it would have tubing in about 3 weeks and defendant, pursuant to the agreement of January 1948, agreed to deliver tubing to plaintiff therefrom. After March 1952 plaintiff "made requests" of defendant for tubing; defendant failed to comply with the requests and has not furnished any tubing to plaintiff "subsequently"; defendant has no intention to further perform the agreement of January 1948. As a direct result of defendant's breach of its agreement plaintiff has suffered loss and damage.

The action was commenced on November 19, 1953. The first count is predicated on the oral contract of January 1948. One of the grounds of the demurrer was that it is barred by the statute of limitations. The parties agree that Code of Civil Procedure, section 339(1), which prescribes a 2-year limitation for the commencement of an action on a contract not founded on a written instrument, applies. They disagree as to when the statute began to run. Plaintiff contends the statute did not begin to run until the first demand for performance.

[1-3] Where a demand is an integral part of a cause of action, the statute of limitations does not run until demand is made. The plaintiff cannot, however, indefinitely suspend the running of the statute by delaying to make a demand. The general rule is that where demand is necessary to perfect a right of action and no time therefor is specified in the contract, the demand must be made within a reasonable time after it can lawfully be made. What is a reasonable time depends upon the circumstances of each case; but in the absence of peculiar circumstances, a time coincident with the running of the statute will be deemed reasonable, and if a demand is not made within that period, the action will be barred. Thomas v. Pacific Beach Co., 115 Cal. 136, 142-143, 46 P. 899; Bass v. Hueter, 205 Cal. 284, 287, 270 P. 958; Fall v. Lincoln Mortgage Co., 115 Cal.App. 651, 655, 2 P.2d 58; Ilse v. Burgess, 28 Cal.App.2d 654, 657, 83 P.2d 527. Where, as here, a plaintiff has it in his power at all times to fix his right of action by making a demand on defendant, such demand must be made within a reasonable time after it can be lawfully made, and such a demand must be made within the period of the statute of limitations. Ilse v. Burgess, supra, 28 Cal. App.2d 654, 657, 83 P.2d 527.

[4] Plaintiff says that if a party indicates his intention to perform an oral agreement within 2 years before the action is commenced, the action is not barred by the statute, citing section 360 of the Code of Civil Procedure which reads:

> "No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this title [time of commencing civil actions], unless the same is contained in some writing, signed by the party to be charged thereby * * *."

To come within the section the acknowledgment or promise must be in writing and signed by the party to be charged. Western Coal & Mining Co. v. Jones, 27 Cal.2d

819, 822–823, 167 P.2d 719, 164 A.L.R. 685; Butt v. Burkett, 18 Cal.App.2d 612, 614, 64 P.2d 437; McCormick v. Brown, 36 Cal. 180, 185. Plaintiff did not plead a written acknowledgment or promise. The fact that in June 1950, two and a half years after the oral contract was made, defendant delivered tubing to plaintiff which plaintiff returned in July 1950, that defendant delivered other tubing to plaintiff on November 15, 1951 which plaintiff returned in February 1952, and that plaintiff made futile demands for tubing in March 1952 and thereafter, does not operate to take the case out of the operation of the statute.

[5] The statute began to run in January 1948. Since it affirmatively appears that plaintiff did not make a demand within the period coincident with the running of the statute of limitations nor secure a writen acknowledgment or promise sufficient to take the case out of the operation of the statute, the cause of action pleaded in the first count is barred.

Count II

[6] Count II alleges substantially the same facts as count I and, in addition: In July 1950 plaintiff owned about 4,200 feet of tubing. About that time defendant *borrowed* the tubing and orally agreed that it would replace it with like tubing when needed by plaintiff. In September 1950 plaintiff needed tubing and requested defendant to replace the tubing *loaned* to it in July 1950. Defendant informed plaintiff it had no tubing in stock and that the tubing would be replaced as soon as it was available. On November 15, 1951 defendant delivered 4,200 feet of used tubing to plaintiff as replacement of the tubing loaned to it in July 1950. Plaintiff suffered damage by reason of the failure of defendant to replace the tubing in September 1950.

Plaintiff argues that the second count is for the conversion of personal property and that the 3-year statute of limitations, Code Civ.Proc. § 338, applies. The contention is untenable. The count pleads a cause of action for damages arising out of defendant's alleged breach of a loan for exchange. The agreement, as pleaded, was that in July 1950 defendant borrowed 4,200 feet of plaintiff's tubing and agreed to "replace said tubing * * * when needed by plaintiff." Section 1902 of the Civil Code provides:

> "A loan for exchange is a contract by which one delivers personal property to another, and the latter agrees to return to the lender a similar thing at a future time, without reward for its use."

Section 1904 of the Civil Code provides:

> "By loan or exchange the title to the thing lent is transferred to the borrower, and he must bear all its expenses, and is entitled to all its increase."

Title to the tubing therefore passed to defendant at the time it was borrowed and delivered. The second count does not state a cause of action for conversion.

One of the grounds of demurrer to the second count was that it is barred by the statute of limitations. The court correctly so held.

Count III

[7] This count alleges a cause of action for damages arising out of the failure of defendant to replace tubing loaned to it by defendant in February 1952. It is alleged that in March 1952 and thereafter plaintiff demanded the return of the tubing and that defendant failed and neglected to do so to plaintiff's damage. It is not contended that the cause of action pleaded is barred by the statute. The only argument made is that the third count is uncertain, ambiguous, and unintelligible.

As recited in the judgment it was the general demurrer, and not the special demurrer, to this count that was sustained. The third count pleads facts sufficient to state a cause of action for a breach of an alleged oral contract of February 1952. It alleges the contract, the breach, and damages. Barber v. Cazalis, 30 Cal. 92, 96; Banducci v. Sresovich, 52 Cal.App. 637, 199 P. 72. Our examination of the third count reveals no ground for a special demurrer.

Plaintiff also appeals from an order taxing costs on the ground that the allowance of an item representing the cost of taking his deposition was erroneous In view of the fact that the judgment must be reversed as to count III, the necessity for a deposition and the reasonableness of the expenditure therefor cannot be determined at this time. If plaintiff should prevail with respect to count III the court may determine that none or a part only of the deposition should be charged against him. The order taxing costs must therefore be reversed.

The judgment as to counts I and II is affirmed. The judgment as tó count III is reversed. The order taxing costs is reversed. Plaintiff will bear two-thirds and defendant one-third of the costs on appeal.

SHINN, P. J., and PARKER WOOD, J., concur.

Mary SOLOT and Joseph D. Solot, Plaintiffs and Appellants,

v.

Michel LINCH, Mrs. Beulah F. Linch, Mr. C. A. Linch, and Does I through V, inclusive, Defendants.

C. A. Linch, Respondent.

Civ. 20756.

District Court of Appeal, Second District, Division 3, California.

June 22, 1955.

Rehearing Denied July 21, 1955.
Hearing Granted Aug. 17, 1955.*

Action to recover for injuries received by plaintiffs in accident with nonresident defendant's automobile driven by another. The Superior Court, Los Angeles County, James G. Whyte, J., entered order vacating judgment by default previously rendered against defendant and plaintiffs appealed. The District Court of Appeal, Ashburn, J. pro tem., held that such action was not abuse of discretion.

Order affirmed.

1. Process 🔑58

Service made by plaintiffs upon statutory agent of outstate defendant was not in fact personal service. Vehicle Code, § 404(a–h).

2. Process 🔑64

Personal service consists of delivery by hand to defendant.

3. Statutes 🔑184

Evils to be remedied and objective sought to be obtained are outstanding guideposts to correct statutory interpretation.

4. Statutes 🔑184

Objective sought to be achieved by statute as well as evil to be prevented is of prime consideration in its interpretation.

5. Statutes 🔑184

Statute should not be extended by construction beyond purpose intended by legislature.

6. Automobiles 🔑235

Statute by which nonresident motorist is deemed to have agreed that any process served in the required manner should be of same legal force and validity as if served on him personally within state, merely lifts substituted service to dignity of personal service for jurisdictional purposes, and has no other purpose. Vehicle Code, § 404(a).

7. Judgment 🔑142

Statute authorizing person on whom summons in an action has not been personally served to answer to merits of original action within one year after rendition of any judgment in such action, extends to all persons who have not been personally served within state, and personal service in another state does not preclude its operation. West's Ann.Code Civ.Proc. § 473a.

8. Judgment 🔑142

Statute authorizing service on nonresident motorist by means of service upon director of motor vehicles as motorist's statutory agent, did not constitute "personal service" within meaning of statute allowing person on whom summons in any action had not been personally served to answer to merits of original action within one year from time of entry of judgment in such action. Vehicle Code, § 404; West's Ann. Code Civ.Proc. § 473a.

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* Opinion vacated 292 P.2d 887.

9. Judgment ⚷142

Under statute allowing person on whom summons has not been personally served to answer to merits of original action within one year after rendition of any judgment in such action, proof that there was not personal service, coupled with showing of merits, makes prima facie case for relief. West's Ann.Code Civ.Proc. § 473a.

10. Judgment ⚷142

Knowledge of suit and neglect to act are not enough to defeat application by nonresident defendant not personally served, to file answer within one year after entry of judgment in such action, and there must be further element of laches or estoppel.

11. Judgment ⚷142

In action to recover for injuries received by plaintiffs in accident with nonresident defendant's automobile driven by another, record failed to disclose any injury to plaintiffs flowing from defendants' inaction in failing to defend suit, and failed to afford any basis for estopping defendant from subsequently asserting right to answer on merits within one year pursuant to statute. West's Ann.Code Civ.Proc. § 473a.

12. Judgment ⚷142

It is proper in acting upon motion under statute authorizing answer by defendant not personally served within one year after rendition of any judgment in such action, to exercise that discretion in favor of trial upon merits.

13. Judgment ⚷142

In action to recover for injuries received by plaintiffs in accident with nonresident defendant's automobile driven by another, action of trial court in vacating judgment by default previously rendered against defendant on statutory ground allowing defendant who had not been personally served to answer to merits within one year after rendition of judgment, was not abuse of discretion. West's Ann.Code Civ.Proc. § 473a.

John N. Frolich, William Levin, Los Angeles, for appellants.

Spray, Gould & Bowers, Los Angeles, for respondent.

ASHBURN, Justice pro tem.

Plaintiffs appeal from an order, made pursuant to section 473a Code of Civil Procedure, vacating default of defendant C. A. Linch and also judgment by default rendered against him. The action is one for recovery of damages for personal injuries received in an automobile accident occurring upon a highway within the State of California. Defendant C. A. Linch[1] was sued as the owner of an automobile which was being driven with his permission at the time of the accident. He was and is a nonresident and was served with summons and complaint pursuant to section 404, Vehicle Code. This occurred in May, 1953, default judgment was entered on April 7, 1954 and said defendant served a motion to vacate on May 17, 1954. This was more than six months after entry of default (which was on November 5, 1953), but well within the year prescribed by section 473a, which period begins to run upon entry of judgment. One of the grounds of the motion was that Linch had not been personally served and hence was entitled to relief under 473a. Plaintiffs opposed upon the ground, among others, that service under section 404, Vehicle Code constitutes personal service and hence 473a is inapplicable.

Said section 404 consists of subsections (a) to (h) inclusive. We quote (a) and (b): "(a) [*Service on Director of Motor Vehicles.*] The acceptance by a nonresident of the rights and privileges conferred upon him by this code or any use of the highways of this State as evidenced by the operation by himself or agent of a motor vehicle upon the highways of this State or in the event such nonresident is the owner of a motor vehicle then by the operation of such vehicle upon the highways of this State by any person with his express or implied permission, is equivalent to an appointment by such nonresident of the director or his successor in office to be his true and lawful attorney upon whom may be served all lawful processes in any action or proceeding against said nonresident operator or nonresident owner growing out of any accident or collision resulting from the operation of any motor vehicle upon the highways of this State by himself or agent.

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[1] There are other defendants but the appeal concerns only the defendant C. A. Linch.

"(b) [*Same: Force and validity.*] The acceptance of such rights and privileges or use of said highways shall be a signification of the agreement of said nonresident that any such process against him which is served in the manner herein provided shall be of the same legal force and validity as if served on said nonresident personally in this State." Subsection (c) provides for handing a copy of the summons and complaint and a fee of two dollars to the Director of Motor Vehicles or someone in his office and declares that to be sufficient service subject to compliance with subdivision (d); it (d) requires plaintiff or his attorney to send by registered mail a notice of such service and copy of summons and complaint to defendant or to make personal service upon defendant wherever found outside the state, which personal service "shall be the equivalent of said mailing"; (e) requires proof of mailing to be made by affidavit which must include a return receipt "bearing the signature of said defendant"; it also prescribes method of proof of personal service if had outside the state; (f) says "The court * * * may order such continuances as may be necessary to afford the defendant reasonable opportunity to defend the action"; (g) requires the director to keep a record of all process so served on him; and (h) defines a nonresident as one who is not residing in this state at the time the accident or collision occurs.

Section 473a Code of Civil Procedure is as follows: "[Answer of defendant not served.] When from any cause the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representatives, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action."

On this appeal counsel for respondent raise no question of constitutionality of the statute and expressly concede that service was made upon said Linch in the manner required by section 404; that he received the documents in the mail; and that the service was a valid one. Appellants' counsel acquiesces in these statements. And both sides devote themselves primarily to discussion of the question whether this service was or was not personal service within the meaning of section 473a. Appellants rely heavily upon the phrase in 404(b) that such service "shall be of the same legal force and validity as if served on said nonresident personally in this State", arguing that this classifies the service as personal and hence renders 473a inapplicable. Respondents' counsel stress the phrase of 473a which says "When from any cause the summons in an action has not been personally served on the defendant * * *." The question of the effect of these two statutes in relation to each other is a new one in this state. Counsel have not cited, nor have we found, any cases directly in point.

[1, 2] Counsel argue as to whether the service made in this case upon a statutory agent of defendant was in fact personal service. That it was not seems clear. For personal service consists of delivery by hand to defendant, Holiness Church of San Jose v. Metropolitan Church Ass'n, 12 Cal. App. 445, 448, 107 P. 633; Hunstock v. Estate Development Corp., 22 Cal.2d 205, 210–211, 138 P.2d 1, 148 A.L.R. 968; 21 Cal.Jur. § 17, p. 492, or its equivalent in case of his refusal to accept the document. Trujillo v. Trujillo, 71 Cal.App.2d 257, 162 P.2d 640; In re Ball, 2 Cal.App.2d 578, 38 P.2d 411; 72 C.J.S., Process, § 34 c, p. 1043. This court in Weisfeld v. Superior Court, 110 Cal.App.2d 148, 151, 242 P.2d 29, 31, said "Section 404 of the Vehicle Code prescribes a form of constructive service." Briggs v. Superior Court, 81 Cal.App.2d 240, 246, 183 P.2d 758, speaks of it as "substituted service." The Supreme Court, in Allen v. Superior Court, 41 Cal.2d 306, 311, 259 P.2d 905, 908, describes it as "substituted or constructive service"

and like characterization is found in Berger v. Superior Court, 79 Cal.App.2d 425, 428, 179 P.2d 600. This service not being such as is properly classified as personal the next question is whether the legislature intended by the language of section 404 to attach that quality to it for all purposes or indeed for any purpose other than that of fastening upon defendant jurisdiction sufficient to support a personal judgment. As above indicated the absence of precedent requires an independent evaluation of the purpose of the statute.

[3–5] The evils to be remedied and the objective sought to be obtained are outstanding guideposts to correct statutory interpretation. Buckner v. Vetterick, 124 Cal.App.2d 417, 418, 269 P.2d 67; 23 Cal. Jur. §§ 137–138, pp. 763–65. "It is fundamental that the objective sought to be achieved by a statute as well as the evil to be prevented is of prime consideration in its interpretation." Rock Creek Water Dist. v. County of Calaveras, 29 Cal.2d 7, 9, 172 P.2d 863, 865. This language is quoted in Richfield Oil Corp. v. Crawford, 39 Cal.2d 729, 738, 249 P.2d 600 and Wotton v. Bush, 41 Cal.2d 460, 467, 261 P.2d 256. "It is also a general rule that a statute should not be extended by construction beyond the purpose intended by the legislature." 50 Am. Jur. § 303, p. 289.

The background of such legislation, the evil to be corrected, is thus stated by Professor Austin W. Scott in 64 Harvard Law Review, page 98: "When automobiles began to spread over the United States in the early days of this century, and people from other states came into a state and negligently caused damage to the person or property of its citizens and then left the state, the citizens became annoyed. Of course an action could be brought against the nonresident motorist in his own state, or in another state in which he could be found and served with process, since the action was a transitory action. But this was not very satisfactory." And the purpose of our own statute is stated in Briggs v. Superior Court, supra, 81 Cal.App.2d 240, 245, 183 P.2d 758, 762, as follows: "It is to provide a method whereby persons from other states, who while temporarily within the state of California, become involved in litigation as the result of their use of a motor vehicle on the highways of the state, may be sued in this state, and, although they have left the state, may be served with process by substituted service." McDonald v. Superior Court, 43 Cal.2d 621, 623, 275 P.2d 464, 465, says: "The obvious purpose of section 404 is to make amenable to suits in the courts of this state those nonresidents who may incur liability in the operation of motor vehicles upon the highways of this state." Allen v. Superior Court, supra, 41 Cal.2d 306, 259 P.2d 905 deals with the validity of section 417, Code of Civil Procedure, relating to personal judgment against a resident who has left the state and thereafter been served by publication and personal delivery of process where found in another jurisdiction. In sustaining this legislation the court adverted to section 404, Vehicle Code, saying 41 Cal.2d at page 311, 259 P.2d at page 908: "The increasingly artificial nature of state boundaries, the expanding of metropolitan areas into two or more states, and the multiplying transportation facilities, especially through the widespread use of automobiles and trucks affecting the mobility of population, all bear significantly on the problem of process. The necessities of the situation are recognized in the nonresident motorist statutes, e. g., Vehicle Code, § 404, permitting an injured person to obtain effective redress against transient motorists. Jurisdiction in such cases is predicated upon the theory of consent of the nonresident to substituted or constructive service and the appointment of the secretary of state or like officer as agent for receipt of service of process. [Citing cases.] This consent is largely fictional but it meets the problem of process in regard to highway automobile accidents involving nonresident motorists, see Annotations, 35 A.L.R. 951; 57 A.L.R. 1239; 99 A.L.R. 130; also 23 Ill.L.Rev. 427, 436. However, these statutes, in order to be valid, must provide some method of service reasonably designed to give notice of the action to the defendant. [Citing cases.]" And the Supreme Court of the United States, in upholding validity of a Massachusetts statute which is substantially the same as our section 404, said in Hess v. Pawloski, 274 U.S. 352, 356, 47 S.Ct. 632, 633, 71 L.Ed. 1091, 1094: "The measure in question operates to require a nonresident to answer for his conduct in the state where arise causes of action alleged against him, as well as to provide for a claimant a convenient method by which he may sue to enforce his rights. * * * It makes no hostile discrimination against nonresidents, but tends to put them on the same footing as residents."

All these explanations of the purpose of the statute speak in terms of jurisdiction,—jurisdiction over the person sufficient to sustain a personal judgment. And that appears to be the sole objective of section 404. It does not concern itself with procedure at all except such as is calculated to fasten effective jurisdiction upon the defendant. It does not even prescribe time to answer as does a somewhat similar statute, section 1018, Code of Civil Procedure. The objective of section 404 has been accomplished when defendant has been brought into court; all subsequent procedural matters are left to other statutes, primarily the Code of Civil Procedure, operating alike upon residents and nonresidents who have been brought into court. 61 C.J.S., Motor Vehicles, § 502, p. 153: "Such statutes primarily relate to jurisdiction, and have the effect of placing a nonresident motorist summoned thereunder on a parity with one actually summoned within the state."

[6] Section 404(a) constitutes the Director defendant's "true and lawful attorney upon whom may be served all lawful processes in any action or proceeding" growing out of an automobile accident, and for no other purpose. When subdivision (b) says that the nonresident motorist agrees that any process served in the required manner "shall be of the same legal force and validity *as if* served on said nonresident personally in this State" (emphasis supplied) it merely lifts substituted service to the dignity of personal service for jurisdictional purposes, and it has no other purpose. This same thought is carried into subdivision (d) which requires service by registered mail and adds: "Personal service of such notice and a copy of the summons and complaint upon said defendant wherever found outside this State shall be the *equivalent of said mailing*." (Emphasis added.) It is thereby shown to be a matter of indifference to the statutory purpose whether the process be received by mail or by personal delivery in another state. Either procedure fastens personal jurisdiction upon the defendant—no more and no less—predicated upon the "largely fictional" consent of the nonresident defendant that the Director shall be his agent for such purpose.

In Holiness Church of San Jose v. Metropolitan Church Ass'n, supra, 12 Cal.App. 445, 448, 107 P. 633, 634, the court held that delivery of process to the Secretary of State was not personal service upon a foreign corporation under section 405 of the Civil Code as it then stood; that section said that "the service is a valid service on such corporation." Stats.1907, p. 558. The court added this: "If the Legislature had intended that the delivery of process to the Secretary of State should be regarded as tantamount to personal service upon the corporation as distinguished from constructive service, doubtless it would have expressly so declared, as is done, we believe, in some states, and as is the case in this state in reference to foreign fire insurance companies doing business here. Section 616, Pol.Code." This the legislature did in section 3302, Corporations Code, which relates to domestic corporations and provides for service of process, under court order, upon the Secretary of State when no agent has been designated for service of process, or, if designated, cannot be found. That section concludes with this sentence: "Service in this manner constitutes personal service upon the corporation."

[7] Section 473a, Code of Civil Procedure, extends to all persons who have not been personally served within the State of California; personal service in another state does not preclude its operation. Tucker v. Tucker, 59 Cal.App.2d 557, 559, 139 P.2d 348. And the statute, by its own terms, becomes applicable whenever "from any cause the summons in an action has not been personally served on the defendant"

The case of Scorza v. Deatherage, 8 Cir., 208 F.2d 660, cited and quoted by appellant's counsel, contains some language which supports his position, but it involves the statute of limitation and not one resembling our section 473a. It was an action for wrongful death arising under the laws of Missouri. Service was made upon a nonresident defendant under a statute like our Vehicle Code, section 404, providing, as does ours, that process so served "shall be of the same legal force and validity as if personally served on him in this state." V.A.M.S. § 506.210. The applicable statute of limitation, V.A.M.S. § 537.100, was one year subject to a proviso that in case of absence of defendant from the state at or after the time of death, "so that personal service cannot be had upon such defendant in the state" the period of such absence should not be counted in computing the statutory period. It was argued that, though the statute authorized personal judgment, the service was not personal service within the meaning of the death statute. The court rejected this contention, saying at page 662 that the State Supreme Court had held that service on an agent authorized to accept service constitutes personal service upon the principal. And at page 663: "We conclude that plaintiffs could at all times subsequent to the accrual of their cause of action have secured personal service of process on the defendants by serving such process upon the Secretary of State of Missouri, and hence, the statute of limitations embodied in the death statute was not tolled." The same holding as to the relation between the nonresident motorist statute and the statute of limitation was made in Busby v. Shafer, S.D., 66 N.W.2d 910, 911. Within their own limited sphere there may be no good reason to differ with these ultimate holdings. But they do not apply here, for our question is entirely different. No process of rationalization can obscure the fact that respondent at bar was not personally served in California or elsewhere; he received the summons by mail.

Midvale Paper Board Co. v. Cup Craft Paper Corporation, 173 Misc. 786, 19 N.Y.S. 2d 135, 137, does say that "Service upon the Secretary of State is not an alternative method of substituted service. It is a method of personal service upon an agent of the corporation appointed by law." But this language referred to a statute which is on a parity with our Corporations Code, section 3302, quoted supra. This appears from the following passage in 19 N.Y.S.2d at page 136. "Section 228 of the Civil Practice Act, providing for '*personal* service of the summons upon a domestic corporation' * * *, in subdivision 4 * * authorizes such service by delivery of the summons 'to the secretary of state when he shall have become the agent of the corporation for the service of process as provided in the stock corporation law.'" This case throws no light upon our immediate problem.

Roper v. Brooks, 201 La. 135, 9 So.2d 485, holds that the appointment of the Secretary of State as agent for service of process under the terms of a statute like our section 404 is not the equivalent of a voluntary appointment within the meaning of a statute denying the right of attachment against a nonresident who has an agent within the state authorized to accept service of process.

In any other type of action a defendant who has been served personally outside the state, or by publication, has a year within which to appear. Tucker v. Tucker, supra, 59 Cal.App.2d 557, 139 P.2d 348. To hold that defendant at bar had only the period prescribed for personal service (30 days at most) and that he must seek relief from default within 6 months and upon different grounds from those applicable to other actions would constitute a discrimination against the nonresident motorist. That would be contrary to the spirit of section 404 and no ground is apparent for imputing such an intention to the legislature.

[8] We hold that service of process pursuant to section 404, Vehicle Code, is not personal service within the purview of section 473a, Code of Civil Procedure.

[9] Defendant-respondent moved for relief from his default within the time prescribed by 473a, tendered an answer to the complaint, and claims to have been entitled as matter of right to relief from the default.

Unlike section 473 no showing of mistake, inadvertence, surprise or excusable neglect is necessary to a motion under 473a. Gray v. Lawlor, 151 Cal. 352, 354, 90 P. 691. And proof that there was no personal service, coupled with a showing of merits, makes a prima facie case for relief. Boland v. All Persons, etc., 160 Cal. 486, 490, 117 P. 547; Palmer v. Lantz, 215 Cal. 320, 324, 9 P.2d 821; Hiltbrand v. Hiltbrand, 218 Cal. 321, 323, 23 P.2d 277; Thompson v. Sutton, 50 Cal.App.2d 272, 276, 122 P.2d 975. "But his opponent may show, in opposition to the application, that the applicant had actual notice of the action in time to have entered an appearance and present the defense, and that the failure to do so was owing to his neglect or to his consent to the judgment. In that event a case arises for the exercise of the discretion of the court, and it must determine whether or not the laches is of a character that should preclude the relief." Hiltbrand v. Hiltbrand, supra, 218 Cal. 321, 323, 23 P.2d 277, 278. Appellants assumed this burden but the court ruled against them and the question of whether there was an abuse of discretion must now be examined.

The pertinent facts viewed most favorably to respondent are these. Summons and complaint were served on the Director of Motor Vehicles on May 7, 1953. On May 25, 1953 summons and complaint and a notice prescribed by section 404 were sent by plaintiffs' attorney via registered mail to defendant;[2] same were received by defendant in Nebraska on May 28, 1953; he signed the return receipt for same; and forwarded the summons and complaint to State Farm Insurance Company, his insurer, in Los Angeles; it in turn transmitted the papers to its attorneys, the firm representing respondents on this appeal. Mr. Robert Bernard, adjuster for the insurance company, had previously conducted some limited negotiations for settlement with plaintiffs' attorneys; Mrs. Solot had submitted to a physical examination by a physician designated by the insurance company, also an electroencephalogram. About May 25, 1953, the same day as the mailing to defendant, plaintiffs' attorney furnished Mr. Bernard with a copy of summons and complaint and he forwarded same promptly to the company's attorneys. The copies arrived not later than June 3, 1953, on which date the calendar clerk had an understanding with plaintiffs' attorney that defendant should have until June 22 to plead. This case was assigned to Mr. Philip L. Bradish of the law firm, Spray, Gould & Bowers. He received the papers not later than June 8. On that day he telephoned Mr. Frolich, plaintiffs' attorney, and inquired as to manner of service upon Mr. Linch. In the face of a conflict in the affidavits the trial judge is presumed to have found that Mr. Frolich said that "* * * the Secretary of State of the State of California had been served with a copy of the Summons and Complaint in compliance with Section 404 of the California Vehicle Code" and notice and copies mailed to Linch. The affidavit of Mr. Bradish says that "he relied upon the information furnished to him in his telephone conversation with attorney John N. Frolich on the 8th day of June, 1953. * * *" But this statement must be recognized as a mere conclusion, for Mr. Bradish on that same day telegraphed the Secretary of State inquiring whether service had been made on him; on the 9th he received an answer in the negative; then he requested and received from the Secretary an affidavit to that effect. On the 11th of June, 1953 (3 days after the telephone conversation) Mr. Bradish wrote Mr. Frolich, referring to the fact that no service had been made upon the Secretary of State as previously stated by Frolich, and then proceeding as follows: "By reason of the fact that valid service under Section 404 of the California Vehicle Code has not been effected upon defendant C. A. Linch or Beulah F. Linch in this matter, we are refusing at this time to file any Answer on behalf of either of these defendants or to put in any appearance whatsoever on their behalf. *If in the future you are able to effect valid service on any of these defendants we shall be very happy to discuss the*

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[2] There is a dispute in the affidavits about this matter of notice but respondents' brief concedes the point.

matter with you and file an Answer on behalf of those who have been validly served." The reference to section 404 should be noted. It does not authorize service on the Secretary of State and the writer had it in mind; he either knew its requirement or could have ascertained same by opening the code before asserting "that valid service under Section 404 of the California Vehicle Code has not been effected upon defendant." When he said "we are refusing at this time to * * * put in any appearance whatsoever on their behalf" he threw down the gage of a jurisdictional battle and released Mr. Frolich from any moral, ethical or courtesy obligation to advise him of any steps he might take looking to a default. There is no suggestion in the affidavits that defendants' attorney ever inquired of Mr. Frolich or otherwise attempted to ascertain whether service upon the Director of Motor Vehicles had been made or attempted. After June 11, 1953 there were never any further communications between the two attorneys until service of the motion to vacate on May 17, 1954. Meantime plaintiffs' attorney had requested entry of default on September 4, 1953, and an order entering default was made on November 5, 1953.[3] Five months later proof was made and a judgment of default rendered in favor of Mary Solot for $7,500 and for Joseph Solot in the sum of $2,807.06. On May 5, 1954, Mr. Frolich sent to Mr. Linch by air mail a notice of entry of said judgment and on the next day Mr. Bradish caused a search of the court records to be made and found the said default judgment. On May 17, 1954, notice of motion to vacate default and judgment was given. An amended and supplemental notice was served on May 25, invoking relief under section 473a as well as 473, Code of Civil Procedure. Same was granted on June 4, 1954, upon condition that defendant pay plaintiff $100 to cover cost of expert testimony at the default hearing and to Mr. Frolich an attorney fee of $150. These sums were tendered and refused. Then came the appeal.

[10, 11] If the order had to rest upon section 473, the motion probably would have been denied as one based upon an inexcusable ignorance of the law, see Security Truck Line v. City of Monterey, 117 Cal. App.2d 441, 445–446, 256 P.2d 366, 257 P.2d 755; Witkin California Procedure, § 50, p. 2102 or a deliberate gamble upon the sufficiency of the service of process. But the question now presented is different from one arising under 473. And "* * * in the case of one served by publication the defendant has an advantage in his attempt to vacate a judgment by default, whereas under section 473 the burden is strictly upon the defendant to show that he has suffered mistake, surprise, inadvertence or excusable neglect." Gardner v. Gardner, 72 Cal.App. 2d 270, 272, 164 P.2d 500, 501. The moving party makes a prima facie showing of a right to relief by establishing the fact of no personal service and tendering an answer raising issues upon the merits. The rule is stated as one of inflexibility in Holiness Church of San Jose v. Metropolitan Church Ass'n, supra, 12 Cal.App. 445, 447, 107 P. 633, 644: "The motion here was made immediately after the entry of judgment, and if the service of the summons in the case may be regarded as constructive and not personal, then the appellant, without any showing of mistake, surprise, inadvertence, or excusable neglect, was entitled as a matter of absolute right to have the judgment vacated and set aside, and the court was without any discretion in the premises." Daniels v. Colkins, 201 Cal. 10, 11, 255 P. 182, states the rule in substantially the same way. Likewise Hoffman v. Superior Court, 151 Cal. 386, 393, 90 P. 939. But it is not so rigid. Boland v. All Persons, etc., supra, 160 Cal. 486, 490, 117 P. 547, 548, uses this language: "In applications for relief under this clause of the section there is no presumption of neglect, as in cases where

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[3] The court apparently considered the service to be constructive, not personal, and the equivalent of service by publication, to which subdivision 3 of section 585, Code of Civil Procedure applies. See also section 187, Code of Civil Procedure, and Winston v. Idaho Hardwood Co., 23 Cal.App. 211, 214, 137 P. 601. We do not consider appellants' argument based on section 585, subdivision 2, Code of Civil Procedure, to be sound.

there has been personal service. The party is not required, in the first instance, to do more than show that he has not been personally served and that he has a good defense to the action on the merits which he could have presented had he been informed of its pendency. Gray v. Lawlor, 151 Cal. 354, 90 P. 691. But his opponent may show in opposition to the application that the applicant had actual notice of the action in time to have entered an appearance and present the defense, and that the failure to do so was owing to his neglect or to his consent to the judgment. In that event a case arises for the exercise of the discretion of the court, and it must determine whether or not the laches is of a character that should preclude the relief." The words neglect and laches are here used as equivalents. In other cases the word estoppel is employed. E. g. Gardner v. Gardner, supra, 72 Cal.App.2d 270, 274, 164 P.2d 500; Gray v. Lawlor, supra, 151 Cal. at page 357, 90 P. 691. In re Mercereau, 126 Cal.App. 590, at page 601, 14 P.2d 1019, at page 1024, says: "The exercise by the court of its discretion involves a determination of whether the defendant's neglect makes it inequitable to grant the relief." Clearly knowledge of suit and neglect to act are not enough to defeat the application for relief. There must be the further element of laches or estoppel. And the exact meaning of those words as used in this connection appears from this quotation: "If there was any neglect on his part *to the injury of the opposite party,* which would make it inequitable to grant him the relief, proof of such neglect and of the circumstances causing injury must come from the plaintiff." Gray v. Lawlor, supra, 151 Cal. 352, at page 355, 90 P. 691. (Emphasis added.) The record does not disclose any injury to plaintiffs flowing from defendants' inaction in the instant case and hence affords no basis for an estoppel.

[12, 13] Defendant made a showing which called upon the trial judge to exercise discretion. True it had to be "a legal discretion, not an arbitrary one". Riskin v. Towers, 24 Cal.2d 274, 279, 148 P.2d 611, 614, 153 A.L.R. 442. But it is proper in acting upon a motion under 473a, as well as one under 473, to exercise that discretion in favor of a trial upon the merits. Thompson v. Sutton, 50 Cal.App.2d 272, 276, 122 P.2d 975. We hold that there was no abuse of discretion in this case.

Order affirmed.

SHINN, P. J., and VALLÉE, J., concur.

133 Cal.App.2d 683

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Donald Bryce LAWRENCE, Defendant and Appellant.

Cr. 3045.

District Court of Appeal, First District, Division 2, California.

June 20, 1955.

Hearing Denied by Supreme Court July 20, 1955.

Rehearing Denied by Supreme Court Aug. 11, 1955.

Prosecution upon two counts of second degree burglary with four prior burglary convictions. Defendant pleaded guilty to the four prior convictions. He was found guilty by a jury on one burglary count, in Superior Court, County of Monterey, Anthony Brazil, J., and appealed. The District Court of Appeal, Nourse, P. J., held that where there was no testimony of an unsuccessful burglary attempt and where defendant testified he had seen another commit the burglary, evidence did not warrant an instruction as to the "included" crime of attempt to commit burglary.

Affirmed.

1. Criminal Law ⚷814(20)

In prosecution for burglary, wherein there was no testimony of unsuccessful burglary attempt and wherein defendant testified he had seen another commit the burglary, evidence did not warrant instruction as to "included" crime of attempt to commit burglary.

2. Criminal Law ⚷771

In prosecution for burglary, wherein testimony showed unlawful breaking by smashing glass window of jewelry store and unlawful entry by reaching through broken window and taking watches stored therein, instruction on element of "corpus delicti," which expression means only "the body of the crime", was unnecessary.

See publication Words and Phrases, for other judicial constructions and definitions of "Corpus Delicti".

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Leslie G. MacGowan, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

Defendant was charged in two counts of second degree burglary; also with four prior convictions of burglary. He pleaded guilty to the four prior convictions. He was tried to a jury on the information. He was found guilty of the charge in count one, and not guilty under the second count. He appealed from the judgment alone and filed a lengthy brief in propria persona. Upon our preliminary examination of this paper the court found that he had completely failed to cover the issues involved and his present counsel was assigned to appear for him. Said counsel has made a very creditable effort in appellant's behalf on a case which is wholly without merit.

The facts are simple and bear no aspect of insufficiency to support the judgment. At about 3:30 A.M. a witness heard a crash of breaking glass coming from a nearby jewelry store. He found that the front window of the jewelry store had been broken by a brick. He called the police, and an officer close by saw defendant running down the street in a semi-crouched position indicating that he was carrying something in his arms. Defendant was seen kneeling at the base of a tree after which he continued running with his arms free yelling "stop thief" in an effort to create the impression that he was chasing the real thief. No one else was seen on the street at the time. Later an officer discovered a package containing the stolen jewelry at the base of the tree where defendant had been seen kneeling. Defendant was taken back to the jewelry store and, on examination, several pieces of glass were found attached to his clothing. These were analyzed as coming from the broken window. His defense was that he was drunk at the time and that some other person had committed the burglary.

[1] The chief argument made for appellant is the failure of the trial court to instruct the jury as to the "included" crime of attempt to commit burglary. He cites People v. Davis, 24 Cal.App.2d 408, 75 P.2d 80, and People v. Carmen, 36 Cal.2d 768, 228 P.2d 281, among others. No one of the cases is applicable here. More pertinent is our recent decision in People v. Brown, 131 Cal.App.2d 643, 281 P.2d 319, a case where the two defendants were convicted of a conspiracy to murder Brown's wife. We held that it was not error for the trial court to refuse to instruct the jury that it might convict Brown of the crime of an accessory after the fact. We held that all the evidence showed a conspiracy to commit the murder and that no evidence was offered tending to prove the offense of an accessory after the fact. We held there that People v. Carmen, supra, was not applicable but that the case was controlled by People v. Sanchez, 30 Cal.2d 560, 567, 184 P.2d 673, where the Supreme Court held that it was not error to refuse to instruct the jury on an issue which was contrary to defendant's testimony. Here the testimony of the defendant was that he witnessed another commit the burglary. There was no testimony of any witness that defendant had merely made an unsuccessful attempt. He got away with the jewelry.

[2] Appellant next contends that the trial court erred in failing to instruct the jury on the element of corpus delicti. This is a favorite subject among those judges and attorneys who seek to show their erudition by the use of a few words in a foreign language. The expression means nothing more than "the body of the crime" which in plain English when re-

lated to a charge of burglary, means an unlawful breaking and entering. The case here shows that the defendant made an unlawful "breaking" when he smashed the glass window of the jewelry store, and an unlawful "entry" when he reached through the broken window and took away the watches stored therein. Other points do not require discussion.

We find no error in the record.

Judgment affirmed.

DOOLING and KAUFMAN, JJ., concur.

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133 Cal.App.2d 756

Clarence J. WILSON, Plaintiff and Appellant,

v.

LOS ANGELES TRONA STAGES, Inc., and Edward Luck, Defendants and Respondents.

Civ. 20507.

District Court of Appeal, Second District, Division 3, California.

June 22, 1955.

Action against bus company and driver for injury to paying passenger in head-on collision with automobile at night. The Superior Court, Los Angeles County, McIntyre Faries, J., entered judgment on a verdict for defendants, and plaintiff appealed. The District Court of Appeal, Parker Wood, J., held that in view of the evidence, instructing jury as to right of bus driver to assume and act on assumption that other drivers would obey the law, without including qualification as to nonexistence of such right when it is apparent or in exercise of utmost care should be apparent, that another driver is not obeying the law, constituted prejudicial error.

Judgment reversed.

1. Carriers 🔑280(1)

Company, which operated bus as common carrier of passengers, and driver of bus owed paying passenger the duty of exercising the utmost care.

2. Carriers 🔑316(4)

In action against company, which operated bus as common carrier of passengers, and bus driver for injuries sustained by paying passenger in head-on collision at night with automobile, res ipsa loquitur doctrine was applicable to raise an inference of negligence of defendants.

3. Automobiles 🔑146

Driver of bus operated as common carrier of passengers was not entitled to rely on assumption that drivers of other vehicles would obey the law and would not in violation thereof interfere with operation of bus, if it was apparent, or in exercise of utmost care, should have been apparent to bus driver that another driver was not obeying the law.

4. Appeal and Error 🔑1064(1)
Carriers 🔑321(12)

In action against bus company and driver for injuries to paying passenger in head-on collision with automobile at night on straight, level road, instructing jury as to right of bus driver to assume and act on assumption that other drivers would obey the law, without including qualification as to nonexistence of such right when it is apparent, or in exercise of utmost care should be apparent, that another driver is not obeying the law, constituted prejudicial error, in view of evidence that automobile had been traveling on wrong side of highway for approximately one and one-half miles and that bus lights were on low beam which would disclose an object for a distance of only ten feet. Vehicle Code, § 648(d).

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Zeman, Hertzberg & Schekman and Samuel Schekman, Los Angeles, for appellant.

Harry E. Sackett, Belcher, Kearney & Fargo and Louis E. Kearney, Los Angeles, for respondents.

PARKER WOOD, Justice.

Action for damages for personal injuries sustained by plaintiff who was a paying passenger on a bus of the corporate defendant which was a common carrier of passengers. Defendant Luck was the driver of the bus. In a trial by jury, judgment was for defendants. Plaintiff appeals from the judgment.

On the day of the accident, June 13, 1952, Luck drove the bus from Los Angeles to Trona, leaving Los Angeles about 8:30 a. m. and arriving in Trona about 3:30 p. m. About 5:45 p. m. of that day he left Trona, driving the bus on the return trip to Los Angeles. About 6 p. m., the plaintiff entered the bus at West End, California. About 10:15 p. m., when the bus was about two miles west of Upland, there was a head-on collision between the bus and an automobile (which automobile was on the wrong side of the highway), and as a result thereof plaintiff was injured.

The highway at and approaching the scene of the collision extended east and west, was approximately level, and consisted of four marked traffic lanes—two lanes for westbound traffic (north side of highway) and two lanes for eastbound traffic (south side of highway). Between the westbound and eastbound lanes (that is, in the middle of the highway) there was a space about five feet wide and on each side of that space there were double white lines. In other words, in the middle of the highway there were two sets of double white lines and the sets were about five feet apart. (The distance of five feet is an estimate indicated by photographs of the highway which are exhibits herein.) The two westbound lanes were separated by a "broken" white line, and the two eastbound lanes were separated by such a line. Subject to the provisions of the basic speed law, Veh. Code, § 510, the prima facie speed limit in the vicinity of the accident was 55 miles an hour.

Plaintiff testified that he was sitting in the sixth seat (from the front), on the right side of the bus and next to the aisle; within a mile or two of the place where the accident occurred the bus was traveling about 70 miles an hour, next to the center of the highway; as the bus was approaching the place that was later known as the place of the accident, he saw a couple of lights ahead of the bus, saw an eastbound car coming and its lights were blinking; the impact threw him against the seat; his shoulder was injured; he did not feel any application of the brakes of the bus; he did not hear the sound of a horn.

Mr. Clark, called by plaintiff, testified that he was a passenger on the bus, sitting on the right front seat next to the aisle; the driver of the bus was on the left side of the bus and a little in front of him (witness); after the bus left Upland and when it was within 500 to 1,000 feet of the place of the accident it was traveling 60 to 65 miles an hour in the lane next to the shoulder of the highway; shortly before the impact and while his head was reclining on the back of the seat, he heard a man, in the seat next to him, yell; he (witness) raised up and saw that the driver was standing crouched behind the steering wheel, turning the wheel to the left; he (witness) saw, through the windshield, the lights of an oncoming car (coming east) and the lights were blinking—they blinked once or twice; he could not tell which lane the lights were in—they were seven or eight feet to the left of the bus; the bus turned to its left; the accident happened two or three seconds after he raised up; he did not feel any slackening of the speed of the bus before the accident; he saw lights of other vehicles proceeding east on the south side of the highway; he has an action pending against defendants.

Defendant Luck testified that after he left Upland he was driving west in the right-hand lane next to the north shoulder; the bus was fairly new and was equipped with air brakes which were in good condition; as he approached the place of the accident he was traveling at a steady rate of not more than 50 miles an hour; he did not increase or decrease the speed before the accident; up to within a second of the point of impact he did not see the automobile with which the bus collided; the automobile was going east; he did not remember whether the lights of the automobile were on; he could not make an estimate of the distance between the bus and the automobile when he first saw the automobile; he did not see the automobile until it was within a distance that could be traveled within a snap of the fingers; he could not estimate the speed of the automobile; after he saw the automobile it continued straight east, and he continued straight west but he tried to turn to the left; the front end of the automobile and the front end of the bus collided; at the time of the collision the bus was on the white line which divides the two westbound lanes; he did not see the automobile cross the double white line; he did not apply the brakes of the bus; after the collision the automobile stopped "right there," and the bus went 40 feet to its left (southwest) across the highway to the south shoulder of the highway; he did not sound the horn; his lights were on low beam and would disclose "an object" for a distance of 10 feet; on high beam the lights would disclose an object for a distance of 300 feet; the lights of the bus had been on about four hours and were in normal working order; immediately before the accident he did not stand up—he remained seated.

Mr. Stage, called by defendants, testified that he was driving a pickup truck east on the south side of said highway and he saw the accident; his wife was also in the front seat of the truck; when he was about two miles west of the place where the accident occurred he was in the lane next to the center or double line, and at that time a Buick automobile pulled out from a restaurant south of the highway, crossed the highway at a place about 200 feet in front of his (witness') truck, crossed the double line and proceeded east on the wrong side of the highway; he continued to observe the Buick until the accident occurred; he (witness) continued to drive for a minute and a half or two minutes, or for a distance of approximately one and one-half miles, in the lane next to the double line, and then he went into the outside lane next to the south shoulder; during that time the Buick continued east on the north side (wrong side) of the highway just north of the double lines; also during that time the Buick and truck were traveling about 50 miles an hour, and the Buick was about 20 feet ahead of the truck; after the witness (in his truck) was in the outside lane he increased his speed to 60 or 65 miles an hour in order to pass the Buick; after speeding up he traveled about 300 feet before he passed the Buick; while he was passing the Buick he saw the lights of an approaching vehicle, which vehicle was on the north side of the highway and was later in collision with the Buick; the lights were about one mile away when he first saw them; when the bus was in a position where he could estimate its speed, it was traveling about 50 to 55 miles an hour; when the collision occurred he (witness) was approximately 15 to 20 feet past the Buick, and he stopped his truck 75 to 100 feet beyond the place of the accident; the bus, immediately before the point of the accident, was astraddle the single white line on the north side and the Buick appeared to be angling toward the north—had turned to its left or north of the single white line; prior to the accident, when the bus came into view, the witness dimmed the lights of his truck; the lights of the bus blinked; the blinking occurred about five seconds before the impact; he did not remember which lights blinked first; he did not recall whether lights were on the Buick when it went across in front of him, and he could not say whether there was a taillight on the Buick when it was on the wrong side of the highway; there was no traffic on the highway, except his truck, the Buick and the bus.

It was stipulated that Mrs. Stage would testify in substance the same as Mr. Stage testified. She testified further that it was a clear night; and she could see the Buick at all times while it was on the wrong side of the highway.

The driver of the Buick was killed in the collision. It was stipulated that a director of a certain laboratory would testify that he made a chemical analysis of the blood of the driver of the Buick shortly after the accident; the analysis was 0.20 per cent ethyl alcohol in the blood; according to accepted medical standards the presence of 0.15 per cent alcohol in the blood indicates intoxication; the tests vary with different individuals, and because the driver died it could not be said whether 0.20 per cent alcohol in his blood would produce intoxication.

Appellant contends that the court erred prejudicially in giving certain instructions.

[1-4] One of the instructions, so referred to and given at the request of defendants, was: "The driver of the bus in question, if exercising the care required of him under the law, had a right to assume and act upon the assumption that the drivers of other vehicles upon the highway would obey the law and would not in violation thereof interfere with the operation of the bus. Therefore, under such circumstances, it was not negligence on the part of the driver of the bus to fail to anticipate that some other driver might violate the law, if you should find such to have been the case at the time and place of this accident." The defendants owed the plaintiff the duty of using the utmost care, and the jury was so instructed. The doctrine of res ipsa loquitur was applicable herein, and the jury was instructed that an inference of negligence on the part of defendant arose. An important question was whether the inference of negligence on the part of defendant was rebutted. Another important question was whether the bus driver, who was required to exercise the utmost care, should have seen the Buick before the instant of the head-on collision. Two witnesses, called by defendant, testified that, prior to the head-on collision, the Buick was on the wrong side of the highway for a distance of approximately one and one-half miles. Those witnesses did not notice, and the bus driver did not remember, whether there were lights on the Buick. The highway was approximately level for a long distance on each side of the place where the accident occurred. The night was clear. The two witnesses could see the lights of the bus a mile away. The bus driver testified that the bus lights were on low beam and that such lights would disclose an object for a distance of 10 feet. Section 648(d) of the Vehicle Code provides that lighting beams should reveal a person or vehicle for a distance of at least 100 feet ahead. The above-quoted instruction, regarding the bus driver having a right to assume that other drivers would obey the law, should have included a qualification or exception to the effect that a right to assume that drivers of other vehicles would obey the law does not exist when it is apparent, or in the exercise of utmost care it would be apparent, that another driver is not obeying the law. Under the circumstances of the present case where the bus driver was required to use utmost care, and where an inference of his negligence arose, and where the driver of the Buick was driving on the wrong side of the highway toward the bus for approximately two minutes before the collision, the preliminary condition stated in the above-quoted instruction, namely, "if exercising the care required of him [bus driver] under the law," was not an adequate qualification of an instruction to the effect that a driver may assume that other drivers will obey the law. A reference to the original file of the case (in the county clerk's office) shows that a notation at the bottom of the instruction is "See Form 138 - BAJI." That form includes the substance of the instruction as given herein, and it also includes, as a second part thereof, the following statement: "However, an exception should be noted: the rights just defined do not exist when it is reasonably apparent to one, or in the exercise of ordinary care would be apparent to him, that another is not going to perform his duty." It is to be noted that the principle of law referred to in the second part of that form (either as the principle pertains to the use of ordinary care or utmost care) was omitted from the instruction as proposed by defendants. In Edlund v. Los Angeles Ry. Co., 14 Cal.App.2d 673, at page 675, 58 P.2d 928, at page 929, wherein only ordinary care was required of the drivers, it was said: "One may not continue to assume that the law is being observed after knowing or having an opportunity, by the use of reasonable care, to know that it is not being observed." In Angier v. Bruck, 56 Cal.App.2d 55, at page 58, 131 P.2d 876, at page 878, wherein automobiles collided at an intersection, the jury was instructed at the request of plaintiff that if plaintiff " 'was at all times pertinent to this case driving plaintiff's automobile in a careful and prudent manner, and exercising that degree of care which is ordinarily

exercised by cautious persons, then he had a right to assume that the defendant, James Platt, would drive his automobile in a lawful manner and would exercise for his own safety, the care and caution which an ordinarily prudent person would exercise under the same or similar circumstances.'" It was held therein that the instruction was erroneous in that it did not include the qualification that one may not continue to assume that the law is being observed after knowing or having an opportunity, by the use of reasonable care, to know that it is not being observed. In reversing the judgment for plaintiff, it was said therein, 56 Cal.App.2d at page 60, 131 P.2d at page 879: "Plaintiff attempts to escape this result by pointing to the preliminary condition stated in the instruction, 'if Raymond Angier [plaintiff] was at all times pertinent to this case driving plaintiff's automobile in a careful and prudent manner * * * then he had a right to assume' etc. This apparently, and as the jury must have understood it, refers to acts done before the making of the assumption referred to. It cannot serve the purpose of a plain statement of the qualification of the rule, which relates to conduct of the driver after he has made the assumption referred to in the instruction. * * * The qualification which was omitted is an essential part of the rule attempted to be stated. Defendant was entitled to have it enunciated in clear and positive language." In the present case, respondents state that giving of the criticized instruction was upheld in Silva v. Pacific Greyhound Lines, 119 Cal.App.2d 284, 289, at page 290, 259 P.2d 743. It is to be noted that the instruction in that case did include the above-quoted qualification to the effect that the right to assume that other drivers will obey the law does not exist when it is apparent or should be apparent that another driver is not obeying the law. Under the circumstances of the present case it was prejudicial error not to include such a qualification or exception in the said instruction which was given at the request of defendants. Such a qualification or exception was not covered by other instructions.

By reason of the above conclusion, it is not necessary to discuss other questioned instructions.

Reference should be made to the manner in which the attorneys for appellant have prepared their opening brief. On page 6 thereof there is a misquotation in purporting to quote from the opinion in Huetter v. Andrews, 91 Cal.App.2d 142, 204 P.2d 655. Their brief states, in part: "Where 'there is a substantial conflict in the evidence * * *.'" The opinion states in part in 91 Cal.App.2d at page 145, 204 P.2d at page 658: "* * * when there is no substantial conflict in the evidence * * *." Also in their brief they quote several instructions wherein the words "negligence" or "negligent" appear, and they have italicized those words. Many of the instructions so quoted, and in which those words were italicized, were requested by appellant and respondents. Appellant's attorneys assert that those instructions were erroneous. Presumably the italics were used by appellant's attorneys to emphasize alleged errors of the court in giving the instructions which they requested. Also, appellant's attorneys have placed various instructions in such sequence in their brief as to create the impression that the instructions were given in that sequence. Those matters of misquotation, asserting error in their own requested instructions, italicizing certain words, and arranging sequence of the instructions, were pointed out in respondents' brief. Appellant did not file a reply brief or make any reply to respondents' criticism as to those matters, except that at oral argument Mr. Schekman said, in response to a question by this Court, that criticism of the arrangement of the instructions was justifiable. The manner in which appellant's brief has been prepared is not commendable.

The judgment is reversed.

SHINN, P. J., and VALLÉE, J., concur.

Marco J. MADIN and Pacific Automobile Insurance Company, a corporation, Petitioners,

v.

INDUSTRIAL ACCIDENT COMMISSION OF The State of CALIFORNIA, James R. Richardson and Lethia Richardson, Respondents.*

Civ. 5118.

District Court of Appeal, Fourth District, California.

June 20, 1955.

Hearing Granted Aug. 17, 1955.

Workmen's compensation case. The Industrial Accident Commission made an award, and defendant petitioned for review. The District Court of Appeal, Griffin, J., held that where claimants, who occupied one of defendant's rental units under agreement that they would manage and maintain other units and were on 24 hour duty, were injured when bulldozer, which belonged to third party, broke through house, injury, although it was in course of employment, did not arise out of employment and was not compensable, since claimants did not, by reason of employment, occupy a position among surroundings which differentiated it from other positions in the vicinity.

Award annulled.

Workmen's Compensation ⟹635

Where claimants, who occupied one of defendant's rental units under agreement that they would manage and maintain other units and were on 24 hour duty, were injured when bulldozer, which belonged to third party, broke through house, injury, although it was in course of employment, did not arise out of employment and was not compensable, since claimants did not, by reason of employment, occupy a position among surroundings which differentiated it from other positions in the vicinity. Labor Code, §§ 4453, 3600(b, c).

Higgs, Fletcher & Mack, John W. Burnett, San Diego, for petitioners.

Everett A. Corten, Edward A. Sarkisian, Daniel C. Murphy, San Francisco, for respondents.

GRIFFIN, Justice.

Respondents James R. Richardson and Lethia Richardson, husband and wife, occupied one of 14 rental units owned by petitioner Marco J. Madin in San Diego on the outskirts of the city in a somewhat unpopulated district. A new subdivision was being graded on the hill, several hundred yards from where the units were located. A large bulldozer was left on that subdivision property by the grading contractor and some vandals started it, and being unable to stop it jumped off and the runaway bulldozer ran down the hill, broke through and demolished the little house then occupied by respondents Richardson, who were at that hour (2 a. m.) in bed, crossed the highway, and continued for about one mile. Severe injuries were inflicted upon both of them and there was some evidence of shattered glass being removed from a portion of Mrs. Richardson's leg. No question is presented in respect to the injuries. For a further factual background in this respect see Richardson v. Ham Bros., Cal.App., 275 P.2d 532.

The pivotal point is whether the evidence supports the finding that the injuries did arise out of and occurred in the course of employment within the meaning of section 3600 of the Labor Code, which provides in part:

> "Liability for the compensation * * * shall, without regard to negligence, exist against an employer for any injury sustained by his employees arising out of and in the course of the employment * * * in those cases where the following conditions of compensation concur: * * *
>
> "(b) Where, at the time of the injury, the employee is performing service growing out of and incidental to his employment and is acting within the course of his employment.
>
> "(c) Where the injury is *proximately caused by the employment,* either with or without negligence, * * *" (Italics ours.)

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* Opinion vacated 292 P.2d 892.

The evidence in this respect shows that Madin did not live on the property. He acquired it in 1950. At that time the Richardsons were living in one of the cabins under arrangements with the former landlord. Similar arrangements were adopted by Madin, i. e., they received a discount of $10 on their rent per month ($35 reduced to $25) and a commission of 10 per cent of the rent they collected, averaging about $44.17 per month. The arrangements were that for the consideration indicated they were to show any vacant apartments to prospective tenants, collect rent, remit it to Madin, clean and remove trash, generally look after the property in the owner's absence, be there at all times, and take care of things if anything went wrong. They had no regular hours. Mr. Richardson did, on at least three occasions prior to the accident, in the middle of the night, repair the water pump which served the premises, and on occasions attended to other similar repairs during the nighttime. When repairs were necessary to the premises Mr. Richardson received a fee of $1.50 per hour for the labor he performed.

In their petition, petitioners concede that there was sufficient evidence to show that the Richardsons were injured "in the course of their employment" under the "bunk house rule", since they were on 24-hour duty. The argument is that the evidence does not show that their injuries were, at the time, proximately caused by the employment or that they "arose out of the employment" within the meaning of section 3600 of the Labor Code, citing such cases as Kimbol v. Industrial Accident Comm., 173 Cal. 351, 353, 160 P. 150, 151, L.R.A. 1917B, 595, holding in effect that the phrase "'arising out of the employment'" is held to refer to the cause of the injury and the risks or hazards presented by the employment, i. e., that the injuries were employment connected, citing Liberty Mutual Ins. Co. v. Industrial Acc. Comm., 39 Cal.2d 512, 516, 247 P.2d 697, 699, holding that:

> "'There must be some connection between the injury and the employment other than the mere fact that the employment brought the injured party to the place of injury.' California Casualty Indemnity Exchange v. Industrial Accident Commission, 190 Cal. 433, 436, 213 P. 257, 258. * * *"

And the term "cause", as it pertains to Workmen's Compensation Laws, as defined in II Hanna, The Law of Employee Injuries and Workmen's Compensation [1954] p. 185, says:

> "To 'cause' means simply to produce an effect or to bring about a result * * * it must do more than merely provide the occasion for an injury or contribute the location for the happening of an accident. To constitute a cause, it must also furnish the harm-producing factors or affirmatively contribute to the production of the harm itself. Clearly an injury is employment-caused when it results from a harm-producing factor of employment origin. Clearly, also, it is not employment-caused when it results from a harm-producing factor of non-employment origin, unless an element of causal connection is also contributed by the employment. Such a contribution may take place through the media of either (1) special exposure, or (2) joint contribution of the employment and non-employment factors to the production of the injury."

It is contended that the "special exposure" doctrine, relied upon by respondents in Fairchild v. Great Western Power Co., 8 I.A.C. 77; and Pacific Indemnity Co. v. Industrial Acc. Comm., 86 Cal. App.2d 726, 732, 195 P.2d 919, is not here applicable because the evidence is indisputable that the harm-producing factor in this case was the bulldozer and was extraneous to the employment; that neither the employer nor anyone acting in his behalf, was responsible for, owned, or operated the bulldozer, and since it was conceded that it was owned by a third party stranger and started by an unauthorized person, and that as a result of this starting it ran away and eventually crashed through the claimant's house, it was not a special exposure insofar as respondents were concerned.

In Truck Insurance Exchange v. Industrial Acc. Comm., 77 Cal.App.2d 461, 175 P.2d 884, 885 [Hearing denied by the Supreme Court], the workman assigned to work on a roof was apparently killed by lightning striking a cast iron vent pipe on the roof of a building which had been dampened by rain. The court, in upholding the award under those circumstances, accepted, in part, the statement in In re Employers' Liability Assurance Corp. (In re McNicol), 215 Mass. 497, 102 N.E. 697, L.R.A. 1916A, 306, that:

> "'It (the injury) arises "out of" the employment, when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury'." And said: "In determining whether an injury through action of the elements arose out of the employment, the commission or other fact-finding body is required to make a finding as to whether the risk from which the injury arose was one which was common to the entire community or one which by reason of the nature of the employment was greater than the risk to which the public in general was exposed. Where the hazard is uncommonly great, the risk arises out of the employment and the injury is compensable. The legal principles which determine liability are the same whether the injury results from an act of God or a human agency. In either case it is a question of fact whether there was a causal connection between the nature of the employment and the injury.
>
> "The courts of all jurisdictions recognize the principle stated in 71 C.J. 758, that 'Harm resulting from lightning may be compensable as an injury arising out of and in the course of the employment, where the injured employee is by reason of his employment peculiarly exposed to risk of injury from this source.'"

It then stated that the sole question before the court was whether the implied finding of the commission that the injured person was peculiarly or uncommonly exposed to injury by lightning found support in the evidence. The court then recited the factual situation and concluded that lightning is less likely to strike the flat surface of the ground than it is to strike at high points or to strike objects such as buildings or trees which extend a substantial distance above the surrounding surface if they are free conductors of electric energy. Many cases are therein cited indicating decisions both ways as to whether or not under certain facts an award was proper. The determining factor was stated to be whether there was sufficient evidence to show that the injured person's "exposed position on the roof involved an uncommon risk, that is to say, one that was substantially greater than the risks of all others who were in the same vicinity". It was then stated that "Those who were required to carry on their work in exposed positions may all have been in greater danger than others in the vicinity who were sheltered from the storm", and accordingly "A person who is injured by a bolt of lightning which strikes at a single point is usually occupying a position among surroundings which differentiate it from the positions of others in the vicinity, and this is not generally true in cases of injuries from heat, cold, floods, cyclones, and the like, where all those who were exposed may have been equally subjected to danger."

It is clear from the evidence here presented that respondents were not, by reason of their employment, occupying a position among surroundings which differentiated it from other positions in that vicinity. All persons inhabiting those several dwellings similarly located, as well as the public at large, were equally subjected to such danger. Under the circumstances of this case we must conclude that no sufficient facts have been shown to support the award.

The additional claim is made that section 4453 of the Labor Code is unconstitutional and amounts to a taking of property without due process of law insofar as the section provides that a claimant earning less than $15 per week at the time of an injury is to be considered as earning a maximum of $15 per week for the purposes of awarding temporary or permanent disability indemnity. In view of the determination heretofore reached it becomes unnecessary to decide this question.

Award annulled.

BARNARD, P. J., and MUSSELL, J., concur.

133 Cal.App.2d 688

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Bennie BROOKINS, Defendant and Appellant.

Cr. 3080.

District Court of Appeal, First District, Division 2, California.

June 20, 1955.

Hearing Denied July 20, 1955.

Prosecution for violation of the Health and Safety Code. From an adverse judgment of the Superior Court, City and County of San Francisco, Eustace Cullinan, Jr., J., defendant appealed. The District Court of Appeal, Nourse, P. J., held that where defendant pleaded guilty, contrary to the advice of his counsel, without any unfair promises or inducements, denial of the defendant's motion to withdraw the guilty plea was not an abuse of discretion.

Judgment affirmed.

1. Criminal Law 🔑1177

On appeal from felony conviction, complaint could not be made that defendant was not adequately represented by counsel at hearing, on vagrancy and felony charges, in municipal court, where matter complained of related solely to vagrancy charge which had been dismissed. Health and Safety Code, § 11500.

2. Criminal Law 🔑273

In prosecution for violation of the Health and Safety Code, when defendant pleaded guilty, he admitted the corpus delicti and no further proof was necessary. Health and Safety Code, § 11500.

3. Criminal Law 🔑274

Where defendant made plea of guilty contrary to advice of his counsel and without any unfair promises or inducements, a denial of defendant's motion to withdraw the guilty plea was not an abuse of discretion. Health and Safety Code, § 11500.

Louis S. Katz, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., of State of California, Clarence A. Linn, Asst. Atty. Gen., John S. McInerny, Deputy Atty. Gen., San Francisco, for respondent.

NOURSE, Presiding Justice.

The appeal is from a judgment following an order denying defendant's motion for leave to withdraw his plea of guilty and to enter a new plea of not guilty. Judgment on the guilty plea was duly entered.

Defendant and one other were charged with vagrancy. During the hearing in the Municipal Court it developed that the arresting officers saw a small package drop from one of the defendants to the sidewalk. On examination this proved to be a bindle of heroin. Defendants were thereupon charged with a felony—a violation of Section 11500 of the Health and Safety Code. After a partial hearing the defendant pleaded guilty and was certified to the Superior Court for sentence.

When appellant and his codefendant were arraigned on the narcotics charge both were represented by counsel. With the concurrence of his counsel appellant voluntarily withdrew his plea of not guilty and voluntarily pleaded guilty. Thereupon the vagrancy charge was dismissed as to both defendants, and the felony charge was dismissed as to the codefendant. When he appeared for sentence the appellant, still represented by counsel, and, against the advice of counsel, made a motion, in propria persona, for leave to withdraw his former plea and to plead not guilty. His motion was fully heard, and denied. Thereafter the appellant, through his new counsel, again moved for leave to withdraw his former plea. This motion was fully heard and the court permitted appellant to present a mass of incompetent and irrelevant testimony, or statements, and again denied the motion. The judgment appealed from followed.

It would serve no good purpose to review this testimony. All that it really showed was that appellant was a repeated loser, that he had been in the criminal courts on numerous criminal charges, and was fully aware of the meaning and consequences of his guilty plea.

[1] Appellant argues that he was not properly or adequately represented by counsel. The record shows that, at all stages of the proceedings in the Municipal Court, he was represented by counsel except on the one occasion when, at his own request, and contrary to the advice of counsel then representing him, he moved to withdraw his plea. The record shows that, at all times in the Superior Court, he was duly and properly represented by counsel, except on the one occasion contrary to the advice of counsel he personally made the motion to set aside the plea. His argument here is based wholly on unfair references to some of the proceedings in the Municipal Court relating solely to the vagrancy charge. Since that charge was dismissed he has no complaint here.

[2] The argument that the corpus delicti had not been proved because there was no evidence of the contents of the package is not sound. When the prosecutor asked for a continuance in order to bring in the official chemist, the defendant pleaded guilty. He thus admitted the corpus delicti and no proof was necessary.

[3] The contention that the trial court abused its discretion in denying the motion to withdraw the guilty plea is frivolous. The evidence here shows that appellant was well aware of what his plea of guilty meant and that he made the plea contrary to the advice of his counsel and without any unfair promises or inducements. There is no merit in any of the arguments made by appellant.

Judgment affirmed.

DOOLING and KAUFMAN, JJ., concur.

133 Cal.App.2d 542

In the Matter of the ESTATE of Margaret S. BULLOCK, Deceased.

Lyndol L. YOUNG, Petitioner and Appellant,

v.

M. Bruce GILREATH, Executor and Respondent.

Civ. 20691.

District Court of Appeal, Second District, Division 1, California.

June 13, 1955.

Rehearing Denied July 11, 1955.

Hearing Denied Aug. 11, 1955.

Petition for allowance of attorney's fees to be paid out of assets of estate of decedent. The Superior Court, Los Angeles County, Victor R. Hansen, J., made an order denying the petition, and petitioner appealed. The District Court of Appeal, White, P. J., held that proceedings in opposition to executor's petition for authority to pay Federal Estate and State Inheritance Taxes from income of estate and testamentary trust and petition by executor and testamentary trustee for authority to continue business allegedly undertaken by testatrix prior to death were prosecuted for benefit of income beneficiaries and that, where all such beneficiaries, represented by counsel, joined in such proceedings, any benefit to estate was occasioned by services of attorneys for the several income beneficiaries and attorney representing two such beneficiaries could not be compensated for his services from general assets of estate.

Order affirmed.

1. Attorney and Client ⚷135

Compensation for services of attorney must be paid by the person employing him, in absence of special agreement, special statutory provision, or exceptional circumstances.

2. Costs ⚷103

A plaintiff who has succeeded in protecting, preserving or increasing a fund for the benefit of himself and others may be awarded compensation from the fund for services of his attorney.

3. Courts ⚷200¼

Probate court has no general equity jurisdiction and its jurisdiction generally is confined to the settlement of estates of deceased persons, but probate court does have power to apply equitable principles in aid of its functions as a probate court.

4. Executors and Administrators ⚷216(2)

Attorney's fees for services rendered to estate of a deceased person may be allowed against estate under equitable rule that fees for legal services rendered in preserving a common fund for the benefit of all heirs or persons interested in an estate are proper charges against such fund.

5. Attorney and Client ⚷155

Allowance of compensation from common fund for services of attorney for one party to litigation resulting in protecting, preserving or increasing such fund is justified only where other interested parties have stood without counsel but will reap the benefits of services rendered by attorney conducting proceedings, and such allowance will not be made where all interested parties were represented by counsel in same litigation.

6. Executors and Administrators ⚷216(2)

Proceedings in opposition to executor's petition for authority to pay federal estate and state inheritance taxes from income of estate of testatrix and trust created by her will and petition by executor and testamentary trustee for authority to continue business allegedly undertaken by testatrix prior to death were prosecuted for the benefit of income beneficiaries of testamentary trust and not for benefit of estate, and where all income beneficiaries represented by counsel joined in such proceedings, any benefit to estate was occasioned by services of attorneys for the several beneficiaries and attorney, representing two of the several income beneficiaries, could not be compensated for his services out of general assets of estate.

7. Appeal and Error ⚷717

Memorandum of opinion of trial judge may be used for the purpose of explaining his decision, but it cannot be used to contradict, change or impeach his findings and judgment.

◆

Lyndol L. Young, Los Angeles, in pro per.

Vaughan, Brandlin & Wehrle, and Brady, Nossman & Walker, Los Angeles, by Fred F. Wehrle, Los Angeles, for respondent.

WHITE, Presiding Justice.

Margaret S. Bullock died May 9, 1952 leaving a last will and testament in which she named Rev. Lorenzo M. Malone, S. J., and M. Bruce Gilreath, co-executors and co-trustees. The former declined to act in either capacity and on May 29, 1952 M. Bruce Gilreath was granted Letters Testamentary and since that date he has served as such executor. On December 31, 1953 the superior court confirmed his appointment by decedent's will as trustee.

By the terms and provisions of decedent's will, the bulk of her estate, comprised of securities, cash and personal property and appraised at the value of $2,515,992.73 was placed in trust for the use and benefit of her sister, Helen Bullock Chappellet, and decedent's nieces and nephew, Mary Margaret Fewel Smith, Valerie Chappellet, Felicia Helen Chappellet and John Bullock Fewel, or their issue. Decedent's said sister received a legacy of $100,000, and under the trust provisions of the will is entitled to income from three-eighths of the trust estate during her lifetime, and each of the said nieces and nephew is entitled to the income from one-eighth of the trust estate until they attain designated ages, at which times they are entitled to distribution of the one-eighth of the trust estate set aside for their use and benefit. The income from the remaining one-eighth of the trust estate is to be accumulated for the use and benefit of decedent's said sister, nieces and nephew.

The trust is to be terminated upon the death of the survivor of decedent's said sister, nieces and nephew, and upon termination, the corpus of the trust estate is to be distributed to the issue of the said nieces and nephew, and if none, then equally to the Sisters of Charity of Albuquerque Hospital, Albuquerque, New Mexico, and Rev. Lorenzo M. Malone, S. J., for distribution among such charities as he shall direct.

On May 29, 1952, respondent, as executor, filed his petition for an order authorizing the continuance of a certain business allegedly belonging to decedent. The business sought to be continued was that of producing and distributing, jointly with Thetis Film, an Italian corporation, 26 motion pictures of approximately 26½ minutes in length, all suitable primarily for television presentation in the United States. The maximum cost for the production of said 26 motion pictures was to have been $325,000, with the provision for an increase not to exceed 20% of the maximum cost, which was to have been borne equally by decedent and said Thetis Film, and the profits therefrom shared by them in somewhat the same fashion.

In support of his petition aforesaid, respondent, as executor, contended that in setting up the Italian Television venture he executed the various agreements forming the basis for the television venture, for and on behalf of decedent. In other words, that decedent was his undisclosed principal and that he signed merely as her agent. The executor's petition asked that he be authorized to proceed under the terms of the television venture contract and to impose the liabilities of said contract on the estate, the first of which would be the assumption by the estate of a payment of $175,000 which was then due under the contract, as well as undetermined liabilities that might arise in the future.

Becoming apprehensive that if the foregoing petition was granted, their interests in the estate would be jeopardized, all primary beneficiaries under the will procured the services of counsel to intervene and oppose the petition of the executor.

Appellant herein represented Mary Margaret Fewel Smith and John Bullock Fewel; Attorney Charles E. Quirollo appeared for Helen Bullock Chappellet, and Wright, Wright, Green and Wright for the California Trust Company, guardian of the estates of Felicia Helen Chappellet and Valerie Chappellet, minors.

When the foregoing petition of the executor came on for hearing, appellant and the attorneys for the other primary beneficiaries under decedent's will, appeared and objected to and resisted said executor's petition. Following a hearing commencing on June 4, 1952 and ending on June 12, 1952, the superior court made its order denying the executor's petition in its entirety. No appeal was taken therefrom and the order is now final. In addition to the foregoing it is unquestioned and found by the court that the legal services rendered by appellant extended over the period from May 15, 1952 to December 2, 1953 and was successful in each instance where his services were performed.

Following completion of his services appellant filed in the estate his petition for an order allowing attorneys fees in a sum to be determined by the court and to be paid from the assets of said estate. After a hearing upon appellant's petition for fees the court made its order denying the same. From such order appellant prosecutes this appeal.

Among the pertinent findings of the trial court are the following:

> "VIII
>
> "It is true that petitioner Lyndol L. Young appeared in various court proceedings and hearings on behalf of said Mary Margaret Fewel Smith and John Bullock Fewel and performed various legal services consisting pri-

marily of objections to Executor's petition to continue business involving the marketing of television films and recordings, financing of said television productions and operating an electrical appliance distributorship, and objections to Executor's petition for authority to pay Federal Estate Taxes and State Inheritance Taxes from the income of the decedent's estate and testamentary trust.

* * * * * *

"X

"It is true that the legal services of petitioner Lyndol L. Young did not increase, preserve or protect the estate or any of its assets.

"XI.

"It is true that the legal services performed by petitioner Lyndol L. Young were for the benefit of the income beneficiaries and to the detriment of the residuary beneficiaries under the will of said decedent.

"XII

"It is true that the legal services performed by petitioner Lyndol L. Young were made necessary by reason of a difference of opinion between the executor and his attorneys, on the one hand, and the beneficiaries and their respective attorneys, including petitioner Lyndol L. Young, on the other, as to the interpretation of the will and the administration of the estate.

* * * * * *

"XVII

"It is true that petitioner Lyndol L. Young performed substantial legal services on behalf of said estate and all of the said beneficiaries at the request of and under the direction of the Court in conducting an extensive examination of M. Bruce Gilreath, Executor, under oath, at the hearing before the Court from November 16th to December 2nd, 1953, concerning the qualifications of M. Bruce Gilreath to be appointed Trustee of said estate; that the entire examination conducted by petitioner Lyndol L. Young is set forth in the reporter's transcript covering said hearing; * * *. That neither the estate nor any of the beneficiaries or persons interested in the estate received any benefit from said services described in this Paragraph XVII."

There can be no doubt in this case that appellant rendered legal services which, as the court stated in its memorandum of opinion: "were of value to the estate", and that appellant's clients, through his efforts were, as the court stated, "successful in each instance" wherein they appeared as objectors and opposed the actions and contemplated actions of the executor and trustee under the will.

But the question which confronted the trial court, and is now presented to us, is whether appellant can be compensated for his legal services out of the general assets of the estate.

[1–4] The applicable rule is thus stated in Re Estate of Reade, 31 Cal.2d 669, 671, 672, 191 P.2d 745, 746:

> "Compensation for the services of an attorney must be paid by the person employing him, in the absence of a special agreement, special statutory provision, or exceptional circumstances. The latter exist in certain actions in equity. For example, a plaintiff who has succeeded in protecting, preserving or increasing a fund for the benefit of himself and others may be awarded compensation from the fund for the services of his attorney. This is to compel those for whose benefit the action or proceeding was taken to bear their share of the expenses of the litigation; and this rule is equitable and just. [Citations.]
>
> "While the probate court has no general equity jurisdiction and its jurisdiction generally is confined to the settlement of the estates of deceased persons, it does have the power to apply equitable principles in aid of its functions as a probate court."

See also In re Estate of Lundell, 107 Cal.App.2d 463, 464, 237 P.2d 62, 63, wherein it is said that such an allowance of attorneys fees for services rendered to an estate "is predicated upon the equitable rule that fees for legal services rendered in preserving a common fund for the benefit of all heirs or persons interested in an estate are proper charges against such fund."

[5, 6] Respondent insists that the foregoing equitable doctrine does not apply where, as in the instant proceedings, all other primary beneficiaries interested in the common fund or their attorneys, have rendered services substantially the same as those rendered by the beneficiary or his attorney who now seeks compensation from the common fund. Research by counsel and the court has not been rewarded with any case in California deciding this precise point of law. We are, however, inclined to the view adopted by other jurisdictions that allowance of attorneys fees for one party to be charged on the general fund where the other interested parties are represented by attorneys in the same litigation, will not be made. That such an allowance is justified only where the other parties have stood without counsel and would reap the benefits of the services rendered by the attorney conducting the proceedings. That where, as in the instant case, the other interested parties all retained counsel, the equitable rule of paying from the general fund does not apply, Cambron v. Pottinger, 310 Ky. 70, 219 S.W.2d 401, 403; Thirlwell's Administrator v. Campbell, 74 Ky. 163, 167, 168; Foster v. Foster, 126 Ala. 257, 28 So. 624, 625, 626; Woods v. McLain, 112 W.Va. 612, 166 S.E. 279, 280; 14 Am.Jur. 47, 48; See also Notes, 49 A.L.R. 1149, 107 A.L.R. 749. This interpretation of the rule would seem to be strengthened by the language of our own Supreme Court in Re Estate of Reade, supra, 31 Cal.2d at page 672, 191 P.2d at page 746, wherein, with reference to the purpose of the rule it is said: "This is to compel those for whose benefit the action or proceeding was taken to bear their share of the expenses of the litigation; and this rule is equitable and just." However, in the instant proceeding, as was said by the learned trial judge in his memorandum of opinion, "The case at bar is not a case where a fund has been created or preserved by the efforts of one beneficiary for the benefit of all. The saving to or benefit to this estate was occasioned by the services of the attorneys for the several beneficiaries." We find ourselves in accord with the view of the trial court that the reasons of justice and equity, underlying the foregoing rule are not here present, and the equitable doctrine contended for is therefore, not applicable.

Appellant earnestly insists that the foregoing findings of the trial court that the legal services performed did not increase, preserve or promote the estate or any of its assets is without evidentiary support. Appellant directs our attention to the statements made by the trial court in the memorandum of opinion and which we have narrated above. But, as heretofore pointed out, appellant and his client were joined by all the other primary beneficiaries and the conclusion seems to us inescapable that the proceedings initiated by the primary beneficiaries in unison were not prosecuted for the benefit of the estate but for their own benefit. In California there is no general rule which permits the recovery of attorneys fees by a successful litigant. Ordinarily, compensation for the services of an attorney must be paid by the client who employs him. True, under certain exceptional circumstances, such as a special agreement, special statutory provisions, or certain actions in equity, attorneys fees may be awarded by the court to a litigant. We are satisfied that appellant cannot bring himself within any of the recognized exceptions to the general rule that each party must pay his own attorneys fees, since his client has benefited and the other beneficiaries benefited no one but themselves. Conceding that, as the trial court stated, the legal services rendered by appellant in association with counsel for the other primary beneficiaries did in fact protect, preserve and increase the estate of decedent, the primary purpose of the objections filed by them, was to benefit themselves. As pointed out by respondent:

"It goes without saying that the services rendered by appellant and the attorneys for the primary beneficiaries in connection with the construction of decedent's will as it pertains to the limitation upon the sale of shares of Bullock's, Inc., the source of funds with which to pay and discharge estate and inheritance taxes, and the Petition for Partial Distribution and Petition for Instructions to Executor and/or Trustee filed by appellant in decedent's estate, which is closely associated with the construction of decedent's will, were rendered for the sole purpose of obtaining an order from the Superior Court determining that the income beneficiaries were entitled to the income from decedent's estate, and trust from the date of her death and that the estate and inheritance taxes were to be paid and discharged from the corpus of decedent's estate. By the determination that the income beneficiaries were entitled to the income from decedent's estate and trust from the date of her death and burdening the corpus with the payment and discharge of estate and inheritance taxes, the remaindermen under decedent's will were prejudiced in that the corpus was reduced in an amount equal to the estate and inheritance taxes. While it is true that the primary beneficiaries represented by appellant and said other attorneys are remaindermen as well as income beneficiaries, there are contingent remaindermen under decedent's will who have been prejudiced by such a determination, namely the issue, born and unborn, of decedent's nieces and nephew, and Sisters of Charity of Albuquerque Hospital, Albuquerque, New Mexico, and Rev. Lorenzo M. Malone, S. J."

[7] Appellant's contention, heretofore adverted to, that statements made by the trial judge in his memorandum of opinion may be used to contradict, change or impeach the findings made cannot be sustained. While the memorandum of the trial judge may be used for the purpose of explaining his decision, it cannot be used to impeach the findings and judgment. As was said in Southern California Freight Lines v. San Diego Electric Railway Co., 66 Cal.App.2d 672, 676, 152 P.2d 470, 472:

> "Counsel for plaintiff argues that since the adoption of the new rules on appeal a written opinion of a trial judge may become a proper part of the record on appeal. Subd. a, rule 5, Rules on Appeal. From this it is argued that such written opinion must be harmonious in all respects with the findings and judgment to support them on appeal. We do not believe that it was the intention of the rule makers to change the long established rule that the written opinion of the trial judge may not be used to impeach his solemn findings and judgment. Such opinions are often an aid to an appellate court in order to disclose the process of reasoning of the trial judge in reaching his ultimate decision. The new rules make such opinions available to appellate courts and this is as far as they go. There is nothing in the rules evidencing a contrary intention. See, 17 So.Cal.L.Rev. 107. As said in DeCou v. Howell, 190 Cal. 741, 214 P. 444, 448: 'The deliberations of the court are conclusively merged in the judgment. The findings of fact and conclusions of law constitute the decision which is the final, deliberate expression of the court. To hold that oral or written opinions or expressions of judges of trial courts may be resorted to to overturn judgments would be to open the door to mischievous and vexatious practices. Neither a juror nor a judge is permitted to impeach his verdict or judgment.' "

The order from which this appeal was taken is affirmed.

DORAN and DRAPEAU, JJ., concur.

133 Cal.App.2d 535

In the Matter of the ESTATE of Judith Linda HOWARD, a Minor (two cases).

Judith Kelly HOWARD, Petitioner and Respondent,

v.

Lindsay Coleman HOWARD, Contestant and Appellant.

Lindsay Coleman HOWARD, Petitioner and Appellant,

v.

Judith Kelly HOWARD, Contestant and Respondent.

Civ. 20245, 20359.

District Court of Appeal, Second District, Division 1, California.

June 13, 1955.

Rehearing Denied July 5, 1955.

Hearing Denied Aug. 11, 1955.

Proceeding by minor's mother for removal of minor's father as guardian of her estate. The Superior Court, Los Angeles County, Victor R. Hansen, J., entered judgment and order removing guardian and appointing new guardian and order denying guardian's motion to vacate sale of property made by him, and father appealed. The District Court of Appeal, Drapeau, J., held that where guardian had sold minor's jewelry to himself through another for $40,000 below appraised value and in verified report of sale told court that intermediary was actual purchaser, there was no abuse of discretion in ordering guardian's removal or in denying his motion to vacate the sale without prejudice to a further motion to vacate sale made by a disinterested guardian.

Affirmed.

See, also, 128 Cal.App.2d 188, 275 P.2d 93.

1. Guardian and Ward 🔑25

Since probate court retains continuing supervisory jurisdiction over guardianship matters, the removal of a guardian for any of the reasons specified in code rests within broad discretion of court. Probate Code, § 1580.

2. Courts 🔑26

In order to exercise judicial discretion, all the material facts and evidence must be both known and considered together with the legal principles essential to an informed, intelligent and just decision, and on that basis and guided thereby, trial judge is given latitude to express his own convictions in the declaration of rights and application of remedies.

3. Trusts 🔑231(1, 2)

Where one is a trustee or stands in a situation of a trust and confidence, he cannot purchase or deal with the subject of the trust nor can he purchase debts due to be paid out of the trust estate or place himself in an attitude antagonistic to the trust.

4. Guardian and Ward 🔑62

Where father was appointed as guardian of his daughter's estate and sold daughter's jewelry to himself through another, guardian was held to strict adherence to the rule that a guardian cannot purchase property which is the subject of the guardianship, and the fact that daughter's mother knew of circumstances of sale and consented thereto, did not excuse the guardian.

5. Guardian and Ward 🔑62

Where minor's father was appointed her guardian and sold minor's property to himself through another below the appraised value of the property, the fairness or good faith of the guardian in consummating sale was immaterial.

6. Guardian and Ward 🔑62

Where guardian purchases ward's property for himself, any investigation into the fairness or unfairness of the transaction or showing by guardian that dealing was for best interest of minor, is not permitted by the court.

7. Guardian and Ward 🔑25

Where minor's father was appointed her guardian and sold minor's jewelry to himself through another for $40,000 less than the appraised value and in a verified account told court that intermediary was actual purchaser, even though minor's mother knew the details of the sale and consented thereto, court did not abuse its discretion in granting mother's subsequent petition to remove father as guardian. Probate Code, § 1580(1, 3, 5); West's Ann.Civ. Code, §§ 2233, 2234.

8. Guardian and Ward ⟹62

A guardian's sale in which guardian purchases or otherwise acquires property of his ward, whether sale made is directly to guardian or through another, is voidable at suit of any proper party interest.

9. Guardian and Ward ⟹62

Where guardian purchased ward's property for himself through another in violation of his duty to ward, court did not abuse its discretion in refusing to grant guardian's motion to vacate the sale without prejudice to a further motion to vacate sale made by a disinterested guardian. Probate Code, § 1580.

◆

Franklin W. Peck, Los Angeles, for appellant.

Edward M. Raskin, Los Angeles, for respondent.

DRAPEAU, Justice.

Lindsay Coleman Howard, father of Judith Linda Howard, a minor, was appointed guardian of her estate on February 8, 1946. The estate consisted of a ring and a necklace bequeathed to the minor by her paternal grandmother. It had an appraised value of $115,000. Judith Kelly Howard, mother of the little girl, gave her written consent to the guardianship. In July of that year, the probate court made its order authorizing guardian to withdraw the jewelry from a sealed deposit box and offer it for sale. Sale to be made subject to confirmation by the court.

Thereafter, guardian made his return of sale of the jewelry to John E. Thoroughgood for the sum of $75,000 cash. Pursuant thereto, order confirming sale in Thoroughgood was made after hearing on February 28, 1947. Guardian's first account current rendered in September, 1948, recited the investment of proceeds of the sale in United States Government Bonds.

In June of 1952, the Howards were divorced. Shortly thereafter, Mrs. Howard initiated the instant proceeding under section 1580 of the Probate Code to remove Mr. Howard, as guardian of their minor daughter, and for appointment of a new guardian.

The petition avers, among other things, that guardian told petitioner that it would be advisable to sell the jewelry to avoid payment of personal property taxes which ran around $3,400 per annum. Petitioner objected to doing anything that would impair the minor's title to the jewelry. However, guardian assured her that the jewelry would not really be sold; that he had legal advice to the effect that he could put up the money used in the purchase and that Mr. Thoroughgood could act as an intermediary in an "apparent sale". He also told her that she "could hold the jewelry for the minor", and in that way "Judy would have both the jewelry and the money."

Guardian admits that he did put up the $75,000 and purchased the jewelry using Mr. Thoroughgood as a dummy. But he attempts to excuse his actions on the ground that petitioner had full knowledge of the circumstances surrounding the sale and consented thereto.

In the instant proceeding, guardian is charged with waste and mismanagement of the estate and abuse of his trust: first, because he sold the jewelry which was appraised at $115,000 for $75,000; and second, by purchasing it himself he acquired an adverse interest in his daughter's estate.

He is also charged with having fraudulently and improperly concealed and withheld from the court the true facts concerning the sale. Particularly, that he and not Mr. Thoroughgood was in fact the purchaser. And that thereby, he demonstrated his incapacity to perform the duties of guardianship in a suitable manner.

Guardian's answer admits that he agreed to purchase the jewelry himself because petitioner opposed a sale to strangers for $60,000. He also admits that he advanced $75,000 to Mr. Thoroughgood, who put in a bid for the jewelry at that figure, and that he filed a return of sale naming Thoroughgood as the purchaser and petitioned for confirmation thereof. Guardian also admits in his answer that he commenced an action in the Superior Court in his individual capacity on July 25, 1952, claiming title to and the right to possession of the jewelry. And he denies that the jewelry "in truth or in fact is now the property of and belongs to said minor."

The trial court found that guardian's return of sale and petition for confirmation of the sale to John E. Thoroughgood for $75,000 cash was "verified under oath by said Guardian."

Also that "It is true that said guardian * * * fraudulently and improperly concealed and withheld from the court and failed to disclose * * * that the guardian, and not John E. Thoroughgood, was in fact the purchaser of said jewelry, and that the consideration for the purchase * * * was paid by said guardian and not by said John E. Thoroughgood", who never had possession of the jewelry and was at all times acting solely as the agent for guardian. That guardian delivered the jewelry to petitioner, who placed it in a safe deposit box held jointly by said parties.

The court further found that in March, 1952, guardian asserted that the title and right to possession of the jewelry was vested in him personally and not in said minor. On July 3, 1952, he demanded possession thereof from petitioner. Shortly thereafter, he commenced an action to recover said property from petitioner. Petitioner, as guardian ad litem of the minor, filed an answer claiming that said minor was the lawful owner of said jewelry.

In accordance with the foregoing, the court found that said guardian (1) had mismanaged said estate and had abused his trust; (2) had demonstrated his incapacity to perform his duties in a suitable manner; and (3) had acquired an interest adverse to the faithful performance of his duties as guardian, within the meaning of subsections (1, 3) and (5), respectively, of section 1580 of the Probate Code.

Lindsay Coleman Howard appeals from the judgment which followed, removing him as guardian of the estate of the minor, and appointing a new guardian.

Mr. Howard has also appealed from an order denying his motion to disaffirm and vacate the sale of the jewelry.

Both appeals have been consolidated for decision by this court and will be disposed of by this opinion.

Appellant urges that the trial court abused its discretion in ordering his removal as guardian in that it failed in the asserted exercise of its *sound discretion* to take into account:

1. Respondent petitioner's participation in the sale;

2. The good faith and generosity of the guardian in administering the ward's estate;

3. The benefits accruing to the ward as result of such generosity of the guardian.

Also, that the evidence fails to support findings of the trial court:

4. That guardian fraudulently and improperly concealed and withheld information from the court;

5. That he mismanaged the estate and abused his trust;

6. That he evidenced his incapacity to perform his duties suitably;

7. That he acquired an interest adverse to the faithful performance of his duties as guardian;

8. That the legal effect of the trial court's findings of fact viewed in the light of its memorandum of decision makes the sale of the jewelry to guardian absolutely void and not voidable, and therefore the court erred in denying his motion made after judgment to disaffirm the entire transaction.

[1] "Since the probate court retains continuing supervisory jurisdiction over guardianship matters, the removal of a guardian for any of the reasons specified in the code, Prob.Code, § 1580, rests within the broad discretion of the court * * *." Guardianship of Riley, 72 Cal.App.2d 742, 747, 165 P.2d 555, 557.

[2] In discussing the attributes of judicial discretion, this court in Gossman v. Gossman, 52 Cal.App.2d 184, 194, 126 P.2d 178, 184, stated:

> "To exercise that power all the material facts in evidence must be both known and considered, together also with the legal principles essential to an informed, intelligent, and just decision. On that basis then, and guided thereby, it gives latitude to the trial judge to express his own convictions in the declaration of rights and application of remedies. * * *
>
> "The term 'judicial discretion' was defined in Bailey v. Taaffe, (1866) 29 Cal. 422, 424, as follows: 'The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice.' "

It is clear from the record that respondent was opposed to the sale from the beginning, but was persuaded by appellant that it was the proper thing to do. He told her he had discussed the matter with his attorney and said "we have figured out a way whereby we can sell it (the jewelry) and still keep it for Judy."

[3] As stated in the early case of Page v. Naglee, 6 Cal. 241, 245: "It is a familiar principle in law, that one who is a trustee, or who stands in a situation of trust and confidence, cannot purchase or deal with the subject of the trust, neither can he purchase debts due, to be paid out of the trust estate, nor place himself in an attitude antagonistic to the trust."

[4] Appellant, as the guardian of his daughter, is held to strict adherence to that rule. What respondent knew or consented to does not excuse him. Moreover, as hereinbefore noted, the evidence discloses that appellant persuaded respondent that the sale of the jewelry was best for the minor.

[5, 6] With reference to appellant's good faith and his so-called generosity resulting in alleged benefits to the minor, the following language from Wickersham v. Crittenden, 93 Cal. 17, 29, 28 P. 788, 790, appears particularly applicable to the instant situation:

> "For the reason that it is against public policy to permit persons occupying fiduciary relations to be placed in such a position that the influence of selfish motives may be a temptation so great as to overpower their duty and lead to a betrayal of their trust, the rule is unyielding that a trustee shall not, under any circumstances, be allowed to have any dealings in the trust property with himself, or acquire any interest therein. *Courts will not permit any investigation into the fairness or unfairness of the transaction, or allow the trustee to show that the dealing was for the best interest of the beneficiary * * *.*" (Emphasis added.)

Again in Pacific Vinegar & Pickle Works v. Smith, 145 Cal. 352, 365, 78 P. 550, 554, it was said: "The great purpose of the law is to secure fidelity in the agent. When one undertakes to deal with himself in different capacities—individual and representative—there is a manifest hostility in the position he occupies. His duty calls upon him to act for the best interests of his principal. His self-interest prompts him to make the best bargain for himself. Humanity is so constituted that, when these conflicting interests arise, the temptation is usually too great to be overcome, and duty is sacrificed to interest. In order that this temptation may be avoided, or, if indulged in, must be at the peril of the trustee, it has been wisely provided that the trustee shall not be permitted to make or enforce any contract arising between himself as trustee and individually with reference to any matter of the trust, *nor will the court enter into any examination of the honesty of the transaction.*" (Emphasis added.)

See, also, Restatement Trusts, section 170, comment B, where it is stated: "It is immaterial that the trustee acts in good faith in purchasing trust property for himself, and that he pays a fair compensation."

[7] It is clear from the record herein that there was no abuse of discretion on the

part of the trial judge in arriving at his conclusion.

The failure of appellant in his petition for confirmation of the sale to disclose to the court that he, and not John E. Thoroughgood, was in fact the purchaser of the guardianship property, was a fraud upon the court. By such failure, appellant withheld a material fact from the court. Moreover, there can be no justification for appellant's filing a verified petition under oath alleging that John E. Thoroughgood was the purchaser, when in truth and fact appellant guardian was the purchaser.

A trustee who acquires any interest adverse to the interest of his beneficiary in the subject of the trust, "must immediately inform the latter thereof, and may be at once removed." Sec. 2233, Civil Code. And, the violation of the provisions of the foregoing section "is a fraud against the beneficiary of a trust." Sec. 2234, Civil Code.

Without going into detail, suffice it to say that the evidence adduced at the trial herein is amply sufficient to support the findings and the judgment.

In his appeal from the order denying his motion to disaffirm the sale, appellant urges that the sale was void and therefore the court's ruling on the motion was error.

[8] "It is a rule of universal recognition that a guardian, in purchasing or otherwise acquiring the property of his ward, violates the duty imposed by the fiduciary character of his position. Such a transaction, whether made directly to the guardian or through another, is voidable at the suit of any proper party in interest." 25 Am.Jur. 131, sec. 210.

[9] At the time the motion was denied, the court stated: "This motion comes on by the same person whom the court has found did defraud the court, made representations falsely to the court, and still claims the ownership of the jewelry, and the court is without the benefit of a disinterested guardian to determine whether or not it is for the best interest of the minor to rely on the sale that was made, although it was some $40,000 less than the appraised value, or whether the sale should be vacated."

The order of denial was made "without prejudice to a further motion made by a disinterested guardian to vacate the sale."

For the reasons stated, the judgment and the order appealed from are, and each of them is, affirmed.

WHITE, P. J., and DORAN, J., concur.

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133 Cal.App.2d 562

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
James Peter VAN EYK, Defendant and Appellant.
Cr. 5275.

District Court of Appeal, Second District, Division 3, California.

June 13, 1955.

Hearing Denied July 13, 1955.

Defendent was convicted of unlawful possession of heroin. The Superior Court, Los Angeles County, Ralph K. Pierson, J., rendered judgment, and defendant appealed. The District Court of Appeal, Parker Wood, J., held that instruction, relating to confessions, that if jury should find that confession was false in any particular, it remained nevertheless evidence for consideration to be given such significance and weight as jury's judgment might determine, was not reversibly erroneous.

Judgment affirmed.

1. Criminal Law 🔑1172(2)

In prosecution for unlawful possession of heroin, instruction, relating to confessions, that if jury should find that confession was false in any particular, it remained nevertheless evidence for consideration to be given such significance and weight as jury's judgment might determine, was not reversibly erroneous. Health and Safety Code, § 11500.

2. Criminal Law ⚿814(17)

The court is not required to instruct upon the rules of law applicable to circumstantial evidence when it is incidental to and corroborative of direct evidence.

3. Criminal Law ⚿814(17)

In prosecution for unlawful possession of heroin, wherein there was direct evidence of guilt including testimony that defendant had taken a vial of heroin from his pocket and thrown it onto a chair, refusal to give requested instructions on circumstantial evidence was not error.

4. Witnesses ⚿387

Control of cross-examination of a witness as to which of his conflicting statements is true should be in sound discretion of trial judge.

5. Witnesses ⚿379(9)

In prosecution for unlawful possession of heroin, wherein there was a variation between police officer's recorded statement on preliminary examination and his testimony at trial, but officer merely stated he probably made testimony recorded on preliminary examination, and it did not appear that matter was of significance or that answer to posed question would have been favorable to defendant, sustaining objection to question as to whether statement on preliminary examination had been true was not abuse of discretion.

6. Criminal Law ⚿670
Witnesses ⚿268(9)

In prosecution for unlawful possession of heroin, sustaining objection to cross-question, posed to police officer, as to whether he had discussed case or testimony with another officer was error, but in absence of offer of proof or indication that answer would have been favorable to defendant, was not reversible error.

* * *

Gladys Towles Root, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant was charged with violation of section 11500 of the Health and Safety Code in that on November 20, 1953, he unlawfully had heroin in his possession. He admitted allegations in the information that on or about June 11, 1952, he had been convicted in the Superior Court of Los Angeles County of violation of said section 11500, a felony; and that on or about July 3, 1952, he had been convicted in the Superior Court of Los Angeles County of violation of section 503 of the Vehicle Code, a felony. In a trial by jury, he was found guilty as charged. He appeals from the judgment.

Appellant contends that the court erred (1) in giving a certain instruction regarding confessions; (2) in failing to give certain instructions regarding circumstantial evidence; and (3) in sustaining objections to two questions asked by appellant on cross-examination.

The parties stipulated that Clifford C. Cromp was an expert chemist; he would testify that on November 23, 1953, he received People's Exhibit 1 (a sealed envelope); he opened the envelope and found therein (1) a green plastic vial containing 43 capsules of light brown powder, and (2) a cardboard box containing a number of empty capsules; he made an examination of five of the capsules containing the powder, and in his opinion they contained heroin.

Officer Kelly testified that on November 20, 1953, about 2:45 p. m., he and Officers Farrell and Matson went to a certain apartment in Los Angeles. Farrell knocked on the door. When appellant partially opened the door, the officers pushed the door open and entered the living room. Officers Kelly and Farrell immediately took one Aguilar into custody. They had a struggle with him on a sofa, and he spat a bindle of heroin from his mouth. During this time Officer Matson had appellant under restraint—he had some kind of hold around appellant's body. The officers then stood appellant and Aguilar against the wall—with their backs against the mantel. Appellant reached into his right front pants pocket, took out a green vial and threw it into an overstuffed chair which was about two feet from him. Officer Kelly picked up the vial. Appellant then raised his right hand to the level of his shoulder, and Kelly struck appellant in the mouth with his fist, pushed him against the mantel, and placed handcuffs on him. The officers then started to search the room. Kelly found a box of empty capsules on a table. He asked appellant if he had "any more narcotics in the place." Appellant replied "No, that is all I have right here, the vial." He also said "I will show you where I did have this vial." Appellant then took them into the bathroom, showed them a little door and said "That is where my cache was." Aguilar, in answer to questions by Kelly, stated that the box of empty capsules was not his, but that the bindle he spat was his. He did not ask Aguilar about the vial. He (Kelly) placed the items, which he had obtained in the room, in the envelope and sealed it. He then took it to the laboratory and turned it over to Cromp. Kelly testified further that after they took appellant to the police station, he (Kelly) and Farrell had a conversation with appellant; appellant stated that the 43 capsules were his, and that he would put "it" in writing. Farrell asked appellant who his peddler was, and appellant stated "I buy my own. I go to Mexico and get my own stuff." Appellant reduced the substance of this conversation to writing and signed it. The writing was then filed, but he (witness) has been unable to find it.

Officer Matson testified that immediately upon entering the apartment he "grabbed" appellant by the wrists and held them behind appellant's back while the other officers were struggling with Aguilar. He then turned him over to Officer Kelly. When he first saw the green vial it was "coming" from appellant's pocket; he saw it coming from appellant's hand and saw it land in an overstuffed chair. He saw Officer Kelly pick it up. After appellant and Aguilar were handcuffed they went with him and Officer Kelly into a clothes closet where appellant showed them a panel. The panel was open, and appellant said that was where he kept the entire cache.

Officer Farrell testified that he went to the apartment with Kelly and Matson on November 20, 1953. He first saw the green vial on an overstuffed chair in the living room, and he saw Kelly pick it up. He was present when Kelly asked appellant if he had any more narcotics at that place, and appellant stated "This is all of my cache. I do not have any more." He (witness) had a conversation with appellant about 4:30 that day at the police station. Officer Kelly was present during part of the conversation. He (witness) showed the vial and the 43 capsules of heroin to appellant, and asked appellant where he had obtained them. Appellant stated that he purchased them in Mexico. Appellant then reduced the substance of the conversation to writing and signed it. After the conversation the vial was marked and placed in an envelope.

Appellant testified that he rented the apartment, and he lived there with his mother. On November 20, 1953, Aguilar came to the apartment and told him that he (Aguilar) wanted to give appellant "the right to all of the stuff there." Appellant replied, "I cannot do it." When the officers came, appellant opened the door. Officers Kelly and Farrell grabbed Aguilar. Officer Matson grabbed appellant and held him. Appellant then looked around and saw the box of empty capsules for the first time—it was on the coffee table. The officers put him and Aguilar against the wall. There was no mantel or anything that resembled a mantel in the room. Officer Kelly gave appellant a "quick shakedown," and handcuffed appellant's right hand to Aguilar's left hand. Appellant saw Officer Kelly take the green bottle from the chair—that was the first time he saw the bottle. Officer Kelly asked appellant if the bottle was his, and appellant said "It is not mine." Officer Kelly struck appellant and cut his lip. Appellant went with the officers into the bathroom and into a closet in the bedroom. He did not say anything about keeping heroin in the apartment, and he did not use the word "cache." He signed a confession, at the police station, to the effect that the capsules belonged to him. Officer Kelly dictated the confession, and appellant wrote it in longhand. He wrote it because Officer Kelly said that they were going to "throw" appellant's wife in jail, but that if appellant would write the statement they would not "pick up" his wife. He testified further that the 43 capsules did not belong to him; they were not in his clothing at any time; and that he did not throw the bottle into the chair.

Aguilar, called as a witness by defendant, testified that on November 20, 1953, he went to appellant's apartment about 1 p. m. He took some merchandise in a big sack with him. The green vial and a hypodermic kit were in the sack. He had found the vial with the heroin capsules in it. He also had a box of empty capsules, an "outfit," and one or two caps of heroin in a paper. When the officers came into the apartment he got the outfit out of his pocket, and he laid the box of empty caps on a coffee table. He had the green vial in his left hand and he grabbed the paper and ran toward the window. He put the paper of heroin in his mouth. He tried to throw the vial behind the chair, but he did not know where it fell. Officer Kelly picked up the vial and asked appellant if it belonged to him. Appellant said "No," and Officer Kelly hit appellant in the face. He (Aguilar) told the officers that the "two" papers were his and that the heroin in the vial was his. He had pleaded guilty to the charge of possession of the two papers, and he had been sentenced. He testified further that he did not tell his probation officer that he discovered a jar of heroin in appellant's apartment and attempted to steal some of it; and he did not tell him that he did not own the jar of heroin.

A probation officer testified, upon rebuttal, that on March 9, 1954, Aguilar told him that when he went to appellant's apartment he discovered that appellant had a jar of heroin; he tried to steal some of the heroin when appellant was not looking; he took heroin from one piece of paper and put it in another piece of paper and, as he was returning the empty paper to the jar, the officers entered the apartment.

[1] Appellant contends, as above shown, that the court erred in giving an instruction regarding confessions. In the instruction referred to there was a proper definition of a confession, and then there was a statement that: "If under my instructions you find that a voluntary confession was made, you are the exclusive judges as to whether or not the confession was true; and in deciding that question you should consider all the circumstances connected with the making of the statement, as shown by the evidence. [If you should find that a confession was false in any particular, it remains, nevertheless evidence for your consideration in connection with all other evidence in the case, to be given such significance and weight as your judgment may determine.]" Appellant asserts that the portion of the instruction which appears in brackets was held to be erroneous in People v. Ford, 89 Cal.App.2d 467, 200 P.2d 867, 871. The instruction in that case was different from the instruction in the present case. The instruction in the Ford case stated that "'if you find that the confession was false *either entirely or in part* it remains nevertheless for your consideration, to be given such significance as your judgment may determine under instructions I shall shortly give you concerning false statements made by a person accused of a crime.'" (Italics added.) Of course, as indicated in that case, if the confession was entirely false there could be no reasonable theory under which it could be considered as an indication of guilt. In People v. Ybarra, 127 Cal.App.2d 74, 273 P.2d 284, an instruction identical with the one given in the present case was held to be proper. It was stated therein, 127 Cal.App.2d at page 78, 273 P.2d at page 287, that the instruction in the Ford case had been "revised to its present form". Also it was stated therein, 127 Cal.App.2d at page 78, 273 P.2d at page 287: "What it [instruction in present form] does say is that if the jury should find the confession untrue in some particular they need not

reject the entire confession; that they still had for consideration the portion of the confession they believed to be true." In the interests of clarity, the instruction needs further revision. The statement in the Ybarra case, which explains the language of the instruction, indicates that further revision is needed. It cannot be said, however, in view of the evidence in the present case, that it was reversible error to give the instruction.

[2, 3] Appellant also contends that the court erred in failing to give three instructions requested by appellant on the subject of circumstantial evidence. One of the requested instructions was to the effect that if evidence is susceptible of two reasonable constructions, one pointing to guilt and the other to innocence, the latter construction should be adopted. Another of the instructions was to the effect that the jury may not find defendant guilty on circumstantial evidence alone unless the circumstances are irreconcilable with any other rational conclusion. The other instruction was to the effect that when the People's case rests entirely or chiefly on circumstantial evidence, and in any case before a jury may find defendant guilty based solely on such evidence, each fact essential to the chain of circumstances to establish guilt must be proved beyond a reasonable doubt. Appellant argues that those instructions should have been given for the reason that a large part of the People's case depended upon circumstantial evidence. The testimony of Officers Kelly and Matson to the effect that appellant took the vial from his pocket and threw it into a chair was direct evidence that appellant had the heroin in his possession. "The court is not required to instruct upon the rules of law applicable to circumstantial evidence when it is incidental to and corroborative of direct evidence." People v. Agajanian, 97 Cal.App.2d 399, 403, 218 P.2d 114, 116; People v. Jerman, 29 Cal.2d 189, 197, 173 P.2d 805; People v. Lapara, 181 Cal. 66, 70, 183 P. 545; People v. Monge, 109 Cal.App.2d 141, 144, 240 P.2d 432. In view of the evidence herein it was not error to refuse to give the requested instructions.

[4-6] Appellant contends further that the court erred in sustaining objections to two questions asked by appellant on cross-examination. Officer Kelly testified on cross-examination that when Officer Matson placed appellant under restraint, appellant's back was against Officer Matson's chest, and that he did not know the exact position of appellant's arms. Appellant then read testimony of the officer from the transcript of the preliminary examination to the effect that while Officer Matson had appellant under restraint he had appellant "pinned with his arms back," with his elbows thrust backward, and his hands to the front with both palms open. Appellant asked the officer if he had given the answers (just read by appellant) and the officer said, "I probably did." Appellant then asked the following question: "And they were true at the time you gave them, were they?" An objection by the People on the ground that it was not a proper question was sustained. Appellant asserts that the testimony at the preliminary examination was read for the purpose of impeaching the witness, and that appellant was entitled to receive an answer to that question. It is to be noted that the officer did not say that he did so testify, but that he probably did so testify. It does not appear that the answer would have been favorable to appellant. Furthermore, the position of appellant's hands while Officer Matson was holding him not of significance—it is not asserted that the vial was thrown while Officer Matson was holding him. The alleged throwing of the vial by appellant occurred thereafter while he was in the custody of Officer Kelly. As stated in People v. Southack, 39 Cal.2d 578, at page 590, 248 P.2d 12, at page 19, "Control of cross-examination of a witness as to which of his conflicting statements is true should be in the sound discretion of the trial judge." It cannot be said that the trial court herein abused its discretion in sustaining the objection to said question above quoted. The other question, referred to in this contention, was asked Officer Matson on cross-examination, and was as follows:

"Have you discussed this case or your testimony in this case with Officer Kelly before you testified here today?" An objection by the People, on the ground that it was not a proper question and that it was incompetent, irrelevant, and immaterial, was sustained. Appellant argues that the question pertained to the credibility of the witness. The objection should not have been sustained, but the ruling did not constitute reversible error. There was no offer of proof, and there was nothing to indicate that the answer to the question would have been favorable to appellant.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

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134 Cal.App.2d 43

PEOPLE of the State of California, Plaintiff and Appellant,

v.

Jerry NATHANSON, Defendant and Respondent.

Cr. 983.

District Court of Appeal, Fourth District, California.

June 23, 1955.

Prosecution of city councilman for allegedly appropriating to his own use stationery which had been furnished to him by the city. The Superior Court, Riverside County, Russell S. Waite, J., granted a motion to set aside the indictment and the people appealed. The District Court of Appeal, Barnard, P. J., held that proper evidence before the grand jury was sufficient to show probable cause, and sustained the indictment.

Order appealed from reversed.

Mussell, J., dissented.

1. Indictment and Information 🔑10.2(1)

"Probable cause" as required to sustain indictment means such state of facts as would lead a man of ordinary caution or prudence to believe and conscientiously entertain strong suspicion of guilt of accused. Pen.Code, § 995.

See publication Words and Phrases, for other judicial constructions and definitions of "Probable Cause".

2. Indictment and Information 🔑137(3)

An indictment is not to be set aside merely because some incompetent evidence has been received, if evidence is otherwise sufficient. Pen.Code, § 995.

3. Indictment and Information 🔑10.2(8)

In prosecution of city councilman for allegedly unlawfully appropriating stationery, furnished by city, to his use and purpose, evidence before grand jury was sufficient to show probable cause, and sustained indictment, notwithstanding contention stationery had been given to him by city, that letters he sent out in course of re-election campaign served public purpose and that his duty under his trust was broad. Pen.Code, §§ 504, 995.

4. Embezzlement 🔑11(2)

Use of stationery, furnished by city, in re-election campaign was not, as matter of law in prosecution of councilman for appropriating stationery for personal use, a use in public interest as opposed to personal use. Pen.Code, §§ 504, 995.

5. Indictment and Information 🔑140(1)

In prosecution of city councilman for appropriating, to personal use, stationery furnished by city, whether stationery was taken and used openly, under claim of title and in good faith, was matter of defense presenting question of fact which could be raised at trial, and was not matter of law which would be controlling on motion to set aside indictment. Pen.Code, §§ 504, 511.

6. Grand Jury 🔑36

Where city councilman, in prosecution against him for allegedly appropriating to his own use stationery furnished by city, was advised that he had been subpoenaed to testify before grand jury and that it was law of state that he could refuse to answer any question to which answer might tend to incriminate him, he was sufficiently advised of rights and no further instructions in such regard were necessary. Pen. Code, §§ 504, 995.

7. Indictment and Information ⚷137(3)

In prosecution of city councilman for appropriating to his own use stationery furnished by city, questions asked of him before grand jury as to whether he had prepared his campaign statement for filing, whether he had paid any person to vote or to refrain from voting, whether he had conversed in regard to opening up city for gambling and questions as to certain other campaign literature he had used, although in part immaterial, were not so prejudicial as to warrant setting aside indictment. Pen.Code, §§ 504, 995.

8. Indictment and Information ⚷137(3)

In prosecution of city councilman for allegedly appropriating to his own use stationery furnished by city, testimony by city attorney, to effect that in his opinion a crime had been committed, even if testimony was improper, did not constitute advice from district attorney, and receipt of such improper evidence did not warrant setting aside indictment where evidence was otherwise sufficient to sustain it. Pen. Code, §§ 504, 995.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., William O. Mackey, Dist. Atty., W. B. Gustaveson, Asst. Dist. Atty., Riverside, for appellant.

Richardson & Henderson, Palm Springs, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order setting aside an indictment charging the defendant with violations of section 504 of the Penal Code. The defendant was a councilman of the city of Palm Springs, and these charges are based on the fact that he used stationery furnished by the city in his campaign for reelection at the election held on April 13, 1954. Briefly stated, the indictment alleged that he had in his possession certain stationery of the value of $74.56 owned by the city, which was furnished for his use as councilman in the official business of the city; and that between February 26, 1954 and April 13, 1954, he unlawfully appropriated said stationery to his own use and purpose, one not in the due and lawful execution of his trust.

The defendant was duly arraigned and moved the court to set aside the indictment. This motion was granted and the court ordered the indictment set aside and the case dismissed. The People have appealed from that order.

In ruling upon this motion the court said: "Possibly none of the matters which go to make up my opinion, standing alone, would furnish ground for setting aside the indictment." The court then stated that he thought the defendant's constitutional rights had been violated; that immaterial evidence had been received; that the city attorney of Palm Springs had given improper testimony; and then said: "I think that the defendant did not receive any sort of a fair and impartial hearing from the members of the Grand Jury."

The appellant contends that there was no legal ground for setting aside the indictment; that an indictment may not be set aside where supported by some evidence; and that the evidence here was sufficient to show probable cause.

[1, 2] Probable cause means such a state of facts as would lead a man of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion of the guilt of the accused. Lorenson v. Superior Court, 35 Cal.2d 49, 216 P.2d 859; People v. Nagle, 25 Cal.2d 216, 153 P.2d 344; Weber v. Superior Court, 35 Cal.2d 68, 216 P.2d 871; Greenberg v. Superior Court, 19 Cal.2d 319, 121 P.2d 713. Where the evidence is otherwise sufficient, section 995 of the Penal Code does not authorize the setting aside of an indictment because some incompetent evidence is received. McFarland v. Superior Court, 88 Cal.App.2d 153, 198 P.2d 318.

The city purchasing agent testified that for the years 1953 and 1954 stationery purchases for the other councilmen ran from $10.52 to $26.06 while those for the defendant amounted to $101.95; that in March, 1954, the defendant ordered 1000 letterheads and 1000 envelopes amounting to $37.28; and that in February he ordered another 1000 letterheads and 1000 envelopes of the same value. The city manager identified orders for 1000 sheets of stationery and 1000 envelopes on city stationery, for the defendant. He testified that he had no knowledge of any other councilman making similar use of city stationery. There was evidence that these articles were paid for, or in the process of being paid for, by the city; and that they were used by the defendant in sending out letters furthering his campaign. A public stenographer testified that in March and April, 1954, she typed certain letters and mimeographed 1000 letters, with addressed envelopes, which were on city of Palm Springs stationery, for the defendant; and that she told him that it was too bad to use this expensive bond paper as mimeograph paper would be better for the work. Several voters testified that they received such letters, and identified the letters and envelopes.

The city attorney of Palm Springs testified that the claims for these articles had not been presented to him for his opinion as to their legality; that stationery is provided for councilmen to be used for public business; and that it could not be used for private business "in the light of the Penal Code." When asked whether, in his opinion, the use of the stationery, bought and paid for by the city, for campaign purposes by city official would be a lawful use, or whether he would consider it a crime he replied: "I believe it has been held where a councilman or a city official was held criminally liable for using public property for a private use * * * it was deemed a crime. * * * I can only state that as a basis." He further testified that he had no knowledge of any ordinance or agreement covering the use of Palm Springs stationery; that he did not tell the respondent that this was illegal; that he did not see the letterheads using the respondent's name for the furtherance of his election before the bill was paid; and that, in his opinion, if the councilman stated the purpose to which he intended to use the property it would still be embezzling.

The defendant testified that he used regular Palm Springs stationery with his name on it in the election campaign; that these articles were paid for by the city; that "The City offices gives all the City Councilmen that stationery"; that "There was never any stipulation as to what it was for; it was just given"; that about a month before he ordered this stationery he told the city treasurer "We are getting in a campaign now, it looks like I am going to need a little more stationery"; that he replied "I think you had better order it then", and "I did"; that he ordered such stationery on four occasions in February and March; that he sent out the various letters referred to; and that he paid the postage himself.

[3-5] Under established rules, we think there was enough material and competent evidence received to show probable cause, and to support the jury's action in returning the indictment, unless the evidence was rendered insufficient for any of the reasons urged by the respondent.

The respondent first contends that there was no valid evidence showing that the city of Palm Springs was the owner of this stationery; and none showing that the use to which he put it was not one in the due and lawful execution of his trust. It is argued that these articles were a gift to him from the city; that title had passed from the city when he used them; that this stationery had his name on it and was useless to others; that such articles were given to every councilman, to be used for his own personal stationery; that there was no regulation or ordinance defining the scope of respondent's duty with respect to his use of such stationery; that there is no evidence tending to show that he derived any personal gain from the use of the stationery; that the letters he sent out concerned matters vital to the welfare of the city of Palm Springs and served a public purpose; and that his duty under his trust was so broad and ill-defined that it must be said as a matter of law that the particular use made by him did not violate any law.

The matters thus suggested present questions of fact, rather than legal questions which are controlling at this time. The appropriation of public property for private use by an officer of a municipality is a violation of section 504 of the Penal Code. People v. Harby, 51 Cal.App.2d 759, 125 P.2d 874; People v. Knott, 15 Cal.2d 628, 104 P.2d 33, 128 A.L.R. 1367; People v. Byers, 5 Cal.2d 676, 55 P.2d 1177. The evidence, as a whole, would justify the inference that this stationery was intended for official and not for personal use, and that it was not a gift in the sense contended for. It cannot be held as a matter of law that the use of such stationery in a campaign for reelection is so certainly in the public interest as to constitute an official rather than a private use. Since he used it in his campaign, at the cost of the city, it cannot be said that the respondent derived no personal gain. The argument that such stationery with the respondent's name on it would be useless to others, is not persuasive with respect to the larger quantities specially ordered for campaign purposes. Moreover, whether these articles were taken and used openly, under claim of title and in good faith, is a matter of defense presenting a question of fact which may be raised at the trial. Penal Code, Sec. 511; People v. Knott, 15 Cal.2d 628, 104 P.2d 33, 128 A.L.R. 1367.

[6] It is next contended that this indictment was returned without reasonable or probable cause in that he was forced to appear and testify under subpoena, thus violating his constitutional right; and that if his own testimony were deleted from the record there would be no competent evidence to constitute reasonable or probable cause.

There was ample evidence to show probable cause, apart from the testimony given by the respondent. At the beginning of his testimony he was told "Mr. Nathanson, you have been subpoenaed here to testify. It is the law of the state if at any time any answer might tend to incriminate you, you can refuse to answer the question." The respondent replied, "I will answer any question." The respondent then gave 18 pages of testimony answering all questions asked of him. While he admitted using the stationery for campaign purposes all of his testimony was in favor of his point of view. It does not appear that he was improperly forced to testify. He was merely given an opportunity to explain his actions in the matter in question, and he expressed a willingness to do so. It cannot be held that he was not sufficiently advised of his rights under the circumstances, or that any prejudice resulted in the lack of further instructions in that regard. McFarland v. Superior Court, 88 Cal.App.2d 153, 198 P.2d 318.

[7, 8] It is next contended that the district attorney was guilty of gross misconduct in three respects in conducting the proceedings before the grand jury. (1) That through the lips of the city attorney the district attorney advised the grand jurors that the respondent was guilty of embezzlement; (2) that the respondent was subjected to humiliation in that it was inferentially made to appear that he had violated the law by not filing a statement of campaign expenses, that he had conspired to promote gambling in Palm Springs, and that he had paid money to prevent people from going to the polls to vote; and (3) that other campaign literature printed in San Francisco was introduced which had nothing to do with this inquiry.

With respect to the second of these items the respondent was asked whether he had prepared his campaign statement for filing, and he replied that none was necessary. He was asked whether he had paid any person to vote or to refrain from voting, and he replied that he had not. Another witness was asked whether he had ever had any conversation with the respondent in regard to opening up Palm Springs for gambling. The witness replied "No sir". In the third instance, the respondent was asked about certain campaign literature he had used and he testified that he had ordered it printed in San Francisco at his own expense, and that it was not on city stationery. While a part of the matter involved in these two items was immaterial it is not so prejudicial as to be controlling, under established rules.

With respect to the first of these items, the effect of this part of the city attorney's testimony was to express his own opinion that a crime had been committed. In support of his contention that this testimony required the setting aside of the indictment the respondent cites United States v. Wells, D.C., 163 F. 313; Cassell v. State of Texas, 339 U.S. 282, 70 S.Ct. 629, 94 L.Ed 839; Quinn v. United States, 91 U.S.App.D.C. 344, 203 F.2d 20; and Dong Haw v. Superior Court, 81 Cal.App.2d 153, 183 P.2d 724.

The Cassell and Quinn cases have no factual relationship to the instant case. In United States v. Wells, the district attorney, without giving the grand jurors an opportunity to deliberate, told them that he was acting under instructions of the Department of Justice, that there was plenty of evidence submitted, and that he had other evidence to give at the trial which would justify their action, and directed the foreman to sign the indictment, when the jurors did not know what it contained and did not even know who was being indicted. In the Dong Haw case, the district attorney told the grand jury that the evidence introduced was legally sufficient to support an indictment whereas, in fact, no relevant or competent evidence had been introduced against the defendant. There is no evidence here that the district attorney told the grand jury that the evidence was sufficient to support an indictment, or that he interfered in any way with the deliberations of the grand jury. While some of the testimony given by the city attorney was improper, it did not constitute advice from the district attorney, and there was other relevant and competent evidence which was sufficient to support the indictment. There is nothing in the cited cases which would support the further contention that the court was authorized to set aside the indictment, in the exercise of his discretion, by the receipt of this improper evidence.

Our personal feelings are in sympathy with the action taken by the trial judge. Leaving political motives aside, it would seem that a prosecution of this case ought to be unnecessary. While it cannot be held, as a matter of law, that the ordering and use of this stationery for campaign purposes was not illegal, it was apparently done openly and in good faith and more as a result of ignorance than of fraudulent intent. The circumstances suggest that other and less drastic remedies were available which would be more fair to everyone concerned. However, under the statute and the established rules, we feel compelled to hold that probable cause sufficiently appears and that the motion to set aside the indictment was improperly granted.

The order appealed from is reversed.

GRIFFIN, J., concurs.

MUSSELL, J., dissents.

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133 Cal.App.2d Supp. 798

Bernice WILLIAMS, Plaintiff and Respondent,

v.

ROSINSKY MOTOR COMPANY, etc., Defendant and Appellant.

C. A. 8679.

Appellate Department, Superior Court,
Los Angeles County, California.

May 25, 1955.

Action by buyer against automobile agency for rescission of, and recovery of payment made on, conditional sales contract. From adverse judgment of the Municipal Court of Los Angeles Judicial District the agency appealed. The Appellate Department of Superior Court, Bishop, Acting P. J., held that where original complaint alleged facts showing that $2,854.10 was due and prayed judgment for that amount, but amended complaint alleged a cause of action for at least $3,854.10 without changing prayer in original complaint, and no part of amount sought was remitted, the Municipal Court did not have jurisdiction to proceed to render judgment.

Reversed with directions to transfer action to Superior Court.

1. Courts 🔑472(6)

A superior court and a municipal court do not have concurrent jurisdiction over any action, since jurisdiction is in one or the other. West's Ann.Const. art. 6, § 5.

2. Courts ⚷170

A municipal court, having jurisdiction of a case, has authority to permit an amendment that results in depriving the court of continued jurisdiction.

3. Courts ⚷121(2)

The fact that judgment was for an amount within the jurisdiction of municipal court does not mean that jurisdiction was not in superior court.

4. Courts ⚷121(6)

Jurisdiction of superior court is not defeated by possibility or probability that a good defense exists to enough of the demand made in complaint, so that amount awarded in judgment will be less than sum chosen to determine jurisdiction.

5. Courts ⚷122, 170

The ultimate test of jurisdiction in action for money judgments is not the prayer but the facts as alleged in the complaint.

6. Courts ⚷170

Where original complaint, which alleged facts showing that $2,854.10 was due and prayed judgment for that amount, was amended to allege a cause of action for at least $3,854.10, the failure to change the prayer was not susceptible of interpretation as a waiver of or desire to remit any part of the amount sought by the amendment and the municipal court did not have jurisdiction to proceed to render judgment. West's Ann.Code Civ.Proc. § 396; West's Ann.Civ.Code § 2982; West's Ann.Const. art. 6, § 5.

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Arkin & Weissman, Culver City, Foster, Tagert & Mills, Los Angeles, for appellant.

David J. Lee, Los Angeles, for respondent.

BISHOP, Acting Presiding Judge.

We see no escape from the conclusion that the judgment, awarding the plaintiff $2,614.98 upon certain conditions, must be reversed because the trial court was without jurisdiction of the case when the judgment was made and entered.

The events leading to the situation that we deem fatal to the judgment are a bit unusual. The action as brought was one within the jurisdiction of the Municipal Court. Framed in three causes of action, the complaint alleged, first of all, an action to recover the payments made upon a contract (as amended by a second) induced by fraud and which plaintiff had and still sought to rescind. These payments, including a $500 Cadillac, were alleged to be $2,854.10. The second cause of action was based on the claim that the contracts, which were conditional sales contracts, were void because of failures to comply with section 2982 of the Civil Code. The third cause of action may be ignored because it was only an endeavor to plead as a common count one or the other of the causes already pleaded. Wellman v. Security-First Nat. Bank, 1951, 108 Cal.App.2d 254, 263–264, 238 P.2d 679, 684. By her prayer, the plaintiff asked to have the contracts cancelled; for judgment for $2854.10; "and for such other and further relief as to the court seems just and proper."

This complaint—presenting an action within the jurisdiction of the municipal court, section 89, Code of Civil Procedure—was filed November 27, 1953. The two defendants answered and the case went to trial on July 8, 1954. Early in the proceedings it was stipulated that the plaintiff had paid to the defendants, in one way or another, a little over $3,600. The defendants, on July 9, filed cross-complaints in which they sought to recover for the reasonable use of the Cadillac during the months that the plaintiff had driven it, "but not to exceed $2,999."

The case was submitted for decision on July 9. In a statement, filed a few days later, the trial judge expressed his opinion that the contracts were void, because of noncompliance with section 2982, Civil Code, and that as a consequence the plaintiff was entitled to recover the total of her payments plus a penalty, altogether $4,614.98, less the reasonable value of the use of the car, determined to be $2,000. Judgment in plaintiff's favor was entered July 22, 1954 for $2,614.98. A motion for a new trial was made in September, and, in lieu of granting it, the judgment was set aside; the case reopened for further proceedings; plaintiff was given permission "to file amendment to the complaint to conform to proof"; defendants were given permission to answer the amendment; and all parties given permission to introduce additional evidence.

The plaintiff did file, September 21, her "amendment to complaint," in which she alleged that since the commencement of this action she had paid the defendants "the further sum of $1,000" upon the contracts. No attempt was made to amend the prayer of the original complaint, when this supplement complaint was filed, and it contained no prayer of its own. The defendant now appealing filed an answer in which it placed the amount plaintiff had paid since the action was filed at $984.00, not $1,000. With the record in this condition, no further evidence being introduced by either party, judgment was again ordered for the plaintiff, and a judgment was entered, October 25, 1954, for $2,614.98. It is from this judgment that the defendant Rosinsky Motor Company appeals.

[1-4] So far as we are aware, no decided case exists that entirely fits all facts of this one, but we do have a number of principles established that direct us to the correct conclusion. First of all, a superior court and a municipal court do not have concurrent jurisdiction over any action; jurisdiction is in one or the other. Const. Art. VI, sec. 5; Norton v. Baranov, 1935, 4 Cal.2d 443, 444, 50 P.2d 67, 68, and case cited. A municipal court, having jurisdiction of a case, has authority to permit an amendment that results in depriving the court of continued jurisdiction. Thomasian v. Superior Court, 1953, 122 Cal.App.2d 322, 336, 265 P.2d 165, 176. The fact that the judgment was for an amount within the jurisdiction of the municipal court does not mean that jurisdiction was not in the superior court. Sellery v. Ward, 1942, 21 Cal.2d 300, 304, 131 P.2d 550, 552; and cases cited. Nor is the jurisdiction of the superior court defeated by the possibility or probability that a good defense exists to enough of the demand made in the complaint, so that the amount awarded in the judgment will be less than the sum chosen to determine jurisdiction. Bank of America Nat. Trust & Savings Ass'n v. Ames, 1936, 18 Cal.App.2d 311, 314, 63 P.2d 1208, 1210; Brooks v. Brooks, 1941, 48 Cal.App.2d 347, 349, 119 P.2d 970, 972.

[5] Our legal literature is not without such statements as this: "The most frequently used yardstick to determine jurisdiction of the court in actions for money judgments is the amount in controversy as indicated by the prayer of the complaint." Berry v. Skone, 1953, 118 Cal.App.2d Supp. 875, 877, 255 P.2d 825, 826. However, it is settled that the ultimate test of jurisdiction is not the prayer but the facts as alleged in the complaint. "Appellant is mistaken in her contention that the sum demanded in the prayer of the complaint is the final test of jurisdiction. None of the cases cited by her, and none ever called to our attention, go to the length of holding that the prayer, irrespective of the allegations of the complaint, concludes an examination into the real amount in controversy." Demartini v. Marini, 1920, 45 Cal.App. 418, 420, 187 P. 985, 986. We find this observation about an earlier case in Consolidated Adjustment Co. of California v. Superior Court, 1922, 189 Cal. 92, 94, 207 P. 552, 553: "In Lehnhardt v. Jennings, 119 Cal. [192] 198, 48 P. 56, 51 P. 195, the court had under consideration the question whether the prayer of the complaint, or the facts stated therein, constituted the determining factor in ascertaining whether the demand in suit amounted to $300, and it determined that the amount demanded was not conclusive, but that the allegations of fact were determinative of the question * * *." We find supporting this same conclusion: Trinidad Bean & Elevator Co. v. Superior Court, 1932, 128 Cal.App. 355, 357, 17 P.2d 153; Larson v. Du Bain, 1933, 135 Cal.App. 433, 434, 27 P.2d 393; Lesser v. Pomin, 1934, 3 Cal.App.2d 117, 123, 39 P.2d 451, 453, and Sellery v. Ward, supra, 21 Cal.2d 300, 304, 131 P.2d 550, 552.

Without doubt, at the time when the trial court undertook to render its judgment, the complaint, as amended or supplemented, revealed a cause of action for more than $3,000. There remains one question: Did the fact that in her prayer plaintiff asked for less than $3,000, keep jurisdiction of the action out of the Superior Court? The cases require a negative answer to this question.

The authority most nearly in point is Du Pont v. Allen, 1930, 110 Cal.App. 541, 543–544, 294 P. 409, 410. This was an action to recover $2,500 upon a contract for the sale of some goods, $3,000 having been paid. Shortly after filing his complaint, the plaintiff took possession of the goods and made use of them. The defendant answered and in addition filed a cross-complaint in which he alleged the value of the goods to be $5,500; that plaintiff had converted them to his own use, and that by reason thereof he (the cross-complainant) had been damaged $3,368 (the amount of principal and interest he had paid). After a trial, it was determined that the plaintiff was entitled to $3,100 (principal, interest and attorney's fee); that by bringing the action, title to the goods had passed to the defendant; that the goods were worth $4,950; the plaintiff had converted them to his use; and judgment was entered awarding the cross-complainant $1,850.

In his appeal from the judgment just referred to the plaintiff contended that, inasmuch as the prayer of the cross-complaint was for $3,368, that was the limit of the amount that could be awarded the cross-complainant; and that the $3,100 should have been deducted from the amount the cross-complainant had prayed for. The contention met with judicial disfavor. After calling attention to the fact that the allegations of the cross-complaint concerning value had been denied, the appellate court continued: "This being so, the amount erroneously demanded in the prayer became immaterial * * *." This decision is in harmony with the run of the cases which agree that if the defendant has answered, the prayer of the complaint imposes no limitation upon the judgment. "* * * we may therefore dismiss from notice the prayer of the complaint, and are only required to look to the case made by the complaint and embraced within the issue. * * * There being an answer in the case, the right of appellants to recover upon the agreement depends, not upon the prayer of their complaint, but upon the scope of that pleading and the issues made, or which might have been made under it." Johnson v. Polhemus, 1893, 99 Cal. 240, 244–245, 33 P. 908, 909. See also Nathan v. Dierssen, 1913, 164 Cal. 607, 610–611, 130 P. 12, 14; Baar v. Smith, 1927, 201 Cal. 87, 97–99, 255 P. 827, 831–832; Murphy v. Stelling, 1908, 8 Cal.App. 702, 706–707, 97 P. 672, 674; McKesson v. Hepp, 1923, 62 Cal.App. 619, 620–621, 217 P. 802.

[6] A municipal court, of course, would have jurisdiction to try a case where the complaint alleged facts revealing a good cause of action for a sum over $3,000, provided that the excess over $3,000 was remitted (note next to last paragraph of section 396, C.C.P.). We are inclined to conclude that if a complaint alleges facts entitling the plaintiff to more than $3,000, but ends with a prayer for some sum not over $3,000, that the prayer should be construed as remitting all above the amount prayed for. That, however, was not the situation in the case under review. In our case the original complaint alleged facts showing that $2,854.10 was due the plaintiff, and prayed judgment for that amount. Here, plainly, was no remission of any excess. Had the plaintiff desired to remit any money due her in excess of that originally sought, there would have been no occasion whatever to amend her complaint to conform to proof, and when the amendment was made the failure to change the prayer is not susceptible of interpretation as a waiver of any part of the amount sought by the amendment. Under the facts of our case, a cause of action for at least $3,854.10 was alleged; no part of it was remitted; the trial court had no jurisdiction to proceed to render judgment.

The judgment is reversed, with directions to the trial court to transfer the action to the Los Angeles Superior Court.

PATROSSO and SWAIN, JJ., concur.

133 Cal.App.2d Supp. 806

James E. KING, Plaintiff and Appellant,

v.

William C. CURTIS, Jr., et al., Defendants and Respondents.

C. A. 8665.

Appellate Department, Superior Court,
Los Angeles County, California.

June 8, 1955.

Action by buyer of automobile on conditional sales contract against company to whom conditional sales contract had been discounted for buyer's damages arising from failure of company to procure collision insurance on automobile that was damaged in an accident. The Municipal Court, Los Angeles Judicial District, entered an order granting nonsuit and judgment of dismissal, and automobile buyer appealed. The Superior Court, Appellate Department, Bishop, Acting P. J., held that where conditional sales contract included amount to be paid for insurance and recited that it was understood by parties that contract was to be assigned by dealer to named company, company was a party to the original transaction and statute requiring conditional seller of automobile to procure insurance policy where rate is included in contract, imposed duty on company to procure the insurance.

Reversed.

1. Appeal and Error ⚷854(5)

A judgment of nonsuit will be upheld on appeal only if a ground specified in support of the motion is a good ground, or some ground exists that could not have been cured had it been specified.

2. Pleading ⚷121(1)

Defendant's answer which "denies that it has sufficient or any information to enable it to answer the allegations contained in paragraphs II and III, and basing its denial on that ground denies * * *" was not denial but an admission of facts alleged.

3. Insurance ⚷104

Where an automobile conditional sales contract included charge for insurance, the duty imposed by statute on conditional seller to procure automobile insurance within 30 days after execution of contract was implicit. West's Ann.Civ.Code, § 2982(b).

4. Estoppel ⚷98(1)

Where conditional sales contract between dealer and automobile buyer recited that it was understood that contract was to be assigned to a named company, such company was a "party to the original transaction" thereby rendering applicable statute providing that a voluntary acceptance of the benefit of a transaction is equivalent to consent to all obligations arising from it in so far as the facts are known or ought to be known to person accepting contract. West's Ann.Civ.Code, § 1589.

See publication Words and Phrases, for other judicial constructions and definitions of "Party to the Original Transaction".

5. Trial ⚷165

On motion for nonsuit the evidence must be interpreted as strongly in plaintiff's favor as reason permits.

6. Insurance ⚷104

Where conditional sales contract between automobile dealer and buyer recited that contract was to be assigned to named company and such contract included an amount for automobile insurance, under statute requiring conditional seller to procure insurance where amount for same is included in contract, company was liable for damages to automobile buyer arising from company's failure to procure insurance. West Ann.Civ.Code, § 2982(b)

John Joseph Hall, Los Angeles, for appellant.

Cannon & Callister, Los Angeles, for respondents.

BISHOP, Acting Presiding Judge.

[1] A judgment of nonsuit will be upheld on appeal only if a ground specified in support of the motion is a good ground, or some ground exists that could not have been cured had it been specified. Lawless v. Calaway, 1944, 24 Cal.2d 81, 94, 147 P.2d 604, 610. It was error to grant the motion

in this case, for a noncurable ground does not exist, and no ground appears to have been specified.

[2] Of greater moment, the evidence warranted a judgment in plaintiff's favor on his third cause of action. These allegations of the third cause of action were not denied: that plaintiff and defendant Trader Bill entered into a written conditional sales contract on December 18, 1952, covering the sale to plaintiff of a Pontiac car; that included in the sums agreed to be paid were two sums, totaling $102, for insurance on the car; that within one or two weeks after December 18, defendant Trader Bill assigned the conditional sales contract to defendant Morris Plan Company; that "Defendant Morris Plan accepted said assignment and all benefits and burdens accruing thereunder." Allegations, to the effect that near the end of February, 1953, plaintiff's Pontiac suffered over $500 damages in a collision, and that due to the negligence of the defendants in not issuing or obtaining insurance, plaintiff suffered damages, in the sum stated, were denied as follows: "Denies that it has sufficient or any information to enable it to answer the allegations contained in paragraphs II and III, and basing its denial on that ground denies * * *." This was no denial, but an admission of the facts alleged. Aronson & Co. v. Pearson, 1926, 199 Cal. 295, 298, 249 Pac. 191; May v. Board of Directors, 1949, 34 Cal.2d 125, 127, 208 P.2d 661, 662. Moreover, it was established beyond question that an accident occurred and no insurance had been taken out by anybody before the accident.

The conditional sales contract was introduced into evidence. By apt words, the terms and conditions on the reverse side of the contract were made a part of it. There we note that "6. Purchaser understands that this contract is to be assigned to The Morris Plan Company of California * * *" and "7. The Morris Plan Company of California is hereby authorized to do all things necessary or required covering any insurance policies now or hereafter issued in connection herewith * * *." The provisions of the contract respecting the thirty monthly payments to be made contain this sentence: "All such payments with interest shall be payable at the office of The Morris Plan Company of California."

In a further provision the contract provides that "Purchaser agrees to keep said property insured against loss by fire, theft, transportation, collision and ——— at his own expense for an amount not less than the deferred balance so long as any thereof remains unpaid; such insurance to be placed through agencies or brokers and in insurance companies approved by the seller; loss thereon shall be payable to seller and purchaser as their interests may appear. The purchaser hereby authorizes the seller to pay the premiums for such insurance, adding the same to the deferred principal balance then due hereunder, and the policies therefor shall be held by the seller until this contract is fully performed. Seller and/or his assigns is hereby given power of attorney by the purchaser to adjust and settle all claims on said insurance without the consent or acquiescence of purchaser."

[3] Implicit in the allegations of the contract is the duty imposed by subdivision (b) of section 2982, Civil Code: "If any charge for insurance is included in the amount paid or to be paid by the buyer under any conditional sale contract for the sale of a motor vehicle, with or without accessories, an insurance policy or policies or a certificate of insurance under a master policy shall be issued and the seller shall within 30 days after the execution of the conditional sale contract send or cause to be sent to the buyer the original or an exact copy of such policy or policies or certificate."

It further appears, from the evidence, that the defendant Trader Bill had no license to sell insurance, but that the defendant Morris Plan did. In December of 1952, The Morris Plan Company was discounting TraderBill's contracts. The assignment, in this case, covered not only all rights under the contract, but the car as well, and The Morris Plan Company received from its codefendant the certificate of ownership of the Pontiac. The Morris Plan Company has a customary practice of checking to see whether insurance has been taken out, a procedure that usually takes about a month to complete.

[4] Plaintiff relies upon section 1589, Civil Code, providing that "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting." Of this section, the court, in Fruitvale Canning Co. v. Cotton, 1953, 115 Cal.App.2d 622, 626, 252 P.2d 953, 955, makes this observation: "This section, however, has generally been held to apply only where the person accepting the benefit was a party to the original transaction." Our problem is thus made precise; was the defendant Morris Plan Company "a party to the original transaction" within the meaning of the cases?

[5] On the motion for a nonsuit the evidence must be interpreted as strongly in plaintiff's favor as reason permits. So interpreting it in this case, we conclude that from the very beginning it was the understanding of the parties, as evidenced by the terms on the printed blank, that the conditional sales contract was to be assigned to The Morris Plan Company, and that it was to become and be a real party to the transaction. A very similar situation was before the court in Jones v. Albert, 1911, 161 Cal. 234, 238, 118 P. 794, 795, and it was there determined that the assignee was, actually, the real party in interest and so under the obligations of the assigned contract.

[6] It is true that the evidence does not show that the defendant The Morris Plan Company knew that no insurance policy had been taken out. The trial court would have been concluding within the bounds of reason had it held that the fact was one that "ought to have been known" to it. Subdivision (b) of section 2982, Civil Code, as we have noted, made it the duty of defendant's assignor to procure a policy within thirty days of the execution of the contract. The assignment was made two to three weeks before this thirty-day period had expired. A purchaser of such a contract should not be heard to say that it did not know whether insurance had been procured. It had ready means of ascertaining, as a part of discounting the paper it bought, whether a policy had been issued. It should not be permitted to take advantage of its willful ignorance.

The judgment of nonsuit in favor of the defendant Morris Plan Company of California is reversed.

PATROSSO, J., concurs.

SWAIN, Judge.

I concur on the ground that the allegation "Defendant Morris Plan accepted said assignment and all benefits and burdens accruing thereunder" is admitted by Morris Plan by reason of the fact that the allegation is not denied.

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133 Cal.App.2d Supp. 784

William H. HAUPT, Plaintiff and Respondent,

v.

LA BREA HEATING & AIR CONDITIONING COMPANY, et al., Defendants and Appellants.

C. A. 8607.

Appellate Department, Superior Court,
Los Angeles County, California.

May 23, 1955.

Action to recover rent under lease and damages to the demised premises. From an adverse judgment of the Municipal Court, Inglewood Judicial District, the lessees appealed. The Appellate Department of the Superior Court, Los Angeles County, held that where lease did not contain an express covenant by lessees to repair the leased premises, which were in a state of disrepair at time lease was executed, lessees' obligation was to restore the premises to lessor unimpaired by lessees beyond ordinary wear and tear.

Judgment reversed.

See also 125 Cal.App.2d Supp. 388, 270 P.2d 125.

1. Evidence 🔑441(4)

Where property was leased by written agreement, such agreement was the measure of lessees' express obligation to repair, and although lessor attempted to testify to conversations preceding its execution, which would have in effect extended lessees' obligation in this particular, such testimony was incompetent

2. Landlord and Tenant ⚷152(4)

Where lease agreement merely contained promise by lessees to make whatever repairs were necessary to floor of the leased premises and to repair the floor to a usable state, judgment for lessor based on finding that lessees, at their cost and expense had to maintain said building in a reasonable state of repair, was improper.

3. Landlord and Tenant ⚷160(1)

Where lease did not possess an express covenant by lessees to repair the leased premises, which were in a state of disrepair at time lease was executed, lessees' obligation was to restore the premises to lessor unimpaired by lessees beyond ordinary wear and tear. West's Ann.Civ.Code, §§ 1928, 1929.

4. Landlord and Tenant ⚷231(8)

In action by lessor to recover rent under lease and damages to demised premises, evidence was sufficient to sustain finding that lessees were liable for rent through and including the month beginning May 19, 1952.

5. Municipal Corporations ⚷601(21)

Where lease permitted use of leased premises for storing of merchandise and supplies incidental to lessees' lawful business, storage was not a business in itself and was not a violation of a zoning ordinance.

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R. F. Neuman, Los Angeles, for appellants.

Leland S. Davis, Los Angeles, and William H. Haupt, Inglewood, for respondent.

Before BISHOP, Acting P. J., and PATROSSO and SWAIN, JJ.

BY THE COURT.

Action by plaintiff to recover rent under lease, and damages to the demised premises. From a judgment in favor of plaintiff, defendants appeal.

The complaint is in two counts: The first alleges that the parties entered into an agreement in writing whereby plaintiff leased to defendants certain premises in the City of Inglewood for a term beginning February 19, 1949, and ending December 31, 1949, with an option to defendants to extend the term for one year from December 31, 1949, at a rental of $50 per month; that defendants entered into possession of the premises and occupied the same until April 21, 1952; that defendants failed to pay the rent which accrued under the terms of said lease, in the sum of $350; that by the terms of said lease "defendants expressly covenanted and agreed to make whatever repairs might be necessary, and to repair to a usable state, at their own cost and expense, the floor of said building, it being agreed and understood * * * that the damage caused to said floor and to the girders and underportions of said floor by dry-rot would be repaired by the defendants and said floor made safe and usable, and it was further understood and agreed * * * that the defendants would, at their cost and expense, maintain said building in a reasonable state of repair"; that defendants failed to repair the floor and the roof, permitting water to drain through the roof and into the plaster; caused electrical wiring to be "cut, pulled and damaged; have broken and removed doors, * * * the front portions of the garage buildings; * * * removed the doors from one of said garages; * * * caused and permitted trucks operated by their employees to be driven into the side of said building whereby a large hole has been driven through said wall"; and "have broken or caused or permitted to be broken a large number of window panes," all to plaintiff's damage in the sum of $3,000.

The second cause of action repeats the allegations of the first as to the execution of the lease, the entry of defendants into possession and defendants' default in the payment of rent accrued. However, it omits the allegations of the first count with respect to defendants' covenant to repair, and proceeds to allege that defendants caused and permitted waste to the demised premises in that defendants failed to keep the roof in repair, knowing that water was leaking through the roof and causing the plaster on the walls and ceiling to become loose and to fall, and the walls and floor to rot; that defendants caused and permitted the electrical wiring and fixtures to be damaged, wires to be cut and fixtures removed; that defendants broke and damaged the rear door and removed two interior doors; that defendants caused and permitted motor vehicles owned and operated by them to be driven into and against the walls and doors of the garage buildings and the walls of the "front building" in such manner as to damage the same; that defendants have caused and permitted glass to be broken in windows and doors, and by reason of repairs required to repair the damage occasioned by defendants, portions of the exterior of the buildings will require to be painted; all to plaintiff's damage in the sum of $3,000—the complaint, however, waiving any right to recover any sum in excess of $3,000.

The trial court found all of the allegations which we have summarized above to be true, with the single exception that "the painting of the entire exterior of the said building has not been made necessary by reason of any act of neglect on the part of the defendants," and entered judgment in favor of plaintiff in the sum of $3,000. The defendants challenge the sufficiency of the evidence to support the findings (1) as to the terms of the lease with respect to defendants' obligation to repair, and (2) the damage found to have been occasioned to the premises by the defendants. We are in accord with defendants' contention, and are reversing the judgment.

Relevant to the problem before us is the condition of the premises at the time of the letting, Roberts v. Freeborn, Com.Pl., 2 N.Y.S. 56, and while the evidence as to this is in some respects conflicting, the following is made to appear.

The improvements on the demised premises consist of a residence and two garages. The front portion of the residence was constructed in 1923 and the rear portion—connected to the front by a covered porch—some two years later. All of the buildings are of frame construction, the floor of the front portion resting upon the ground and that of the rear portion, which is slightly higher, is very little above the ground. Sometime about 1925 or 1926 the then owner of the premises built a small frame addition on the east side of the residence, which was occupied as a barber shop. In 1933 a severe explosion occurred in the barber shop, completely demolishing it and seriously affecting the whole building to which it was attached. The record is replete with testimony by former owners and occupants of the building to the effect that prior to its sale to plaintiff in August, 1947, it was in a deteriorated state, to say the least. Particularly the floor of the front portion of the residence had a hole in it of some size as a result of dry rot which a witness for plaintiff testified had been present for a period of four to seven years prior to the trial. Plaintiff purchased the property without making any inspection of the improvements thereon, as he desired the site for a contemplated radio station.

In February, 1949, when the property was vacant, having been unoccupied and seemingly unattended since August, 1948, the defendants, whose place of business was in the immediate vicinity, approached plaintiff with the view of leasing the same for storage purposes, with the result that the parties executed a writing of which the following is a copy.

"February 12, 1949

"Mr. Wm. H. Haupt, Attorney
458 South Spring Street
Los Angeles, California

"Dear Mr. Haupt Re: Building at
737 East Hyde Park Blvd.,
Inglewood California

"Do you care to rent the building to us at the above address for $50.00 per month. We will make whatever repairs are necessary to the floor without charge to you and sign a waiver of responsibility in respect to any accidents by reason of disrepair of the floor.

"Also, if you wish we will provide a guarantee to repair any damage that may occur if floors are overloaded.

"We would use the building for storage of light, materials that have considerable bulk, such as registers used in our business, tin pipe of considerable bulk and practically no weight, etc.

"If the building is rented, we intend to repair the floor to a usable state without expense to you.

"Yours truly,
"(signed) Frank M. Kriwanek
Frank M. Kriwanek
General Manager

"FML/cm

"Above property is rented under the terms above stated, for the period from date to Dec. 31, 1949, with option to lessee to renew for a further year, at same rental, provided that if lessor shall be required to construct a radio station on said property under rule of Federal Communications Commission, possession of rear building may be had on six months prior written notice, with proportinate reduction in rent. Dated February 19, 1949.

"(signed) Wm. H. Haupt—Lessor
La Brea Heating & Air
Conditioning Co.,
734 East Hyde Park Blvd.,
Inglewood
"(signed) Frank M. Kriwanek
Frank M. Kriwanek
General Manager"

[1] The foregoing agreement is the measure of defendants' express obligation to repair, for although plaintiff attempted to testify to conversations preceding its execution, the effect of which would be to extend defendants' obligation in this particular, such testimony was incompetent and must be disregarded. Hale v. Bohannon, 1952, 38 Cal.2d 458, 465, 241 P.2d 4.

[2] At the outset it should be noted that there is no claim that any damage was occasioned to the floor by overloading, and there is nothing in the agreement to support the trial court's finding that defendants "would at their cost & expense maintain said bldg in a reasonable state of repair." The sole obligation in this respect is the promise to "make whatever repairs are necessary to the floor" and "to repair the floor to a usable state." To the extent that defendants failed to do this, they are liable, but the judgment upon the first count of the complaint, founded as it is upon a finding that the defendants agreed to maintain the premises in repair, cannot stand, particularly in view of the fact that the amount of the judgment is predicated upon evidence as to the cost of constructing a new floor, a new roof, and to repair the premises in other particulars.

[3] Nor is the result avoided by reason of the fact that the court found substantially all of the allegations of the second count to be true. Absent an express covenant by a tenant to repair, his sole obligation in the premises is that set forth in Civil Code sections 1928 and 1929, which read as follows: "§ 1928. The hirer of a thing must use ordinary care for its preservation in safety and in good condition." "§ 1929. The hirer of a thing must repair all deteriorations or injuries thereto occasioned by his want of ordinary care."

There is nothing in the foregoing statutory provisions to suggest that, in the absence of an express covenant so to do, a tenant is obligated to restore the premises to his landlord at the end of his term in better condition than they were in at the inception of the tenancy. Otherwise stated, a tenant's duty in such circumstances is to restore the premises to the lessor unimpaired beyond ordinary wear and tear. If, at the time of the letting, the roof was old and worn, certainly defendants were not required to repair the same and should not be held liable for the cost of a new roof nor for damages occasioned by rain water finding its way into the premises. See note 64 L.R.A. p. 649, and cases there cited. The witness who undertook to testify as to the cost of "repairing" the roofs upon the residence and garages had no knowledge as to their condition at the time the premises were let to the defendants. His testimony as to the condition of the roofs was as of a time immediately preceding the trial, when he stated that the roof on the residence was full of holes and that the garage had no roofing at all—"not even wood to put any roofing on," as a consequence of which he said new roofs would be required involving a cost of $425. It is significant also that he neither looked at the roof nor was he advised of its age or of the character of the roofing material. He said the roof of the residence was full of holes because he saw evidence of "rain marks on the ceilings." And with respect to the floor in the residence, he testified that except for the hole in the northeast corner occasioned by dry rot, the condition of the front portion of the floor was "not bad." From this it is apparent that his testimony that it would be necessary to put in an entirely new floor was predicated upon the hypothesis that this was required in order to put the same in first-class condition—not to repair the hole therein and restore it to the condition in which it was at the time of the letting and ordinary wear and tear to which it would normally be subjected during defendants' occupancy of the premises. The same may be said of damage occasioned to the plastering, walls and floors occasioned by rain water leaking through the roof.

[4] Defendants complain that the trial court erred in finding that defendants were liable for rent through and including the month beginning May 19, 1952. While it is true that defendants introduced evidence to the effect that they vacated the premises on February 18, 1952, pursuant to their written notice to this effect, there was other evidence from which the court could properly conclude, as it did, that defendants remained in possession subsequent to May 19, and we see no occasion to disturb the trial court's finding in this regard.

[5] Nor do we find any merit in defendants' contention that the lease is illegal because it permitted use of the premises for the storing of defendants' merchandise and supplies. The storage was incidental to their lawful business and was not a business, or use, in itself. Such use was not, as claimed by defendants, violative of the zoning ordinance (Sec. 10A, 8h of Ord. 925) of the City of Inglewood. Dugan v. Harry J. McArdle, 1918, 184 App.Div. 570, 172 N.Y.S. 27; Walsh v. Woolworth Co., 1917, 180 App.Div. 120, 167 N.Y.S. 394.

The judgment is reversed.

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